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sons that Musammat Jagrani relinquished her right to the property in favour of Mulai. The learned counsel for the respondents has relied on the case of *Khunni Lal* v. *Govind Krishna Narain* (1) but that case is no authority for the proposition that a document evidencing family settlement does not require registration.

I am therefore of opinion that the petition of compromise dated the 12th of February, 1901, is inadmissible in evidence for want of registration for the purpose of proving the relinquishment of her right to the property in suit by the plaintiff appellant.

I would allow the appeal subject to the payment of usufructuary mortgages of Chandrika and Musammat Anurani which have been found to have been paid off by the respondents or their father.

BY THE COURT.—The order of the Court is that the plaintiff will have a decree for possession conditional upon her paying the sum of Rs. 157-5-3, being the amount of the usufructuary mortgages dated the 8th *Sawan Sudi*, 1309, 1*st Jeth Sudi*, 1303 and 10*th Asadh Sudi*, 1287. The amount must be paid within six months from this date. If the amount is not paid the suit will be dismissed with costs in all courts. If the amount is paid within the time the plaintiff will have her costs in all courts.

Appeal decreed.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Piggott.

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January, 17.

HARI KUNWAR (DEFENDANT) *v.* LAKHMI RAM JAIN AND ANOTHER (PLAINTIFFS.) *

Civil Procedure Code (1908), *section* 104(*f*)—*Arbitration—Application to file an award made without the intervention of the court—Appeal—Duties of arbitrator.*

Held, that an appeal lies from an order directing the filing of an award in an arbitration made without the intervention of the court.

Held, further, that in an arbitration proceeding if the parties come to terms on a certain point it does not absolve the arbitrator from passing

* First Appeal No. 137 of 1914 from an order of Bans Gopal, Subordinate Judge of Benares, dated the 8th of April, 1914.

(1) (1911) I. L. R., 33 All., 356.

judgement on that point incorporating the terms of the compromise in the award.

THE facts of this case were as follows :—

The parties were members of a joint Hindu family, the appellant being a widow of a deceased member of the family. Certain disputes having arisen between them, they appointed by a deed dated the 11th of October, 1911, three arbitrators (Pandit Chhannu Lal, Pandit Basti Ram Jha and Pandit Lakshmi Kant Pande). While the proceedings were pending one of the parties to the reference and one of the arbitrators Pandit Chhannu Lal died. Consequently a fresh agreement was executed on the 22nd of November, 1912, referring the matter to the two surviving arbitrators. According to the plaintiffs, one of the two arbitrators, Pandit Basti Ram, having refused to act as an arbitrator, the parties executed a third agreement appointing Pandit Lakshmi Kant Pande as the sole arbitrator. The arbitrator went into the questions in dispute very minutely and on the 31st of March, 1913, he made what has been called by the parties a preliminary award in which he noted the various claims made before him by the parties and after discussing them, he expressed his opinion as to how the property should be divided. This award was registered. Two of the defendants having raised certain objections to his conclusions he gave them a further hearing and on the 20th of April, 1913, he expressed in writing his opinion as regards those objections and then proceeded to make the final award which he delivered on the 21st of April, 1913, and got it registered. The plaintiffs then applied to the court to have the award filed in court and to make a decree in terms thereof. Notice having been issued two of the defendants, Harakhram Jani and Musammat Hari Kunwar, raised various objections alleging that the arbitrator had not decided some of the points which were referred to him and had not divided some property; had decided certain points which were not referred to him and had acted wrongly in making three awards; that the award was indefinite and incapable of execution and that the plaintiffs were guilty of fraudulently concealing the account-books. Musammat Hari Kunwar further alleged that she never executed the third agreement appointing Pandit Lakshmi Kant Pande the sole arbitrator.

