governed by the Benares School of Law (i.e. Mitakshara), but it is quite clear that the case cited was one under the Bengal School of law, namely, the Dayabhaga. This appears from the judgement in the case of *Chowdhry Thakur Prasad Shahi* v. *Bhagbati Koer* (1). On the other hand, there are several authorities in favour of the plaintiff which refer to the Mitakshara School of law, see *Damoodur Misser* v. *Senabutty Misrain* (2); *Damodardas Maneklal* v. *Uttamram Maneklal* (3). The same point was expressly decided by this Court in the case of *Mathura Prasad* v. *Deoka* (4). In our opinion the view taken by the court below was correct and should be affirmed. We dismiss the appeal with costs.

Appeal dismissed.

1915
November, 29.

Before Mr. Justice Tudball and Mr. Justice Piggott.

RAM UGRAH PANDE AND OTHERS (PLAINTIFFS) *v.* ACHRAJ NATH PANDE AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *schedule II, clauses* 17 *and* 20—*Award—Application to file an award on reference made out of court—Proceedings in court continued—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *sections* 5 *and* 14; *schedule I, article* 178.

Pending proceedings for mutation of names the parties concerned referred to arbitration out of Court the whole question of their title to the property in dispute, and the arbitrator delivered his award. The mutation proceedings were nevertheless continued. More than six months after the date of the award, some of the parties filed an application in the Civil Court purporting to be under clause 17 of the second schedule to the Code of Civil Procedure, and subsequently an amended application under clause 20.

Held that the application was time-barred. Clause 17 of the second schedule to the Code of Civil Procedure was totally inapplicable, and neither section 5 nor section 14 of the Indian Limitation Act, 1908, could be applied in favour of the amended application under clause 20.

THE facts of the case sufficiently appear from the judgement of the Court and briefly stated, they are as follows :—

One Prag Dat Pande had five sons. On the death of Prag Dat Pande the whole of the property recorded in his name was

* First Appeal No. 99 of 1915, from an order of Muhammad Shafi, Second Additional Subordinate Judge of Basti, dated the 2nd of February, 1915.

(1) (1905) I C. L. J., 142 (143). (3) (1892) I. L .R., 17 Bom., 271.
(2) (1882) I. L. R., 8 Calc., 537 (542). (4) Weekly Notes, 1890, p. 124.

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recorded in the name of one of his sons, Gokul Nath. Gokul Nath died leaving a widow, Musammat Dirka, and a daughter. On Gokul Nath's death the whole of the property recorded in his name was recorded in the name of Kedar Nath. During the time of Gokul Nath and Kedar Nath other properties were acquired in the names of different members. One of the sons of Prag Dat Pande *viz.*, Mukt Nath, died childless. Hans Nath, another son, died in 1910, leaving a widow, Musammat Sheopali, and five sons, *viz.*, Ram Ugrah and others. Sheomangal, the eldest son of Prag Dat Pande, died on the 30th of July, 1912, leaving three sons, *viz.*, Achraj Nath and others, and Kedar Nath died on the 31st of July, 1912. Disputes arose in the mutation department between the sons of Sheomangal, the sons of Hans Nath and Musammat Sonkali, widow of Kedar Nath. On the application of Achraj Nath and others, Musammat Sheopali and Musammat Dirka were also made parties. An agreement was executed between all the parties appointing one Rameshar Dat Man Tiwari as an arbitrator and agreeing to abide by his award. The agreement which was dated the 18th of November, 1912, was filed before the Tahsildar on the same day, but the Tahsildar did not send the case to the arbitrator and fixed a date for hearing. Some more mutation cases were pending in the court of the Deputy Collector. The parties executed another agreement in exactly the same terms on the 2nd of December, 1912, and filed it before the pargana officer, who was an Assistant Collector of the first class. The Assistant Collector sent the agreement to the Tahsildar directing him to forward the same to the arbitrator. The agreement with the records of cases was sent to the arbitrator by the Tahsildar. He, however, did not fix any time within which to deliver his award. The arbitrator wrote an award, dated the 8th of February, 1913, which reached the Tahsildar on the 13th of February, 1913. In the meantime the Tahsildar had proceeded with the hearing of the cases on the merits ignoring the award. On appeal the Collector set aside the order and directed the Assistant Collector to fix a date within which the arbitrator should give his award. The agreement was again sent to the arbitrator who wrote another award in exactly the same terms on the 28th of

