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sale. Before a sale took place the plaintiffs appellants voluntarily paid the amount of the decree and relieved the property from the attachment. The defendants respondents were never liable to satisfy that decree, which, as we have said, was a simple money decree. The sole liability to discharge the decree rested upon the judgement-debtor. The fact that the plaintiffs appellants in order to protect from sale the property purchased by them paid the amount of the decree and so relieved the entire property from the attachment does not give them a right of contribution. Under such circumstances there being no common burden—no common liability—we are of opinion that a right of contribution did not arise, and upon this ground the appeal must fail.

An objection was filed under order XLI, rule 22. In the lower appellate court a decree was passed for Rs. 164 with proportionate costs *et cetera* against Zahur-ud-din and Fakhr-ud-din. The contention is that no decree ought to have been passed against these parties, and, in view of what we have said above, this objection is well founded.

We accordingly dismiss the appeal. We allow the objection, and, setting aside the decree of the lower appellate court, dismiss the plaintiff's suit with costs in all courts.

Appeal dismissed.

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March 8.

Before Mr. Justice Richards and Mr. Justice Tudball.

KUNJI LAL (PLAINTIFF), *v.* DURGA PRASAD AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1882), *sections* 13, 525 *and* 526—*Res judicata—Order refusing to file an award on the ground of misconduct of arbitrators—Subsequent suit to enforce the award.*

Held that the refusal of a court to file a private award on the ground of misconduct of the arbitrators will not operate as *res judicata* in respect of a subsequent suit brought to enforce the award. *Bhola* v. *Gobind Dayal*, (1) *Katik Ram* v. *Babu Lal* (2) and *Basant Lal* v. *Kunji Lal* (3) followed. *Ghulam Khan* v. *Muhammad Hassan* (4) referred to.

THIS was a suit brought to enforce an award. The defence was that there had been an application under section 525 of the

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* First Appeal No. 270 of 1908 from a decree of Chhajju Mal, Subordinate Judge of Mainpuri, dated the 17th of August, 1908.

(1) (1814) I. L. R., 6 All., 186.
(2) Weekly Notes, 1903, p. 234.
(3) (1905) I. L. R., 28 All., 21.
(4) (1901) I. L. R., 29 Calc., 167.

Code of Civil Procedure, 1882, to file the award; that the filing of the award was resisted on the ground of misconduct of the arbitrators; that the Court refused to file it on that ground, and that therefore the present suit was barred by the provisions of section 13 of the Code. The court of first instance (Subordinate Judge of Mainpuri) gave effect to this contention of the defendants and dismissed the suit. The plaintiff appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Braj Nath Vyas*, for the appellant.

Babu *Jogindro Nath Chaudhri*, (with him Babu *Lalit Mohan Banerji* and Babu *Girdhari Lal Agarwala*) for the respondents.

RICHARDS and TUDBALL, JJ.:—This appeal arises out of a suit which was brought to enforce an award. The defence was that there had been an application under section 525 of the Code of Civil Procedure, Act No. XIV of 1882, to file the award; that the filing of the award was resisted on the ground of misconduct of the arbitrators; that the court refused to file it on that ground, and that therefore the present suit was barred by the provisions of section 13 of Act No. XIV of 1882. The court below decided in favour of this contention and hence the present appeal. It is contended on behalf of the appellant that the refusal to file the award cannot possibly operate as *res judicata*, because the order of the court refusing to file the award on the ground of the misconduct of the arbitrators was not a decision made *in a suit* and that the only matter before the court on that application was the question whether or not the award should be filed. On behalf of the respondents it is contended that the refusal to file the award, on the grounds mentioned, must be deemed to be a decision in a suit, and, the court having decided the very issue on the application, the question as to the validity of the award cannot be again raised and that the plaintiff's suit is accordingly barred. Section 525 of the Code of Civil Procedure, Act No. XIV of 1882, provides as follows:—"When any matter has been referred without the intervention of a court of justice, and an award has been made thereon, any person interested in the award may apply to the court of the lowest grade having jurisdiction over the matter to

