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allow the appellant the period occupied in obtaining the copy of the order appealed against, we should be altering the special period of limitation contained in section 46, clause (4). A good deal of argument on behalf of the appellant turned on the hardship which would arise if we did not allow this period for which he is in no way responsible and which was entirely beyond his control. The answer is that he can always present his petition of appeal and ask for time under the special circumstances to obtain and file subsequently a copy of the order under appeal. As it happens in the present case the appellant had in his hands the copy on the 9th of September, 1909. This Court re-opened after the long vacation on the 26th of October, 1909, and the appeal was not presented until the 1st December, 1909. The special case of hardship owing to the closing of the Court for vacation is moreover met by the provisions of section 10 of the General Clauses Act No. X of 1897. The preliminary objection succeeds and the appeal fails and is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C. 1911 *June* 14, 15, *July* 21.

SADIQ HUSAIN (DEFENDANT) *v.* NAZIR BEGAM AND ANOTHER (PLAINTIFFS).

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

Arbitration Arbitrator refusing to act—Compromise of suit and decree in terms of compromise—Compromise stating matters in dispute and nominating arbitrators to decide them—Power of Court on arbitrator refusing to act—Civil Procedure Code (1882), sections 375, 506, 508, 510—Court determining matters referred to arbitration.

Section 510 of the Code of Civil Procedure (Act XIV of 1882), which provides that "if an arbitrator refuses to act the Court may in its discretion appoint a new arbitrator . . . . or make an order superseding the arbitration, and in such case shall proceed with the suit," is applicable even if the person appointed arbitrator has not accepted office before refusing to act. When he has been nominated by the parties his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue; and any other construction would defeat the provisions of the Act.

Pugardin Ravutan v. *Moidinsa Ravutan* (1) and *Bepin Behari Chowdhry* v. *Ananda Prasad Mallick* (2) disapproved of.

Present:—Lord MACNAGHTEN, Lord SHAW, Lord MERSEY, and Mr. AMEER ALI.

(1) (1882) I. L. R., 6 Mad., 414. (2) (1891) I. L. R., 18 Calc., 324.

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In the present case the parties had compromised the suit, and had stated in the instrument of compromise the matters in dispute, and had each nominated therein a person as arbitrator to decide them. A decree in terms of the compromise was made by the Court and the matters were referred to the arbitrators named for their decision. One of them refused to act, and the party whose nominee he was declined to make another nomination. The District Judge in the exercise of his discretion under section 510 of the Code thereupon himself determined the matters submitted to the arbitrators, thus practically superseding the arbitration. His decision was confirmed by the Court of the Judicial Commissioner.

Held (reversing the decision of the Courts in India) that the District Judge should, under section 510, have appointed a new arbitrator, which he had power to do notwithstanding that the arbitrator refusing to act had not first consented to do so, and he was not precluded from making such appointment by the fact that the party whose arbitrator had refused to act declined to assist the Court by suggesting another name. The Court could not "proceed with the suit," which had been put an end to by the compromise, the decree on which was final; and it had no power except by consent of parties to itself decide the matters referred to arbitration. That rights, having been remitted to one tribunal, had been decided by another, was a fatal objection to the procedure adopted.

APPEAL from a judgement and decree (27th November, 1906) of the Court of the Judicial Commissioner of Oudh, which affirmed an order (5th September, 1906) of the District Judge of Lucknow.

The questions for decision in this appeal arose out of the compromise of a suit brought by the respondents Musammat Nazir Begam and Musammat Kaniz Zohra Begam against the appellant.