May, 1913, and filed it before the Tahsildar. Mutation of names was ordered to be effected in accordance with the said award. Achraj Nath and others took the matter in third appeal to the Board of Revenue, which set aside the orders of the Commissioner, Collector and Assistant Collector and held the award to be void on the ground that the Tahsildar had no power to refer the matter to arbitration. Thereupon Ram Ugrah and others, the sons of Hans Nath, applied to the Subordinate Judge of Basti under paragraph 17 of the second schedule to the Code of Civil Procedure praying *(a)* that the agreement be filed in court and the matter might be referred to the arbitrator and after the award was filed, a decree may be passed in terms of the award, and *(b)* in the alternative that if for any reason the agreement is not filed the award, dated the 8th of February, 1913, might be filed in court and a decree might be passed in accordance therewith. The Subordinate Judge dismissed the application. The applicant appealed to the High Court.

Munshi *Jang Bahadur Lal* (for Babu *Durga Charan Banerji*) for the appellants, submitted that, the Board having declared the award to be waste paper, the parties reverted to their original position, and the agreement being a general agreement and not for the purposes of the mutation cases, the court below was wrong in not ordering it to be filed. The award was a valid award, but as it followed an illegal reference therefore it was illegal. He relied on *Mathura Prasad* v. *Ganga Ram* (1).

Dr. *Surendra Nath Sen* (with him Pandit *Lakshmi Narain Tiwari*), for the respondents, submitted that the agreement was a valid agreement and it was followed by a valid award. The agreement had now lost its force, and the matter had now passed that stage. He further submitted that the prayer as to the filing of the award was barred by six months limitation under article 178 of the Limitation Act. Time could not be extended. Section 5 of the Limitation Act could not apply as it had not been made applicable by any enactment, to the provisions of the Code of Civil Procedure relating to arbitration, and section 14 of the

(1) (1909) 7 A. L. J., 69.

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Limitation Act did not apply because the Assistant Collector was an executive officer and not a Civil Court within the meaning of section 14 of the Limitation Act. He relied on *Muhammad Subhanullah* v. *The Secretary of State for India in Council* (1).

Munshi *Jang Bahadur Lal*, was heard in reply.

TUDBALL and PIGGOTT, JJ. :—This is an appeal arising out of an application made in the court below which was primarily based on clause 17 of the second schedule of the Code of Civil Procedure. While the matter was pending an application for amendment was made and an alternative relief was asked for under clause 20 of the same schedule. The lower court has refused both the reliefs. The first relief, which was claimed under clause 17, it rejected on the ground that an award had been made by the arbitrator on the basis of the agreement between the parties and that clause 17 could not apply, the matter having attained a stage beyond that contemplated by that clause. With regard to the relief claimed under clause 20, it rejected it on the ground that the application was barred by time under article 178 of the first schedule to the Limitation Act. The applicants have come here on appeal. The parties are the descendants of one Prag Dat Pande. The latter had five sons, one of whom died childless. All the others have now died. Sheomangal has left three sons who are parties to the present dispute. Hansraj has left five sons and a widow who are also parties to the present dispute. Kedar Nath left a widow Musammat Sonkali and three daughters, of these the former alone is a party to the dispute. Gokul Nath has left a widow Musammat Dirka and three daughters and the former only is a party to this dispute. It appears that the family was possessed of shares in a number of villages lying in the two tahsils of Basti and Khalilabad in the Basti district. Some of the villages stood in the names of some of the members, and others stood in the names of other members. After the death of Kedar Nath a dispute arose amongst the various branches as to their title. One branch alleged separation, the other branch alleged that the family still remained joint. An