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The learned Subordinrte Judge having gone into the evidence produced by the parties came to the conclusion—

(1) that the Musammat executed the third agreement and appointed Pandit Lakhshmi Kant as sole arbitrator;

(2) that the award was not indefinite and incapable of execution;

(3) that the award was not illegal and that the decision of the 21st of April, 1913, was the final award;

(4) that the arbitrator did not decide any point not referred to him;

(5) that the plaintiff neither misled nor decieved the arbitrator;

(6) that the arbitrator left no point undetermined inasmuch as—

(*a*) the parties had stated that they did not want to bid for Jaipur property and had dedicated it, so it was not necessary for the arbitrator to divide it,

(*b*) the parties similarly stated that they would arrange for Gaya Sradh and Brahman Bhojan according to their means and so the arbitrator was right in not deciding this point and

(*c*) that Musammat Hari Kunwar had clearly stated that she wished to live with Rabiram Jani and so it was not necessary for the arbitrator to make a separate provision for her residence.

From this order two of the defendants, Harakhram Jani and Musammat Hari Kunwar, filed two separate appeals. This was an appeal by Musammat Hari Kunwar.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Pandit *Rama Kant Malaviya*), raised a preliminary objection to the hearing of the appeal on the ground that no appeal lay from the order complained of. It was a decree passed according to section 21 (1) of the second schedule to the Civil Procedure Code and according to sub-clause (2) no appeal lies from such decree, except in so far as the decree is in excess of, or not in accordance with, the award. There being no such allegation here no appeal lies. An appeal, no doubt, lies under section 104(*f*) from an order filing or refusing to file an award, but once a decree has been passed in accordance with the judgement, no appeal lies.

Munshi *Haribans Sahai*, for the appellant, contended that section 104(*f*) clearly gives a right of appeal and that right is not taken away by section 21 (2) of the second schedule. Moreover, section 21 (1) expressly lays down that the court shall order the award to be filed only where no ground such as is mentioned or referred to in paragraph 14 or 15 is proved, so if the appellants have proved any such ground, the court should not have ordered the award to be filed, and this being an appeal from a judgement which according to the appellants is in contravention of the aforesaid section, an appeal would certainly lie.

[The Court overruled the preliminary objection and allowed the appellant to proceed with his arguments on the merits of the appeal].

Munshi *Haribans Sahai*, for the appellant :—

The respondents had failed to prove that the Musammat knowingly executed the third agreement appointing Pandit Lakshmi Kant as the sole arbitrator. It was clear from the evidence on the record that she had signed a blank paper, she was accordingly not bound by any decision of the arbitrator. If, however, the court found that the Musammat had executed the agreement then the award was bad in law and could not be merged into a decree of the court because the arbitrator could make only one award according to law, and as soon as he gave his first award his powers ceased and he had no jurisdiction to make the subsequent awards. The so-called final award, however, was illegal and bad in law and liable to be set aside inasmuch as the award was indefinite and incapable of execution, as the arbitrator has in one place written ' third party ' instead of ' second party ' and as the arbitrator has in his award made the delivery of possession of a certain house conditional on the second party's paying to the first party a certain sum of money, and as in the operative part of the award he has said that the second party will not get possession of the house until the ' third party ' pays to the first party certain sum of money, and as the ' third party ' having no interest will never pay it, the second party can never get possession of the house. This may be a mere clerical mistake, but the award being a private one it cannot be amended or modified. Secondly the award was bad in law inasmuch as the

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arbitrator decided certain points which were not referred to him. In the first place he has made certain provisions for the marriage expenses of Data Ram Jani and this was nowhere referred in the agreement. Secondly he has decided the question of inheritance of the Musammat's *stridhan* which was not referred to him for decision.

Lastly the award was bad because the arbitrator has not decided some of the important points which were expressly referred to him viz. :—

i. The arbitrator has not divided the Jaipur property which was expressly included in the agreement and should have been divided.

ii. He has made no provision for Gaya Sradh and Brahman Bhojan expressly mentioned in the agreement, and

iii. He has not decided the question of Musammat's residence, one of the main questions raised by the Musammat in the agreement.