The facts were that one Agha Hasan Khan died on the 27th of December, 1901, leaving as his heirs his widow, the first respondent, a daughter, the second respondent, and a son, the appellant. The estate of the deceased was governed by the Shia Muhammadan law, in accordance with which it was, for the purpose of determining the shares of those inheriting, divided into 24 parts, of which the widow took three, the daughter seven, and the son fourteen parts. Disputes arose between the heirs as to their shares, and the suit abovementioned was on the 25th of April, 1903, brought in the Court of the Subordinate Judge of Lucknow for the administration of Agha Hasan Khan's estate, in defence of which the appellant put in his written statement. On the 1st of August, 1905, the parties settled the suit by a compromise, the material portion of which was as follows:—

"*Paragraph* 10.—The division of the zamindari property between the parties will be effected in this way that instead of allotting detached portions of zamindari property (in a share), some *ek-ja* (lit: in one place) zamindari property situate in one district of as nearly as possible the same value will be allotted to the share of the plaintiffs in accordance with the proposal of the defendant which will be declared by the 1st of September, 1905, but subject to this condition that the plaintiffs would under all circumstances get a 6 anna 8 pie share in village Dadra, pargana Partabgarh, district Bara Banki.

"Maulvi Muhammad Nasim and Sheikh Ali Abbas, two pleaders of the Court, would ascertain the fact that the property proposed by the defendant is with regard to the plaintiffs' share, yielding as far as possible equal profits and is *ek-ja* (situate in one place), that is to say, the share allotted to the plaintiffs in each of the villages as proposed by the defendant includes the whole of the share possessed by the defendant therein, provided the profits arising out of that share do not exceed those of the plaintiffs' share.

"If after examination both the gentlemen should decide that there is some defect in the defendant's proposal as regards the equality of profits and situation of the property, they would be authorized to make such proposal as they may think proper to remove that defect, and that proposal would be final for the parties.

"If Maulvi Muhammad Nasim and Sheikh Ali Abbas differ in their opinions the decision of Syed Nabi-ullah, barrister-at-law, on the points in which they differed would be binding on the parties.

"The defendant would before the 1st of October, 1905, deliver to the plaintiffs possession over the zamindari which may fall to the share of the plaintiffs, and the plaintiffs would be entitled to the profits of *kharif* 1313 Fasli. If the defendant fail to deliver over possession, the plaintiffs would be entitled to obtain possession by getting the decree executed through Court.

"If by the 1st of September 1905, the defendant does not submit his proposal in respect of the partition of zamindari to Maulvi Muhammad Nasim, plaintiffs' pleader, the plaintiffs would be at liberty to apply to the Court to have a Commissioner appointed for partition, and according to the partition made by the Commissioner the plaintiffs would be entitled to recover possession through Court."

On the 2nd of August, 1905, a decree was made by the Subordinate Judge in terms of the compromise; and on the 31st of August the defendant, in accordance with the compromise, submitted his proposal of the zamindari property to be allotted to the plaintiffs.

The decree of the Subordinate Judge stated that—

"It is ordered that in terms of the compromise plaintiffs' claim be decreed under sections 157 and 375 of the Civil Procedure Code; and as regards costs the Court orders that parties do bear their own costs."

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On the 17th of August, 1906, the District Judge made an order referring the suit to arbitration, and appointed Maulvi Muhammad Nasim, and Sheikh Ali Abbas arbitrators according to the terms of the compromise. On the 21st of August, 1906, Maulvi Muhammad Nasim refused to act as arbitrator, and on the 23rd of August the plaintiffs applied to the District Judge praying the Court to withdraw the order of reference to arbitration and to deal with the matter itself. The plaintiffs declined to appoint another arbitrator, and on the 28th of August, 1906, the District Judge made an order that he would scrutinize the list of properties proposed by the defendant and decide thereon. He said :—

"The provisions of chapter XXXVII, and especially section 510, Civil Procedure Code, do not apply here because there is no point in issue and speaking technically no reference to arbitration. In my opinion the decree-holder cannot be compelled to appoint a fresh arbitrator and is entitled on the failure of one of the persons named in clause 10 to demand the decision of the Court on the question which clause 10 referred to arbitration.

"The decree embodying the compromise of course stands good. Only the provisions of clause 10 have become incapable of execution. If the parties had agreed to the appointment of a substitute for Muhammad Nasim it would have come nearest to carrying out the original intentions of clause 10. But it would not be a competent order to direct decree-holder against his will to nominate a fresh arbitrator. Even under section 510 the Court can only appoint where there has been an acceptance followed by a refusal, not where the arbitration has never been accepted."

