

REVISIONAL CIVIL.

1915.
May 11.

Before Mr. Justice Tudball and Mr. Justice Chamier.

RAM AUTAR TEWARI (DEFENDANT) v. DEOKI TEWARI (PLAINTIFF).*

Civil Procedure Code (1908), Section 105—Arbitration—Appeal.

Held, that an order of a court setting aside the award of an arbitrator, and deciding that the case shall be tried by the Court is an order affecting the decision of the case within the meaning of section 105 of the Code of Civil Procedure, and is therefore liable to be challenged in appeal against the decree. —*Ganga Prasad v. Kwa* (1), *Kalyan Das v. Pyare Lal* (2), dissented from. *Shyama Charan Pramanik v. Prohlad Darwan* (3), referred to. *Nanak Chand v. Ram Narain* (4), *Ram Jivan v. Nawal Singh* (5), *Damodar Trimbale Dharap v. Raghu Nath Hari* (6), *Achuthanya v. Thimmayya* (7), *Mathooranath Tewares v. Brindaban Tewares* (8), followed.

THE facts of this case were as follows :—

A suit was filed in a Munsif's court and by agreement of parties the matter was referred to arbitration. The time for filing the award was extended from time to time and finally the 2nd of December, 1912, was fixed. No award was received by the Munsif on the 2nd of December. He therefore passed an order superseding the reference and fixed the 10th of December, 1912, for hearing evidence and proceeding with the suit on the merits. On the 5th of December an award was received purporting to have been made on the 2nd of December, 1912. Objection was taken to the award by the defendant on various grounds. The Munsif without considering those objections, refused to reconsider his order superseding the reference and after hearing evidence on the merits dismissed the plaintiff's suit on the 8th of March, 1913. The plaintiff appealed against the final decree and also took exception to the Munsif's order superseding the reference. The Additional Judge by an order, dated the 17th of June, 1913, set aside the order superseding the reference and remanded the case under order XLI, rule 23, of the Code of Civil Procedure for trial of the questions whether the award had really been made on the 2nd of December, 1912, and also whether it was otherwise valid. The Munsif after recording evidence held on the 26th of November, 1913, that the award was not made on the 2nd

*Civil Revision No. 21 of 1915.

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| (1) (1906) I. L. R., 23 All., 408. | (5) (1908) 5 A. L. J. R., 644. |
| (2) (1907) 4 A. L. J. R., 256. | (6) (1902) I. L. R., 26 Bom., 551. |
| (3) (1904) 8 C. W. N., 390. | (7) (1908) I. L. R., 31 Mad., 345. |
| (4) (1879) I. L. R., 2 All., 181. | (8) (1870) 14 W. R., 327. |

of December, 1912, and that it was also void on account of the misconduct of the arbitrator. He therefore again dismissed the suit. The plaintiff again appealed against the final decree. The Additional Judge overruled the Munsif's finding that the award was not made on the 2nd of December, 1912, and framing certain new issues as to the legality of the award remitted them to the Munsif for findings. The Munsif found in favour of the award.

The Additional Judge, accepted those findings and passed a decree in favour of the plaintiff in accordance with the award. The defendant applied in revision to the High Court. The application came on for hearing before Chamier, J., who referred it to a bench of two Judges.

Munshi *Jang Bahadur Lal*, for the applicant.

The Munsif having set aside the award by his order, dated the 26th of November, 1913, on the ground that it had not been made within the time allowed by the court and that it was void on account of the misconduct of the arbitrator, no appeal lay to the Additional Judge against that order and his order setting aside the Munsif's order was *ultra vires* and should be set aside. He relied on paragraph 15, schedule II to the Code of Civil Procedure, *Ganga Prasad v. Kura* (1), *Kalyan Das v. Pyare Lal* (2).

The intention of the Legislature was that all questions relating to the validity or invalidity of the award should be decided by the court making the reference and not by an appellate court; *Lutawan v. Lachya* (3), *Sumirta v. Musammatt Ganesha* (4).

[TUDBALL, J.—Could not the plaintiff under section 105 of the Civil Procedure Code take exception to the interlocutory order of the Munsif setting aside the award in his appeal against the final decree?]

The plaintiff could not have done so because in that case it would be necessary for him to show that the order affected the decision of the case on the merits; *Chintamony Dassi v. Raghonath Sahoo* (5), *Gulab Kunwar v. Thakur Das* (6), *Sankali v. Murlidhar* (7).

(1) (1906) I. L. R., 28 All., 408.

(4) (1912) 16 I. C. (Oudh) 595 at p. 596.

(2) (1907) 4 A. L. J. R., 256.

(5) (1895) L. L. R., 22 Cal., 981.

(3) (1913) I. L. R., 36 All., 69.

(6) Weekly Notes, 1902, p. 136.

(7) (1890) I. L. R., 12 All., 200.

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Munshi *Ishwar Saran*, for the opposite party :—

The cases cited by the other side did not apply inasmuch as none of them was a case of an arbitration award. The cases exactly in point were *Mothooranath Tewaree v. Brindaban Tewaree* (1), and *Dutta v. Khedu* (2); such an order was an interlocutory order and it could be objected to in the memorandum of appeal against the final decree; *Ram Jiwan v. Nawal Singh* (3), *Nanak Chand v. Ram Narain* (4), *Abdul Rahman v. Yar Muhammad* (5), *Chattar Singh v. Lekraj Singh* (6), *Naranjan Singh v. Musammatt Gujri* (7), Durga Charan Banerji's Law of Arbitration at pages 343, 344 and 345, *Achuthayya v. Thimmayya* (8), *Damodar Trimbak Dharap v. Raghunath Hari* (9).