The award being thus indefinite, incapable of execution, illegal and bad in law no decree should have been passed in accordance therewith, and the decree that has been passed is liable to be set aside.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Pandit *Rama Kant Malviya*) for the respondent :—

The evidence of the arbitrator, against whose honesty nothing has been alleged, much less proved, and that of one of the respondents Salig Ram read with the evidence of the Musammat herself, makes it clear that the Musammat did execute the last agreement. As regards the award itself, it was perfectly valid and has been rightly merged into a decree of the court. What has been called the preliminary award is a mere decision of the arbitrator of certain principles on which the property was to be divided and the second was merely a decision of certain objections raised by some of the parties. The real and the only award was the one which has been called the final award. Morever, after the second decision, the parties themselves stated before the arbitrator that they had no more objections to urge and that he should proceed with the final division of the property. The next point urged by the other side was equally of no force inasmuch as the insertion

of the 'third party' for 'second party' was a mere clerical mistake and could not, and as a matter of fact did not, affect the award. The sums payable by one party to the other had been rightly adjusted at the end and there was no mistake. Then as regards the question of the arbitrator having decided some of the points not referred to him, it was submitted that the arbitrator had not exceeded his powers in deciding those points. By the agreement he was entitled to divide the property as he thought proper. Taking into consideration the fact that the marriage expenses of all the other members of the family had been met from the joint fund and that Data Ram was to be married while arbitration was going on, the arbitrator was perfectly within his rights in making some provision for it. Then as regards the inheritance of Musammat's *stridhan* property, the arbitrator stated in the award merely what is laid down in law, and as he was allowing the Musammat a lump sum in lieu of her maintenance, it was incumbent upon him to lay down her rights in the sum awarded as also to whom it was to go after her death. Then as regards the questions not decided by the arbitrator, it was submitted that those points were no longer at issue between the parties and so need not have been, and were rightly not decided. The first objection was about the Jaipur property. In a statement recorded by the arbitrator the parties had stated that they had dedicated the property to a certain idol and did not desire its division. After this the arbitrator could not divide it.* The next objection was as to no provision having been made for Gaya Sradh and Brahman Bhojan. This was equally groundless because the parties had stated that each party would do it according to his means. The arbitrator therefore was justified in ignoring it. The last objection was that no provision had been made for Musammat's residence. The Musammat having stated that she was living with Rabi Ram Jani (one of the parties) and would also live in future with him, and Rabi Ram Jani having stated that he had no objection to it, it was not necessary for the arbitrator to decide it. Moreover, the Musammat in her statement expressly said that she wanted provision to be made for certain things in which she did not include this question of residence, this was therefore no longer a

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question at issue between the parties and need not have been decided. It was no doubt mentioned in the agreement, but by not raising it before the arbitrator, it must be taken to have been waived. Any how this alone was not a sufficient ground for setting aside the award which had been accepted by the whole family excepting these two.

Munshi *Haribans Sahai*, replied.

TUDBALL and PIGGOTT, JJ. :—These two appeals arise out of an application under paragraph 20 of the second schedule to the Code of Civil Procedure. They are heard together and this judgement will cover both appeals. The parties to this proceeding are a son of Gulab Ram Jani, eight grandsons of the same and the widow of a deceased son, Santokh Ram Jani. Disputes arose in the family and the members agreed to partition the property by means of arbitration. At the time of the first submission to arbitration in October, 1911, Adit Ram Jani, one of the sons of Gulab Ram Jani, was alive. An agreement was drawn up on the 11th of October, 1911, and signed by all. It set forth what the parties desired the arbitrators to do and the powers given. Three persons were appointed.

Before the latter were able to do anything, Adit Ram Jani and one of the arbitrators died. Therefore a fresh agreement was executed submitting the matter to the decision of the two remaining arbitrators. Then one of these refused to act and so a third agreement was drawn up on the 25th of September, 1912, and signed by all, submitting the matters to the decision of the third remaining arbitrator, Pandit Lakshmi Kant. This agreement contained a reference to the first agreement of October, 1911, and set forth that the arbitrator was to act under the conditions set forth in the latter.