The District Judge accordingly came to a decision on his scrutiny of the list, and on the 5th of September, 1906, he passed an order allotting to the plaintiffs jointly seven villages, not the villages proposed by the defendant. And as the order was appealed from he added the following observations to his order of the 5th of September :—

"The parties entered into a compromise on the 2nd of August, 1905, by which they agreed among other matters that there should be a partition of the zamindari property, in the following terms :—

"The plaintiffs' share consisting of various fractions in the various villages was to be calculated in terms of rupees representing their share of the profits, and totalled. Then the defendant was to draw up a list of villages yielding profits equal to this total, as nearly as might be. It was further provided that these villages should be as far as possible situate at one place.

"The defendant proposed to allot to plaintiffs all the villages in Gonda and some in Bara Banki. The plaintiffs objected that it was not practicable to give them the whole of their share in Gonda, but it was practicable to give the whole of it in Bara Banki. I upheld this objection and assigned them certain villages in Bara Banki nearly equivalent to the total profits due to them."

From that decision the defendant appealed to the Court of the Judicial Commissioner and MR. E. CHAMIER (1st Additional Judicial Commissioner) and MR. L. G. EVANS (2nd Additional Judicial Commissioner) affirmed the order of the District Judge with the observation in the course of their judgement, that—

"It seems impossible to make any division of the property which will comply with the compromise more literally than that adopted by the learned Judge."

On this appeal,

De Gruyther, K. C., and *S. A. Kyffin* for the appellant contended that the Courts in India ought to have appointed an arbitrator in the place of Maulvi Muhammad Nasim who had refused to act. Those Courts had no jurisdiction to settle the matters in dispute as stated in paragraph 10 of the compromise. Section 510 of the Civil Procedure Code (Act XIV of 1882) gives the Court power to appoint another arbitrator in the place of one who "refuses or neglects to act." Here one of them after being appointed arbitrator, did "refuse" and did "neglect to act." Reference was made to *Pugardin Ravutan* v. *Moidinsa Ravutan* (1), which, it was submitted, had been wrongly decided on the construction of section 510; and to sections 506 and 508 of the Civil Procedure Code, 1882. That the Courts should take up and decide what the arbitrators ought to have themselves decided was a wrong procedure: they had no power to do so without the consent of the parties.

Sir *Erle Richards, K. C.*, and *B. Dube* for the respondent Zohra Begam contended that the decision of the Courts below was right. They had power under section 244 of the Code of Civil Procedure to give effect to the compromise in the execution of the decree; see sub-section (2) of that section and the case of *Ghulam Khan* v. *Muhammad Hasan* (2). They had, without consent of the parties, no power to appoint another arbitrator in the place of Maulvi Muhammad Nasim. Reference was made to *Pugardin Ravutan* v. *Moidinsa Ravutan* (1) and *Bipin Behari Chowdhry* v. *Annoda Prosad Mullick* (3). In the present case, as in those cases, the arbitrator who is said to have refused to act had never accepted the office of arbitrator, or

(1) (1882) I. L. R., 6 Mad., 414. (2) (1901) I. L. R., 29 Calc., 167.
(3) (1891) I. L. R., 18 Calc., 324.

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consented to act: *Sadha Sookh* v. *Shiva Dyal* (1). Section 510 of the Code applied to cases where the machinery for carrying on a reference to arbitrators appointed by the parties had broken down; in such a case the Court has power to take the suit in hand, and that was the view taken, and it was submitted rightly taken, by the Courts below. Reference was made to the Civil Procedure Code, 1882, sections 213, 392, 396, 506, 514 and 523; and also to section 375 and the case of *Biraj Mohini Dasi* v. *Srimati Chinta Moni Dasi* (2) to show that when a decree had been passed by consent of parties, the question as to whether or not the compromise decree was valid could not be gone into on an appeal against that decree. The Civil Procedure Code, 1908, section 5, schedule II, was also referred to. Whether on the construction of this compromise all the property allotted to one party ought to be in one district was a question on which their Lordships were also asked to intimate their opinion.

De Gruyther, K. C., replied, referring to sections 506—510. No suit was "pending" within the meaning of the Civil Procedure Code, and the Court had no power itself to decide the reference. Sections 524, 525 and 526 of the Civil Procedure Code were also referred to.

