It is obvious to us that the law contemplated that the full powers exerciseable by the Civil Court in execution of a decree should be transferred to the Collector in certain cases, and, as we have pointed out above, one of the powers of the Civil Court is to pass an order which is final and cannot be questioned by a regular suit under order XXI, rule 92, clauses (1), (2) and (3). In our opinion there is no force in this appeal. We therefore dismiss it with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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January, 1*.

SHIAM LAL (PETITIONER) *v.* PARSHOTTAM DAS (OPPOSITE PARTY).*

Civil Procedure Code (1908), *schedule II, paragraphs* 14, 15 *and* 20 *—Arbitration —Award—Ground for remitting or setting aside an award—Arithmetical error.*

It is not a ground for remitting an award on matter referred to arbitration or for setting aside an award that the arbitrator has made a mistake in arithmetic and apparently unintentionally has awarded a larger sum of money to be paid by one party to the other than he would have awarded if his attention had been directed to the mistake.

Nor does the decision of an arbitrator appointed to divide family property that a certain debt is due from the family to a person not a party to the reference amount to the determination of a matter not referred to arbitration, and in any case such a decision, so far as it might be considered as an award in favour of the creditor, would be entirely separable from the rest of the award. *Allarakhia Shivji* v. *Jehangir Hormasji*, (1) and *Mustafa Khan* v. *Phulja Bibi* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Durga Prasad* (for Mr. *B. E. O'Conor*) and Dr. *Surendro Nath Sen*, for the appellants:—

There is no illegality apparent on the face of the award. It is only an arithmetical error of calculation due to a confusion in the arbitrator's mind. This can be set right and the award made a rule of court. Paragraphs 14, 15 and 21 of the second schedule to the Code of Civil Procedure 1908, lay down the circumstances under which a private award can or cannot be filed. No such objections exist in the present case. The lower

* First Appeal No. 83 of 1919, from an order of P. K. Roy, Additional Subordinate Judge of Meerut, dated the 12th of April, 1919.

(1) (1873) 10 Bom., H. C. Rep., 391. (2) (1905) I. L. Rep., 27 All., 526

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court had also held against the appellant because the arbitrator had awarded certain properties to a daughter of the family and certain properties to another relation. In order to find out the divisible properties belonging to the joint family, the arbitrator was bound to exclude properties which did not belong to the joint family and in order to do so, the arbitrator had to find out what properties were such to which others were entitled. The arbitrator did in fact only do this and nothing else. This is in no way "determining any matter not referred to arbitration" and was not beyond the scope of the reference.

Munshi *Harnandan Prasad*, (with him Munshi *Shiva Dayal Sinha*, for Pandit *Shiam Krishna Dar*), for the respondents :—

There is a clear error apparent on the face of the award. The arbitrator's decision had the effect of awarding to a party a sum in excess of what he is entitled to. This is altogether illegal. It is every day seen that judgments of lower courts are attacked on the ground that a decree is illegal as the Judge has awarded to a party a thing to which on his own findings he was not entitled to. If such a point can be raised in second appeal, and can be entertained by this Court, I submit it is so entertained as raising a question of law, or in other words, that the decree of the lower appellate court is not legal. Such a mistake of the arbitrator is, therefore, an illegality apparent on the face of the record. An arithmetical mistake in a private award cannot be amended. I rely on *Allarakhia Shivji* v. *Jehangir Hormasji* (1). In that case the Judges of the Bombay High Court after discussing the various sections of the old Code of Civil Procedure of 1859, held that as corruption or misconduct of the arbitrators was not proved, the award had to be upheld. The provisions of the Code of Civil Procedure of 1908 are much altered and the power of the court as regards private awards is much more restricted. I refer to section 312 to section 327 of Act No. VIII of 1858 and the corresponding sections of the Codes of 1877 and 1908. In view of the alterations in the sections, under the present Code, even when only an arithmetical mistake apparent on

(1) (1873) 10 Bom., H. C. Rep., 391.

the face of the award is found, the court should refuse to allow the award to be filed. Moreover, it would be very bad if, knowing that the award is a wrong one on the face of it, the court makes it a rule of court. In cases of private awards the court can either file the award or refuse to file it; *Mustafa Khan* v. *Phulja Bibi* (1). There also the arbitrator had no business to award properties to parties outside the reference.