An award was made on the 21st of April, 1913. The respondents, Lakhmi Ram Jani and his son Ganesh Ram Jani, then filed an application under paragraph 20 of the second schedule to the Code of Civil Procedure, that the award be filed and that a judgement and decree be passed in terms thereof.

Notice was issued to all the parties. Objections were filed by the appellants now before us. They were heard and decided, being disallowed, and the award was ordered to be filed. The court in the course of the same order passed judgement on the 8th of April, 1914, in accordance with the award and a decree followed in due course on the 28th of May, 1914. The present appeals are directed against the order of the court below that the award be filed.

A preliminary objection is taken that the appeal is incompetent in that a decree had been passed and there was no plea that it was in excess of, or not in accordance with, the award and therefore under paragraph 21, clause 2, no appeal can lie on any other ground.

In our opinion there is no force in this objection. The appellants are the 2nd and 5th parties to the submission to arbitration. The appeals, in both substance and form, are appeals against the order directing the award to be filed. Section 104(*f*) of the Code, in plain and clear terms, grants a right of appeal against an order filing an award in an arbitration without the intervention of the court. These appeals have been filed within the period allowed by law, and it is manifest that the bare fact that the court below has passed a judgement and a decree upon the award cannot take away the right of appeal from the order which the law allows.

The point is covered by the decision in *Khettra Nath Gangopadhyay* v. *Ushabala Dasi* (1). It is obvious that if the order of the court below filing the award be set aside, the judgement and decree based thereon must also fall to the ground; just as a final decree in a suit based on a preliminary decree falls, if on appeal the preliminary decree be set aside and the suit dismissed, *vide Kanhaya Lal* v. *Tirbeni Sahai* (2). We therefore disallow the preliminary objection.

Coming to the grounds of appeal, we note that they are the same in both appeals except that Musammat Hari Kunwar takes the additional plea that it is not proved that she executed the agreement dated the 12th of December, 1912, appointing Pandit Lakshmi Kant Pande sole arbitrator.

(1) (1914) 18 C.W.N., 881. (2) (1914) 12 A.L.J., 876.

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On this point the court below has held against her and we fully agree with that decision.

The two first agreements were drawn up in English and the third in Urdu. Admittedly, it bears the lady's signature, which followed the signatures of all the other parties to the submission. The lady swears that she had never agreed that Lakshmi Kant Pande alone should act as arbitrator and that the document was blank when she signed it, except for the signatures; that she was told it was to bear a document on it which would merely expedite the decision of the dispute, and she signed because the others had already signed.

Her allegation is disproved by the evidence of Pandit Lakshmi Kant and of the witness Salig Ram. The latter is direct evidence of the execution by her, and the former shows that the arbitrator, when he examined her, and recorded her statement, was careful enough to ask her before hand if she had agreed to his acting as sole arbitrator. It is true that he made no record of her reply, but the witness is a man of good education and good position in life against whose honesty and honour not a word is said. He is a member of the bar in good practice at Benares, and we agree with the court below that his word is to be trusted. It is urged that he wrote a letter to the second arbitrator on the 26th of December, 1912, asking him to come and join in the arbitration and that the court below wrongly refused to allow the appellant to prove this. This letter was put forward at a late stage of the proceeding in the court below and moreover was not put to the witness in cross-examination to enable him to admit and explain it or to deny it.

We hold that Musammat Hari Kunwar did execute the submission of the 25th of December, 1912, and that she willingly and knowingly did so.

The other grounds of appeal are—

(1) That the arbitrator made three separate awards and had no jurisdiction to do so, (2) that the award is so indefinite as to be incapable of execution, (3) that the award is bad in that the arbitrator has decided points not referred to him, and (4) that he has omitted to decide all the points referred to him.

These are common to both appeals. It will be noticed that they raise points of the nature of grounds mentioned or referred to in paragraphs 14 and 15 of the second Schedule to the Code of Civil Procedure.

Paragraph 21 of that Schedule lays down that if any such grounds are not proved the court shall order the award to be filed. It is obvious that if any such ground is proved the court cannot order the filing of the award but must leave the parties to their remedy by a regular suit.