(1) Weekly Notes, 1904, p. 54.

application for mutation of names was made in regard to each village. In the case of the Basti villages the applications were made in the regular way to the Tahsildar Assistant Collector. In the case of the Khalilabad villages the application appears to have been made in the court of the Assistant Collector who was in charge of the pargana. In the Basti cases the 18th of November, 1912, was fixed by the Tahsildar. In the Khalilabad cases the 2nd of December was fixed by the Pargana Officer. On the 18th of November, the parties executed an agreement to refer their dispute as to the title to the land to the arbitration of one Rameshwar Dat Man Tiwari. This agreement clearly sets out that the parties have a dispute as to their title to the family property, that they refer the dispute to the arbitrator, that they will abide by his decision, that they will take possession of their various shares according to his decision and that they will cause mutation of names to be made according thereto. Apparently the agreement was put before the Tahsildar and was filed on the record of the case before him. He adjourned the mutation case clearly with a view to enable the parties to settle their dispute by means of arbitration. He fixed a date directing them to settle that dispute but also laying down that if the disputes were not settled by the date so fixed then they were to be prepared to produce evidence in connection with the mutation case. On the 2nd of December, 1912, the date fixed by the Pargana Officer in the case before him, a similar agreement, written exactly in the same language and bearing the date 2nd of December, 1912, was filed before the Pargana Officer of Khalilabad. Under orders of the Collector the Pargana officer of Khalilabad was directed to decide both sets of cases, namely, the Basti and the Khalilabad cases. The Pargana Officer of Khalilabad sent all his files to the Tahsildar of Basti and told him to send the agreement to arbitrate to the arbitrator. This clearly was done, for on the 13th of February, 1913, the arbitrator filed an award bearing date the 8th of February, 1913. It appears that at a subsequent stage of the case he was directed to write out another award and that he did draw up an award worded exactly in the same language as the first one simply bearing a different date. One of the parties, the respondents to the present appeal, apparently

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was not pleased with the decision of the arbitrator. The mutation cases were fought up to the Board of Revenue which finally sent back the records of the mutation cases with directions to try them *de novo* without any reference whatsoever to the arbitration proceedings. The present appellants then filed the present application, out of which this appeal has arisen, in the Civil Court. Primarily, as we have noted, it was an application under clause 17 of the Schedule asking that the agreement to arbitrate of the 18th of November, 1912, should be filed in court. Subsequently an alternative relief was prayed by the subsequent amendment asking that the award dated 8th of February, 1913, be filed in court and that a decree be passed based on the same. We have heard considerable argument as to whether the Tahsildar of Basti or the Pargana Officer of Khalilabad had or had not power to refer the matter to the arbitrator. We have not been shown any written application by the parties to either of those officers asking them to make the reference to the arbitrator. It is quite clear that the agreement of the 18th of November, 1912, was an agreement made entirely out of court. It is an agreement to refer to the arbitrator the disputed question of title, *i.e.*, a question which the Revenue Court was not competent to decide in the cases then pending before it. It was not an agreement to refer the mutation case or cases to an arbitrator. It is an agreement on which the arbitrator, if the parties had referred the matter at once to him directly, would have been empowered to take the evidence of the parties and to make an award. It seems to us immaterial whether or not the Tahsildar or the Pargana Officer had not legal power as a Revenue Court to refer the agreement to the arbitrator. It is quite clear that the Tahsildar forwarded it to the latter with the full consent of the parties. If, therefore, there was any illegal reference under the Revenue Act it does not concern this present case. An agreement to arbitrate and a valid agreement was made out of court and by the wish of the parties it was sent on to the arbitrator by the Tahsildar, as indeed it might have been forwarded through any private person. It is an admitted fact that the arbitrator made an award. It is, therefore, quite clear that clause 17 of the second schedule of the Code of Civil Procedure cannot operate in the circumstances of