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

TUDBALL and CHAMIER, JJ.—This application for revision arises out of a suit filed in the court of a Munsif. The parties agreed to refer the matters in difference between them to arbitration and an order of reference was made accordingly. The time for completing the award was extended from time to time up to December 2nd, 1912. On the case being called on on that date it was found that the award had not been filed. The Munsif then made an order superseding the arbitration and fixed December 10th for the hearing of evidence. On December 5th the arbitrators filed an award purporting to have been made on December 2nd; but the Munsif held that the award had not been made in time, and he declined to recall his order superseding the arbitration. Ultimately he tried the case out and dismissed it. The plaintiff appealed to the District Judge, and one of his grounds of appeal was that the award had been made in time, and therefore the arbitration should not have been superseded. The Additional Judge held that the Munsif was wrong in holding that the award had not been made within time, merely because it had not been filed in court within the time limited, and that he should have enquired whether it had been made by the

(1) (1870) 14 W. R., 327.

(5) (1881) I. L. R., 3 All., 636.

(2) (1911) I. L. R., 33 All., 645.

(6) (1883) I. L. R., 5 All., 293.

(3) (1908) 5 A. L. J. R., 644.

(7) (1912) 15 I. C., 928.

(4) (1879) I. L. R., 2 All., 181.

(8) (1908) I. L. R., 31 Mad., 345.

(9) (1902) I. L. R., 26 Bom., 551.

arbitrators within that time. Accordingly he remanded the case under order XLI, rule 23. The Munsif after inquiry dismissed the suit again, holding that the award had not been made within time, and also that it was invalid on account of misconduct by the arbitrators. The plaintiff appealed and the Additional Judge found that the award had been made within time, and he remitted an issue on the question of misconduct. The Munsif found on the issue in favour of the plaintiff. The Additional Judge agreed with the Munsif and passed a decree in accordance with the award which was in favour of the plaintiff. The defendant has applied to this Court for revision of the order of the Additional Judge on the ground that the Munsif's second order, holding that the award was invalid on account of misconduct of the arbitrators, could not be interfered with by the Additional Judge. No appeal lies against the order of a court under paragraph 15 of the second Schedule to the Code of Civil Procedure setting aside an award, and it is contended that the order cannot be challenged in appeal against the decree in the suit, because even if it is erroneous it does not affect the decision of the case within the meaning of section 105 of the Code. The applicant relies upon the decisions of this Court in *Ganga Prasad v. Kura* (1) and *Kalyan Das v. Pyare Lal* (2). In the latter case AIKMAN, J., merely followed the former which was a decision by two Judges. The learned Judges who decided the former case profess to follow the decision of BANERJI, J., in *Shyama Charan Pramanik v. Prohlad Darwan* (3), but an examination of the judgement of BANERJI, J., shows that he was of opinion that an appellate court was entitled, in an appeal against a decree, to interfere with the order of the court of first instance setting aside an award. He held that a second appeal lay against the decision of the appellate court, and he sent the case back in order that certain evidence might be taken. The judgement of BANERJI, J., seems to us to give no support whatever to the view taken in *Ganga Prasad v. Kura* (1). The decision in the last mentioned case, and the decision in *Kalyan Das v. Pyare Lal* (2) which follows it, seem to stand quite alone. They are inconsistent with several

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(1) (1906) I. L. R., 28 All., 403. (2) (1907) 4 A. L. J. R., 253.

(3) (1904) 8 C. W. N., 330.

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decisions of this Court beginning with the Full Bench decision in *Nanak Chand v. Ram Narain* (1) and ending with the decision of KNOX and GRIFFIN, JJ., in *Ram Jiwan v. Nawal Singh* (2), with the decision of the Bombay High Court in *Damodar Trimbak Dharap v. Raghunath Hari* (3), and with a long string of cases in the Madras High Court ending with *Achuthayya v. Thimmayya* (4). It seems to us that an order of a court setting aside the award of an arbitrator and deciding that the case shall be tried by the court is an order affecting the decision of the case within the meaning of section 105 of the Code. It has been held that the words "affecting the decision of the case" in section 105, mean "affecting the decision of the case on the merits," but even so we think that the order of the Munsif setting aside the award was liable to be challenged in appeal against the decree. As long ago as 1870 SIR R. COUCH, C. J. and KEMP, J., held that such an order affected the decision on the merits, see *Mathooranath Tewaree v. Brindaban Tewaree* (5). The weight of authority is clearly against the applicant and we are of opinion also that the order of the Munsif was liable to be challenged in the appeal against the decree. It is not suggested that there is any other ground upon which we could in revision interfere with the order of the learned Additional Judge. This application is dismissed with costs.

Application dismissed.

APPELLATE CIVIL

Before Sir Henry Richards, Knight, Chief Justice and Justice Sir Pramada Charan Banerji.

PHUL KUAR (PLAINTIFF) v. HASHMATULLAH KHAN AND ANOTHER (DEFENDANTS).*

Civil Procedure Code (1908.) order IX, rules 8 and 9.

When the plaintiff and his pleader are both absent on the day fixed for the hearing of a case and the court does not intend to give them another opportunity of appearing it ought not to decide the suit on the merits but should dismiss it for default of appearance.

*First Appeal No. 12 of 1915, from an order of Banke Bihari Lal, Subordinate Judge of Aligarh, dated the 24th of October, 1914.

(1) (1879) I. L. R., 2 All., 181.

(3) (1902) I. L. R., 26 Bom., 551.

(2) (1908) 5 A. L. J. R., 644.

(4) (1908) I. L. R., 31 Mad., 845 XIII 84 R.

(5) (1870) 14 W. R., 327.

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