of (WILSON and BEVERLEY, JJ.) in a case not yet reported--Appeal No. 207 of 1884, decided on the 20th July last, followed the decision in *Seru Mohun Bania* v. *Bhagoban Din Pandey* (1).

Our own opinion is in accordance with that decision; but with regard to the opposite rulings already cited, we felt a doubt whether we ought not to refer the question to a Full Bench. We have, however, had an opportunity of consulting the learned Chief Justice in the matter, and have his authority for saying that he had no intention of laying down that no such suit could be under any circumstances maintainable; but that so long as the means provided by s. 318 are open to a purchaser, he is bound to have recourse to that section rather than bring a fresh suit.

In the present case it appears that the purchaser did endeavour to obtain possession in the shorter and more simple manner, but that he was opposed by a third party who actually brought a suit to restrain him.

There seems, therefore, to be no reason in law why the present suit should not be maintained. The lower Appellate Court is mistaken in supposing that, because the summary remedy is no longer available, therefore the purchaser's title is extinguished.

We, therefore, set aside the decree of the lower Appellate Court and remand the appeal to be heard and decided on the merits. Costs of this appeal to abide the result.

Appeal allowed and case remanded.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

BHUGWAN DASS MARWARI AND ANOTHER (DEFENDANTS) *v.* NUND LALL SEIN AND ANOTHER (PLAINTIFFS.)*

1885 *August* 10.

Arbitration—Reference to Arbitration by Court of Appeal—Order by Appellate Court remitting case to Original Court to pass decree upon award—Appeal—Award made out of time—Arbitration award, Legality of—Civil Procedure Code (Act XIV of 1882), *ss.* 2, 506, 514, 582.

An appeal was preferred against a decree of an Original Court dismissing

* Appeal from Appellate Order No. 166 of 1885, against the order of L. R. Forbes, Esq., Deputy Commissioner of the Sonthal Pergunnahs, dated the 2nd of May 1885, reversing the order of W. M. Smith, Esq., Sub-Divisional Officer of Dumka, dated the 12th of September 1883, and directing him to pass a formal decree in accordance with the decree of the arbitrator, dated the 12th September 1884.

(1) I. L. R., 9 Calc., 602.

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a suit, and the Appellate Court sent the case back for the purpose of certain evidence being taken, and certified to it. Pending that being done, the parties applied to the Appellate Court to refer the case to arbitration, and that Court referred that application to the Original Court for disposal, although the case was still pending in its own file for disposal. Subsequently another application was made to the Original Court to refer the case to arbitration, and on the 10th May the record was sent to the arbitrator with directions to submit his award within seven days. On the 12th September, as the award had not been sent in, the Original Court passed an order recalling the record, and subsequently the award of the arbitrator, dated the 12th September, was filed. The Original Court thereupon forwarded the record to the Appellate Court for its decision. Objections were taken to the award, but overruled, and the Appellate Court passed an order directing the case to be sent back to the Original Court, with orders to pass a formal decree in accordance with the award of the arbitrator.

Held, that a second appeal lay against the last mentioned order, inasmuch as it amounted to a decree under the provisions of s. 2 of the Civil Procedure Code.

Held, also, that the award was bad in law, because the time within which it was directed to be made had never been enlarged, and the Court's order of the 12th September recalling the record could not be taken as an indication that the time was enlarged.

Semble, an Appellate Court has the power to refer a case to arbitration at the instance of the parties under s. 582 of the Code of Civil Procedure, 1882.

In re Sangaralingam Pillai (1), cited; *Jugessur Dey* v. *Kritartho Moyee Dossee* (2), cited and distinguished.

THE plaintiffs in this case sued to recover a sum of Rs. 960 and interest thereon, being half the compensation money which they alleged had been paid by Udit Narain Singh to the second defendant in consideration of a right to an *ijara* being given up and in which compensation the plaintiffs claimed to be entitled to a half share.

The facts of the case and the nature of the proceedings which gave rise to the appeal are sufficiently stated in the judgment of the High Court.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Rajender Nath Bose* and Baboo *Dwarka Nath Chuckerbutty*, for the appellants.

Baboo *Sreenath Dass* and Baboo *Kuruna Sindhu Mookerjee* for the respondents.

(1) I. L. R., 3 Mad., 78.

During the hearing of the appeal the case of *Jugessur Dey* v. *Kritartho Moyee Dossee* (1), was cited, and relied on as an authority for the proposition that an Appellate Court has no power to refer a case to arbitration.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows:—

The different procedure followed in the Courts of the Sonthal Pergunnahs from that laid down in the Code of Civil Procedure has very much complicated the present case. The suit was one to recover money from the defendants. The first Court dismissed it. Upon appeal the lower Appellate Court considered that the evidence upon the record was insufficient to enable it to come to a determination and that the evidence of one Baboo Udit Narain Singh was necessary. It therefore sent the case back to the first Court in order that the evidence of this witness might be recorded and certified to the lower Appellate Court. So far the Court seems to have followed the ordinary procedure recognised in the Code. After the case had gone down a petition appears to have been presented to the lower Appellate Court requesting that the case might be referred to the arbitration of two persons named therein. The lower Appellate Court thought fit to refer this petition to the Court of Original Jurisdiction to which the case had been remitted only for the purpose of having the evidence of a particular witness recorded, the case still pending in appeal in the file of the lower Appellate Court. The petition having gone down, the application seems to have fallen to the ground. Another application was made to the Court of first instance, requesting it to refer the case to the arbitration of the same Udit Narain, for whose evidence the lower Appellate Court had sent the case down. The petition stated that the parties agreed to be bound by the decision of Udit Narain Singh. The Court on the 10th May sent the record to Udit Narain, with directions to submit his award as arbitrator within seven days. Nothing, however, seems to have been done till the 12th September following. On that day the Court directed an order to be sent to the arbitrator to re-submit the record, inasmuch as up to that time his award had not been sent in; and

(1) 12 B. L. R., 266.