The power of the court to pass such an order is strictly limited by the terms of paragraph 21 of the Schedule.

We take the points *seriatim*.

(1) In regard to the so-called three awards we agree with the court below that there was only one award, viz. that of the 21st of April, 1913.

The arbitrator seems to have taken very great care and to have expended a great deal of trouble and time.

On the 31st of March, 1913, he drew up a long proceeding setting forth the priciples on which he intended to base his award and partition the property and his reasons therefor. This he showed to the parties whereupon some of them filed objections. On the 20th of April, 1913, he drew up another long proceeding dealing with and disallowing these objections.

He then, on the 21st of April, 1913, drew up his award which is the award in the case. The other two documents are not awards in the true sense of the word and there is no force in this point. We reject it.

(2) The next is the plea of indefiniteness. This is based on a small clerical error apparent on the face of the award, but which does not in our opinion make the latter either indefinite or incapable of execution.

In dividing the family property the arbitrator allotted a certain house to the second party to the submission to arbitration. This was in the possession of the first party at the time. The arbitrator further ordered the second party to pay a certain sum of money to the first party within a fixed period.

He then laid down a further condition that possession of the house in question was not to be taken by the second party unless

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and until the latter had paid the said sum of money to the first party. In writing down these conditions in his award he made a slip and wrote "unless the '*third*' party pays this sum to the first party they will not be entitled to take posession of the house." This was clearly only a slip, but the meaning of the word is clear. The house was allotted to the second party and the sum of money was ordered to be paid by that party to the first party who was in possession of the house.

There is no force in the appellant's contention.

(3) The next plea is that the award is bad in that the arbitrator decided points not referred to him.

This plea relates to two matters entered in the award.

The first is as follows:—Musammat Hari Kunwar is the widow of one of the deceased sons of Gulab Ram Jani, and as a Hindu widow in a joint family is entitled to rights of maintenance and residence in the family house. There was also a dispute as to her *stridhan*. In the agreement to submit to arbitration it was set forth that she was entitled to *stridhan*, maintenance and right of residence, and the arbitrator was authorized to decide as to all these as he pleased.

The arbitrator awarded to the lady a lump sum to cover her *stridhan* and her maintenance, giving to her full power to deal with it as she pleased during her life-time or by will. In other words he made her absolute owner thereof.

He then added that if she died intestate, leaving any portion of the sum, that balance would go to her husband's heirs in equal shares.

It is urged that he had no power to decide this question as to the inheritance of what she might thus leave on her dying intestate, as it was not a question in dispute.

In the first place what he has thus stated is apparently merely what the Hindu law lays down to be the law in case of this class of *stridhan*; and in the next place it is a matter which can be entirely separated without affecting the determination of any of the matters referred.

It was, however, we consider, merely an expression of the arbitrator's opinion as to the law which would govern the inheritance to the property if she were to die intestate.

We do not think that there is any force in this contention. The second point relates to that part of the award where the arbitrator makes provision for the marriage expenses of Data Ram, one of the parties to the submission. It is urged that there was no reference on this point and there ought to have been no decision. With this we cannot agree. The arbitrator was given power to ascertain what was the divisible property of the family and to divide it up, as he thought best, among the members of the family. He saw that the marriage expenses of the other members of the family had been met, as is usual, out of the family income. He saw that Data Ram had not been married. He therefore thought it just when dividing the property to allot to Data Ram an extra sum to enable him to meet his marriage expenses. If he had given no reason for thus awarding this sum of money to Data Ram, his award could not have been touched. The bare fact that he gave his reason does not vitiate it, and he cannot be said to have decided a point not referred to him. We reject this plea also.

The fourth and last objection is that the arbitrator has failed to decide *all* the points referred. This plea is based on three points; (1) that he has failed to partition certain property at Jaipur, (2) that he has passed no award as to the expenses of the *Gaya Sradh* and *Brahman Bhojan*, and (3) that he has failed to decide as to the widow's (Musammat Hari Kunwar's) right of residence.