1911, *July* 21*st*.—The judgement of their Lordships was delivered by LORD SHAW:—

This appeal is presented from an order, dated the 27th of November, 1906, made by the Court of the Judicial Commissioner of Oudh, which affirmed an order, dated the 5th of September, 1906, made by the District Judge of Lucknow.

It appears that one Mirza Agha Hasan Khan died on the 27th of December, 1901. He was survived by a widow, a daughter and a son. They were heirs of the deceased under the Muhammadan law of the Shia sect, and the property fell to be divided amongst them in certain proportions. Mirza Agha Hasan Khan's property, however, was situated in various districts, and while the arithmetical division of the shares fell to be determined by law, it was considered by the heirs that it would be to their advantage that, instead of a large variety of fractional portions of property being taken by each heir in subjects situate, it might be, at a

(1) (1863) 1 Agra, 150. (2) (1901) 5 C. W. N., 877.

considerable distance from each other, an arrangement should be carried out by arbitrators whereby the shares falling to the ladies should be consolidated in one district, and other arrangements for convenience of management entered upon. Accordingly a compromise and agreement in this sense was drawn up.

In April, 1903, the respondents had brought a suit claiming administration of the estate, and on the 1st of August, 1905, the compromise was made, and on the following day, namely, the 2nd of August, 1905, the decree which raises the crucial question in this case was pronounced by the Subordinate Judge of Lucknow, which bore that "It is ordered that in terms of the compromise herewith annexed, marked 'A' . . . . plaintiffs' claim be decreed under sections 157 and 375, Civil Procedure Code; and as regards costs, the Court orders that parties do bear their own costs." Section 157 seems to have no bearing upon the procedure and to have appeared in the judgement by mistake, but section 375 deals with the matter of compromise of suit and provides that "if a suit be adjusted wholly or in part by any lawful agreement or compromise . . . . such agreement, compromise, or satisfaction shall be recorded and the Court shall pass a decree in accordance therewith, so far as it relates to the suit, and such decree shall be final so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise, or satisfaction."

As has been pointed out, the agreement or compromise in this case went by its nature beyond the actual matter of suit between the parties. But it is also clear that the decree thus, so to speak, ratifying the compromise, was a final decree. The Court has discharged itself of the *lis* between the parties, and by their own agreement thus ratified the settlement of the points upon which they had agreed fell to be made by the tribunal of arbitration to which the parties had consigned it.

By the agreement two arbitrators were appointed to settle, allocate, &c., the respective rights of parties. One of these, for reasons which need not be entered upon (he was the advocate for the respondents), refused to act as arbitrator. Thereupon the respondents, on the 23rd of August, 1906, presented a petition in the Court of the District Judge, narrating this fact and averring that

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"owing to his refusal to act, it has become necessary that the honourable Court should itself examine the schedule and bring it in conformity with the terms of the compromise, or, failing that, it should appoint a commissioner and direct," &c. The respondents declined to nominate another arbitrator on their behalf; and, in fact, it seems clear that they held, not only that this declinature was within their rights, but that it was also not in the power of the Court to nominate another arbitrator to supply the gap which had been caused by the declinature. The Court accordingly was asked to take the matter into its own hands. Before seeing how the Civil Procedure Code and the Indian decisions bear upon the point, it may be added that the District Judge acceded to the view presented and to all intents and purposes superseded the arbitration and entered upon the scrutiny of the lists of properties and the determination of the allocation—in short, performed the duties of the tribunal of arbitration as if the agreement of compromise had authorized that procedure. This was confirmed in the Court of the Judicial Commissioner of Oudh by the order appealed from.