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the case was set down for trial on the 18th September. The arbitrator's award, dated the 12th September, was then sent in, and the first Court forwarded it with the record to the lower Appellate Court for the decision of the appeal. Objections were taken by the defendants to the award on various grounds. The lower Appellate Court notices only one ground from among the objections filed by the defendants, namely that the judgment of the arbitrator was delivered in their absence. That objection, the lower Appellate Court thought, was of no consequence. It considered that the parties were bound by the decision of the arbitrator. Thereupon, instead of formally deciding the appeal in accordance with his view, the Deputy Commissioner sent the case back to the first Court, with orders to pass a formal decree in accordance with the award of the arbitrator.

The defendants have preferred a second appeal to this Court. The ultimate procedure adopted by the lower Appellate Court gave the respondents an opportunity, which their pleader has availed himself of, of objecting to the hearing of this appeal. He says that there can be no appeal against an arbitration award, and there is no decree of the lower Appellate Court against which a second appeal can be preferred. It seems to us, however, clear that the order of the lower Appellate Court, such as it is, amounts in law to a decree within the meaning of s. 2 of the Civil Procedure Code, because the matter was before the lower Appellate Court on the merits. The parties were entitled to a decision of that Court as upon the merits; and we have no doubt that the order made by the Deputy Commissioner directing the first Court to draw up a formal decree in accordance with the terms of the award, was intended by him finally to dispose of the matter before him. We, therefore, held that the appeal is one that we ought to hear; and the greater part of the day has been spent in hearing it.

The objections taken to the decision are based upon the alleged illegality of the proceedings connected with the arbitration. It has been contended that a case cannot be referred to arbitration when it is before an Appellate Court, and that arbitration can only be had recourse to before the decree of the first Court has been made. It has been next objected that, supposing an Appel-

late Court has authority to refer a case to arbitration, there is no authority in the first Court to do so, when the case is really pending in appeal in the Court above it. It has been further objected that the application in this case to refer the matter to arbitration was not made in accordance with s. 506 of the Code. That section says that the parties desiring the reference must apply in person, or by their respective pleaders specially authorized in writing in their behalf. It is contended that the application for the reference to arbitration to this case was not made by the appellant Bhugwan Dass nor by any pleader duly authorized on his behalf; and that, therefore, the reference was one with respect to which the Court below had no jurisdiction to act. And it is further contended that the award was not valid, because it was not made within the time allowed by the Court. The time allowed was seven days from the 10th of May, and the award was not made until the 12th September following.

As to whether a case can be referred to arbitration after it has been in an Appellate Court, a Full Bench decision of this Court was cited, wherein it is said that an Appellate Court has no authority to refer a case to arbitration. That case, however, was decided when Act VIII of 1859 and Act XXIII of 1861 were in force. It was held that s. 37 of Act XXIII of 1861 did not extend to an Appellate Court, the powers of an Original Court with reference to arbitration. The terms of s. 582 of the present Code seem to us rather wider than the old sections; and there has been a ruling of the Madras High Court in the case of *Sangaralingam Pillai* (1), to the effect that an Appellate Court has power in such matters. Though we are inclined to follow the Madras High Court Ruling, it is not absolutely necessary for us in the present case to decide this point. It is not necessary, because we think that on two other grounds taken by the appellant, the arbitration proceedings were bad. Section 506 is distinct as to the persons by whom the application to refer a case to arbitration must be made. There were two defendants. One of them appears to have made the application in person. The second is said to have made it, not in person, and not through any pleader specially authorized in writing, but through

(1) I. L. R., 3, Mad., 78.

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a person named Ram Rek. If Ram Rek had been a recognised agent of the defendant Bhugwan Dass, within the meaning of s. 36, we might have said that he would have been competent to make the application under s. 506, but Ram Rek was not his recognised agent within the meaning of s. 36. He was simply a person authorized by a muktearnamah to look after the present suit on behalf of the defendant Bhugwan Dass. The Court below therefore, in our opinion, had no jurisdiction to make this reference to arbitration.

As to the other ground, that the award was not made within the time allowed by the Court, we think that this is a matter which is governed by the last clause of s. 514. The time fixed was seven days. That time was never enlarged, and the award was not made till four months afterwards. For the respondents it has been contended that the time allowed by the Court must be held to mean all the time between the reference and the formal recall of the case, unless the Court has by some specific order cancelled the reference in the meantime. It was argued that the Court's order of the 12th September, calling back the record, must be taken as an indication that the Court considered that it had enlarged the time sufficiently. To our minds it simply indicates that the lower Court was ignorant of the procedure to be adopted. It is evident that that Court is not familiar with several portions of the Code.

We think that the arbitrator's award being clearly bad in law in two different respects, all the proceedings connected with that award must fall to the ground, and that the lower Appellate Court was wrong in sending the case back to the first Court. We, therefore, set aside the decree of the lower Appellate Court and send the case back to the Deputy Commissioner to be decided according to law. If the lower Appellate Court still thinks that further evidence is required, it will be at liberty to have it taken.

The costs of this appeal will abide the result.

Appeal allowed and case remanded.