As to the first, the arbitrator's evidence shows that when in the course of his inquiry he came to the Jaipur property, the parties all informed him that it no longer belonged to them, as they had created a *waqf*, dedicating this property to a certain God. He therefore did not partition that which was not divisible. In the agreement the parties gave him power to ascertain the divisible property and to divide it. They clearly all stated that this was not divisible having been dedicated. His evidence is clear on the point and can be trusted. He therefore has not failed to do his duty in respect to this property.

(2) In regard to the expenses of the *Gaya Sradh* and *Brahman Bhojan*, these are expenses which had been met in the past out of the monies in the family chest. The arbitrator has testified

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(and we believe him as the court below did) that the parties told him that he need pass no orders in respect to these as they would each separately spend what they could afford from time to time under these heads. Such expenditure is not fixed in amount. What a man spends under these heads depends on the length of his purse and his temperament. The parties having deliberately withdrawn the point cannot be now heard to say that there has been no decision thereon.

(3) Lastly, we come to the question as to the widow's right of residence. Here unfortunately we come to what we are forced to hold is a flaw in the award.

We have noted above that in the agreement executed by the parties it was distinctly laid down that the arbitrator was to decide as he pleased in regard to the widow's *stridhan*, maintenance and right of residence. The arbitrator's evidence shows that in the course of his inquiry he questioned Musammat Hari Kunwar. He asked her what she wished to be arranged for her benefit. She made many demands and in the course of her statement she said that she had always lived in the house, or that portion of the house, occupied by Rabi Ram Jani, the father of the appellant Harakh Ram Jani, that she wished to live in that house-hold and would not live anywhere else. Rabi Ram Jani was questioned as to her demands. He did not agree to at least one of them, but in regard to her wish to live with him he expressed a full consent. None of the other parties expressed any objection. Admittedly the award is silent on the point and does not give the widow a right of residence in any part of the family house, nor allot to her any sum as compensation in lieu thereof.

It is urged that the parties having come to an agreement on the point it was not necessary for the arbitrator to pass judgement on it and that there was a practical withdrawal of the point by the parties from his jurisdiction. With this it is impossable to agree. The fact that she asked for something and that Rabi Ram acquiesced in her demand and no one else objected made the arbitrator's task simple; but it did not absolve him from passing judgement. When parties to a suit compromise, either the suit is withdrawn or a decree passsed in terms of the compromise. There was no withdrawal in the present case, but at the utmost a

statement by the parties giving the terms of a compromise. Where there is no specific withdrawal of the suit, the court must pass a decree in accordance with the compromise effected between the parties.

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In our opinion the arbitrator ought in his award to have decided the question of the widow's right of residence and the manner in which it was to be satisfied.

As he has not done so, one of the matters referred has been left undetermined by the award and this being so, that court, in view of the language of paragraph 21 of the second schedule, ought to have rejected the application made under paragraph 20.

We therefore allow the appeal and set aside the lower court's order and reject the application. The appellant will have her costs in both courts.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR *v.* LAL BIHARI*

1916
March, 29.

Criminal Procedure Code, section 110—*Security to be of good behaviour—Appeal—Judgement.*

A court of Criminal Appeal dismissing an appeal summarily is not bound to write a judgement; but an appeal from an order requiring a person to furnish security to be of good behaviour is distinguishable from an appeal against a conviction in respect of an offence specifically charged. And in such cases a District Magistrate should not dispose of an appeal otherwise than by a judgement showing on the face of it that he has applied his mind to a consideration of the evidence on the record, and of the pleas raised by an appellant, both in the court below and in his memorandum of appeal.

THE facts of this case were as follows :—

An order was passed against Lal Bihari and two others by a Magistrate of the first class under section 110 of the Code of Criminal Procedure. They appealed against this order to the District Magistrate of Basti, who dismissed their appeal by the following judgement :—" I see no reason for interference.

* Criminal Revision No. 124 of 1916, from an order of R. H. Williamson, District Magistrate of Basti, dated the 29th of November, 1915.