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which the award relates, that the award may be filed in court. The application shall be in writing, and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. The court shall direct notice to be given to the parties to the arbitration other than the applicant requiring them to show cause within a time specified why the award should not be filed." Section 526 then provides :—"If no ground such as is mentioned or referred to in section 520 or section 521, be shown against the award, the court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter." If the application after it has been numbered and registered as a suit could be treated as a suit in the proper sense of the word, the order of the court whether it granted the application to file the award or refused it would be a decree. The order refusing to file the award would be appealable as a decree and the order granting leave to file the award would also be appealable, subject perhaps to the provisions of section 522 of the Code of Civil Procedure. We think that a great deal can be said in favour of the argument that the Legislature intended that when the application was numbered and registered it should be deemed a suit. The Court as soon as it has numbered and registered the application is bound to consider the matters mentioned in section 520 and section 521. One of the matters mentioned in section 521 is the very question which was tried in the present case, namely, whether or not there had been misconduct on the part of the arbitrator. It seems to us that it is hardly likely that the Legislature intended to provide this machinery to try such questions, and that the finding could be re-opened immediately, by bringing a regular suit. It seems to us that the trying of such question a second time involves the parties in a large amount of unnecessary litigation and a waste of the time of the Court. In the case of *Ghulam Khan* v. *Muhammad Hassan* (1) Lord Macnaghten says :—"The question appears to their Lordships to turn upon the true construction and effect of the provisions of the Code of Civil Procedure relating to arbitration. The decisions of the Indian courts on these provisions are so conflicting

(1) (1901) I. L. R., 29 Calc., 167.

that it may be useful to state generally the conclusions of which their Lordships have arrived on some of the disputed points brought to their attention in the course of the argument." Their Lordships then proceed to deal with the matter under several heads. The third head was "where the agreement of reference is made and the arbitration itself takes place without the intervention of the court and the assistance of the court is only sought in order to give effect to the award." At page 183 of the report Lord Macnaghten says:—"In cases falling under Heads II and III the provisions relating to cases under Head I, are to be observed so far as applicable. But there is this difference, which does not seem to have been always kept in view in the courts in India. In cases falling under Head I, the agreement to refer and the application to the court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the court. So that no question can arise as to the regularity of the proceedings up to that point. In cases falling under Heads II and III proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award as the case may be—under the cognizance of the court. That is or may be a litigious proceedings—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression, as defined in the Civil Procedure Code." We are inclined to think that where their Lordships refer to the order made thereon, they must have referred not only to an order granting leave to file the award, but also to an order refusing such leave. We, however, feel that we are bound by the authority of certain rulings of this court. In the Full Bench case of *Bhola* v. *Gobind Dayal* (1) it was held by four Judges out of five that no appeal lay from an order disallowing an application to file an award under section 525. That decision proceeded on the grounds that the order was not a decree, and it seems to us that this involves a decision that the proceedings under the application did not constitute a suit. This decision was followed in the case of *Katik Ram* v. *Babu Lal* (2). The case of *Ghulam Khan* v. *Muhammad Hassan*, to which we have

(1) (1884) I. L. R., 6 All., 186. (2) Weekly Notes, 1903, page 234.

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already referred, was cited in this case ; the learned Judges described the remarks of their Lordships of the Privy Council at page 184 of I. L. R., Calcutta, Vol. XXIX, as a dictum, and said that the words used by their Lordships referred only to an order granting leave to file an award. In the case of *Basant Lal* v. *Kunji Lal* (1) the same question arose. The decision of their Lordships of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* as also the decision of this court in *Katik Ram* v. *Babu Lal* were referred to and it was again held that the order refusing to file the award was unappealable on the same ground, namely, that it was not a decree. Of course the only reason for holding it not to be a decree was that the order was not made *in a suit*. The High Courts of Calcutta and Madras have taken a different view. It was suggested that perhaps this appeal might be referred to a larger Bench. We have considered this matter. There is no doubt that at the time when the court refused the application to file the award the plaintiff in the present suit could not have appealed against the order having regard to the ruling of the court. His only remedy was to bring a fresh suit. We, therefore, think that we ought to follow the decisions of the High Court in the cases of *Katik Ram* v. *Babu Lal* and *Basant Lal* v. *Kunji Lal*. We, therefore, hold (following the rulings referred to) that the issue as to the misconduct of the arbitrators was decided in a proceeding which was not a suit within the meaning of section 13 of Act XIV of 1882 and that the decision on the said issue, accordingly, cannot operate as *res judicata*. We therefore allow the appeal and set aside the decree of the court below. As the suit was decided on a preliminary point, we remand the case to the lower court with directions to readmit the suit on its original number in the register and proceed to determine it on the merits. Costs will abide the result.

Appeal decreed and cause remanded.

(1) (1905) I. L. R., 28 All., 21.