By section 510 of the Code of Civil Procedure, 1882 (Act XIV) it is provided that "if the arbitrator, or, where there are more arbitrators than one, any of the arbitrators . . . . . dies, or refuses or neglects or becomes incapable to act . . . . . the Court may in its discretion . . . . . appoint a new arbitrator . . . . . or make an order superseding the arbitration, and in such case shall proceed with the suit." What had happened in the present case was that after the arbitrator had been appointed he refused to accept office as such, or to act. It appears, however, that the Courts in India have construed this section of the Code as meaning that the section can only apply if the arbitrator who refuses had accepted office before refusing. These decisions are, *Pugardin Ravutan* v. *Moidinsa Ravutan* (1) and *Bepin Behari Chowdhry* v. *Annoda Prosad Mullick* (2). In both of these cases it was held that the Court has power, under section 510, to appoint a new arbitrator in the place of another only when that other had first consented to act and thereafter refused or become incapable. In their Lordships' opinion this is not a

(1) (1882) I. L. R., 6 Mad., 414. (2) (1891) I. L. R., 18 Calc., 324.

proper construction of section 510 of the Code. It appears to their Lordships that, when an arbitrator is nominated by parties, his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. His refusal to act necessarily follows, for he has not performed the first action of all, namely, to take up the office by signifying his assent to his appointment. Their Lordships do not enter at length into the matter as it appears that any other construction would open the way to an easy defeat of the provisions of the Statute. Nor do their Lordships doubt that the decisions referred to proved in the present case an embarrassment to the Courts below and have probably prevented the District Judge doing what would have supplied all that was required, namely, to appoint another arbitrator instead of the one who had declined to accept nomination. Had that been done the tribunal of arbitration would have been set up and the proceedings could have gone forward. Furthermore, the appointment was in the hands of the District Judge, and he was in no way precluded from making it by the fact that the party whose arbitrator had declined refused to assist the Court by suggesting another name. In their Lordships' opinion the procedure of the Courts below in this particular, and the decisions upon which they manifestly proceeded, were erroneous.

What was done, however, was (apparently under the same section which was held to make it incompetent to appoint a fresh arbitrator), to adopt the other course of superseding the arbitration and entering upon the determination of the matters submitted by the agreement. It was this latter which was done, and not proceeding with the suit. To "proceed with the suit" (to use the language of section 510) was in this case in their Lordships' view, impossible. The suit was at an end, something different from and going much beyond the suit had been entered upon. The decree of the 2nd of August, 1905, was not a decree for partition nor for administration. It was simply a decree ordering the agreement and compromise of parties to be carried into effect, and that decree was final. It put an end to the suit, and that was the very object of the compromise. The alternative in section 510 is impossible, because there is no suit now pending with which the Court can proceed. All that the Courts in India could

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do was to take advantage of the sections of the Code which enabled them to keep the machinery of arbitration going. This could have been done, and, had it not been for the decisions cited, would in all probability have been done, by simply naming a fresh arbitrator. Parties who agree to set up a tribunal of arbitration are not bound to submit the case referred to to another tribunal, such as a District or other Judge. It may be regretted that the supersession of the arbitration and the interposition of the Judge himself to settle the points referred to arbitrators should not have been assented to. But the objection which has been taken—that the rights having been remitted to one tribunal have been settled by another—is, in their Lordships' opinion, a fatal objection.

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed and the decrees of the Courts below reversed with costs. The respondent, Kaniz Zohra Begam, must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant :—*Watkins and Hunter.*

Solicitors for the respondents :—*Barrow, Rogers and Nevill.*

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June 1.

APPELLATE CIVIL.

Before The Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

MANOHARI (DEFENDANT) *v.* MUHAMMAD ISMAIL AND OTHERS (PLAINTIFFS.) *

Civil Procedure Code (1882), sections 13, 539—Res judicata—*Suit for declaration of trust and of property comprised in it—Party to such suit not competent subsequently to deny existence of trust.*

Held that a person who had been a party to a suit under section 539 of the Code of Civil Procedure, 1882, in which suit the existence of a waqf and the property comprised therein had been declared, was not competent in a subsequent suit for ejectment of the defendant from a part of the waqf property to plead that the property was not waqf. *Ghazaffar Husain Khan* v. *Yawar Husain* (1) referred to.

* First Appeal No. 298 of 1909 from a decree of Soti Raghubans Lal, Subordinate Judge of Meerut, dated the 18th of June, 1909.

(1) (1905) I. L. R., 28 All., 112.