

opinion the position taken up in all these cases are against the appellants. The appeal is beyond time and is dismissed with costs. Separate sets of costs will be allowed in case of the Official Liquidator, respondents Nos. 4 and 5 and respondent No. 33.

*Appeal dismissed.*

*Before Mr. Justice Kuramat Husain and Mr. Justice Chamier.*

DUTTA AND OTHERS (DEFENDANTS) *v.* KHEDU (PLAINTIFF).\*

*Civil Procedure Code (1908), sections 99, 107; schedule II—Arbitration—Appellate court, powers of—Reference once made unaffected by death of party.*

An application for a reference to arbitration under schedule II to the Code of Civil Procedure, 1908, may be made to an appellate court as well as to a court of original jurisdiction, and the court is bound to accept and act upon such application if made by all the parties interested in the appeal. When an application for arbitration has been made, it will not lapse by reason of the death of one of the parties; but if the right to sue survives, the arbitration must be proceeded with after substitution of the representatives of the deceased party. *Perumalla Satyanarayana v. Perumalla Venkata Rangayya* (1) referred to.

IN this case when the suit was in appeal before the lower appellate court (District Judge of Benares) all the parties interested applied for a reference to arbitration under the second schedule to the Code of Civil Procedure, 1908. The Judge however rejected the application holding that the powers conferred by the second schedule to the Code were not exercisable by an appellate court.

*Babu Piari Lal Banerji*, for the appellant :—

The order of the lower court cancelling the reference to arbitration is illegal. An appellate court can refer a case to arbitration. The learned Judge has held that the law dealing with arbitration no longer forms part of the Civil Procedure Code, as the second schedule cannot be said to be a part of the Code. This reasoning is not sound.

*Munshi Haribans Sahai* for the respondent :—

The lower court says that under section 2, clauses (1) and (18) of the Civil Procedure Code, 'Code' includes 'rules' and 'rules' mean 'rules and forms contained in the first schedule or made under section 122 or 125.' Therefore the second schedule is

\* Second Appeal No. 788 of 1910 from a decree of G. A. Paterson, District Judge of Benares, dated the 17th of March 1910, confirming a decree of Kesari Narain Chand, additional Munsif of Benares, dated the 28th of November, 1909.

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GHRU MAL  
v.  
THE OFFICIAL  
LIQUIDATOR,  
SHRI BALDEO  
MILLS  
COMPANY,  
LIMITED.

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v.  
KREDDU.

not part of the Code. Further, the appeal abates, as one of the appellants Gurudatta is dead. The reference to arbitration is also therefore now of no force. The appeal is based solely on one ground. The order was only an interlocutory order. At most it was an irregularity only, and was covered by section 99 of the Code. In section (1), clause (2) of the second schedule the word 'shall' is directory only and not mandatory; and jurisdiction does not cease till the order of reference is made; *Abdul Hamid v. Riaz-ud-din* (1). The fifth schedule has been referred to in sections 154 and 155 of the Code. At any rate, an order for reference should not be made on the original application, inasmuch as the arbitrator had already made an award before any order for reference was made.

Babu *Piari Lal Banerji*, in reply.

The appeal does not abate on the death of an appellant. The cause of action survives and the reference to arbitration holds good. *Perumalla v. Perumalla* (2).

It will be open to the legal representatives of Gurudatta to refuse to join in the reference afterwards. The law of arbitration was related to a separate schedule, because a new enactment is to be passed on the subject. There is some difference between mere submission and reference to arbitration. It was the policy of the law to allow parties to choose their own forum. The word 'shall' should be construed as mandatory. He quoted *Sheo Dat v. Sheo Shankar Singh* (3), *Perumalla v. Perumalla* (2), *Abdul Hamid v. Riazuddin* (1), *Ramjidas Poddar v. Howse*, (4) and *Razu Ali v. Fida Ali* (5).

KARAMAT HUSAIN and CHAMIER, JJ:—When this case was before the lower appellate court all parties joined in an application to the court that the matters in difference between them should be referred to arbitration, and an arbitrator was named in the application. The court declined to make a reference to arbitration because in its opinion schedule II of the Code of the Civil Procedure was no part of the Code and therefore section 107 of the Code did not confer upon an appellate court the power to make a reference to arbitration conferred upon courts of first

(1) (1907) I. L. R., 30 All., 32.

(3) (1904) I. L. R., 27 All., 58.

(2) (1908) I. L. R., 27 Mad., 112.

(4) (1907) I. L. R., 35 Cal., 199.

(5) (1900) 4 Oudh Cases, 17.

instance. This view cannot be supported. The second schedule to the Code is as much an enactment as any other part of the Code, and there is no doubt that the lower appellate court in this case had power to make a reference to arbitration as prayed by the parties. Under paragraph 3, schedule II, the court ought to have referred the matters in dispute to the arbitrator named in the application. It is contended that the error committed by the court is cured by section 99 of the Code. But, inasmuch as the error resulted in the substitution of the Judge's decision for the decision of the arbitrator, it is impossible to hold that the case is governed by section 99 of the Code. Then it was suggested that it would be useless to remand this case to the lower appellate court, because one of the parties to the original application has died. It seems clear, however, that the authority of an arbitrator is not necessarily revoked by the death of one of the parties to a proposed arbitration. In the present case the right to sue survived, and therefore after substitution of the representative of the deceased party the case should have been referred to the arbitration as prayed. We are supported in this opinion by the decision of the Madras High Court in *Perumalla Satyanarayana v. Perumalla Venkata Rangayya* (1). We allow this appeal, set aside the decree of the lower appellate court, and remand the case to that court for disposal according to law. Costs of this appeal will be costs in the cause.

*Appeal allowed.*

## REVISIONAL CIVIL.

1911  
May, 11.

*Before Mr. Justice Sir George Knox and Mr. Justice Piggott.*

RAM KISHAN DAS (APPLICANT) *v.* JAI KISHAN DAS AND OTHERS (OPPOSITE PARTIES).\*

*Act No. I of 1877 (Specific Relief Act), section 9—Possessory suit dismissed—Application by plaintiff for revision rejected.*

When the plaintiff's suit under section 9 of the Specific Relief Act, 1877, was dismissed, the High Court declined to interfere in revision upon the ground that it was open to the plaintiff to take another remedy and bring a regular suit on title. *Tiwala v. Ganga Prasad* (2) followed.

\* Civil Revision No. 8 of 1911.

(1) (1903) I. L. R., 27 Mad., 112. (2) (1909) I. L. R., 30 All., 331.