the present case. The facts have gone beyond the stage contemplated by that clause. In regard to clause 20 of the schedule, in so far as the application is based thereon, the question is whether or not the application is barred by time. Admittedly article 178 of the first schedule to the Limitation Act applies and that lays down a period of six months from the date of the award. The present application was made more than a year after the date of the award. *Primâ facie* it is therefore barred by limitation. A certain amount of stress has been laid on sections 5 and 14 of the Limitation Act. Section 5 clearly cannot apply. If the present proceedings be deemed to be based on an application and not to be a "*suit,*" section 5 does not apply, as that only relates to an appeal or an application for review of judgement or for leave to appeal or any other application to which this section may be made applicable by any enactment or rule for the time being in force. No enactment or rule can be shown which would make this section applicable to an application of the present description. On the other hand, if the present matter be deemed to be a suit within the meaning of section 14, it is equally clear that the present appellants are not entitled to exclude the time during which they were prosecuting the mutation cases in the Revenue Court. The present application is an application to have an award filed and a decree passed on the basis of that award. The matter in controversy in the Revenue Court was not of this description. It was merely a mutation matter with a totally different cause of action as its basis. The present application is based upon the fact that there was an agreement to arbitrate and an award made upon that agreement. The two proceedings cannot be said to be founded on the same cause of action.

There remains the question, which we need not decide, as to whether the proceeding in the Revenue Court was a suit within the meaning of section 14, although on that point there is a ruling in *Muhammad Subhanullah* v. *The Secretary of State for India* (1), which is against the present appellants. It is therefore impossible for us either under section 5 or section 14 of the Limitation Act to extend the time so as to enable the present

(1) Weekly Notes, 1904, p 54.

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application to be treated as made within time. We note that the respondents plead before us in argument that both the agreement and the award were *primâ facie* legal and binding, subject to any objection which could be raised on the ground of fraud or misconduct of the arbitrator, *etc.* The court below has found that both the agreement and the award were valid and that the present application was barred by time. With this we find ourselves in agreement. This result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

1915
November, 26.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.

ABID ALI (PLAINTIFF) *v.* IMAM ALI AND ANOTHER (DEFENDANTS). *

Mortgage—Contribution—Payment by co-mortgagor—Guardian and minor—Power of de facto *guardian to mortgage minor's property—Muhammadan Law.*

Held that where a joint mortgagor seeks contribution upon the ground that he has paid the whole mortgage debt and thus relieved the property of his co-mortgagor from a burden, it is not necessary for him to plead that he did so under compulsion.

Held also that the *de facto* guardian of a minor Muhammadan is competent, in case of necessity and for the benefit of the minor, to make a valid mortgage of the minor's property.

THE facts of this case were as follows :—

The plaintiff came into court on the allegation that he and the defendants had borrowed Rs. 3,000 on the 11th of April, 1908, from Dalel Khan and Sikandar Khan, and that he and defendant No. 1 and Musammat Shaffat Fatima as mother and guardian of defendant No. 2, who was then a minor, executed on the said date a simple mortgage-deed in favour of the said creditors, but as the rate of interest stipulated in the mortgage-deed was very high, the plaintiff alone paid the amount due on foot of the said mortgage to the creditors on the 1st of July, 1912. The plaintiff having paid the amount brought this suit for contribution against the defendants. The defendant No. 1 pleaded unsoundness of mind and the exercise of undue influence over him. The defendant No. 2 contended that the mortgage-deed had not been executed by his

* Second Appeal No. 1290 of 1914, from a decree of C. M. Collett, First Additional Judge of Aligarh, dated the 18th of May, 1914, reversing a decree of Shams-ud-din Khan, Additional Subordinate Judge of Aligarh, dated the 5th of January, 1913.