Munshi *Durga Prasad*, was not called upon to reply.

PIGGOTT, J.:—This appeal arises out of an application made under paragraph 20 of the second schedule to the Code of Civil Procedure to have an award made in an arbitration conducted without the intervention of the court filed. The party contesting the award put in what we may call a written statement, in which they contested the award on a great variety of grounds. They went so far as to contend that the award sought to be filed had never been made by the gentleman to whose arbitration the matters in dispute between the parties had been referred, but was a forgery concocted after that gentleman's death. On the pleadings of the parties a number of issues were fixed, ten in all, and the case was set down for hearing. The objector moved the court to decide first of all two issues only, in respect of which it was represented to the court that it would not be necessary to take any evidence. The issues as framed ran as follows:—

Issue No. 2.—"Has the arbitrator determined any matter not referred to arbitration under the agreement, dated the 6th of April, 1918"?

Issue No. 4.—"Is an objection to the legality of the award apparent on the face of it?"

On each of these issues the court below, after hearing arguments, found in the affirmative, and on these findings alone, and without any inquiry into the matters of fact raised by the pleadings, it has dismissed the application to have the award filed. The appeal before us is against the order refusing to file the award, and we have to consider whether that order is justified upon the only findings, which have been recorded. The first finding is that the arbitrator has determined two matters not

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referred to arbitration under the agreement. The first of these matters relates to a sum of Rs. 2,000, which the arbitrator has held in effect to be a debt due from the joint family business, the assets of which it was his duty to apportion between the parties to the arbitration, and due from them to a connection of the family named Baijnath Prasad. Now it is quite true that Baijnath Prasad was no party to the reference, that there is no mention of Baijnath Prasad in the agreement of reference, and that the arbitrator had no authority to make an award of Rs. 2,000 or of any other sum in favour of Baijnath Prasad. The arbitrator, however, was bound to distribute between the parties the assets of the joint family business, and in so doing he recorded the finding that those assets were subject to a liability of Rs. 2,000 in favour of Baijnath Prasad. It is only incidentally relevant to note that he purports to do this with the full consent of the parties to the agreement; but in any case he had authority to determine what were the divisible assets of the business before he proceeded to divide them. Looking at the matter from another point of view, it may be that, in so far as the award purports to operate in favour of Baijnath Prasad to the extent of Rs. 2,000, it is a matter which can be separated from the rest of the award without affecting the determination of the matter really referred to the arbitrator, namely, the division of the assets of the joint family business. This is of course subject to what has already been remarked, namely, that for the purpose of determining the divisible assets the arbitrator had authority to find that the assets of the firm were less by Rs. 2,000 in consequence of a debt due to Baijnath Prasad. This portion of the award is within the powers of the arbitrator. The award cannot operate as a decree in favour of Baijnath Prasad, who was not a party to the reference, but if, and in so far as it purports to do so, that portion of the award is obviously separable from the rest. The same remarks apply in substance to the other portion of the award, in which the arbitrator finds that certain money and jewellery must be taken out of the divisible assets of the joint family and left with one Musammat Tara Devi, a member of the family. I hold, therefore, that the finding of the court below on the second issue fixed by it is

incorrect and that the award is not open to any valid objection on the ground of the arbitrator's having determined a matter not covered by the agreement of reference.

The decision of the court below on the fourth issue raises two quite distinct points. They may be conveniently taken in the reverse order to that in which they are dealt with in the judgment under appeal. Part of the arbitrator's duty was to divide between the parties certain residential houses. The objector contends that the arbitrator first of all made a division of these houses in a particular way and that he subsequently altered that division. In so doing it is contended that the arbitrator acted illegally and that this illegality is apparent on the face of the award, within the meaning of paragraph 14 (c) of the schedule. We have been taken through that part of the award in which the decision about these residential houses is embodied, and in my opinion it does not show that the arbitrator was guilty of any illegality. I wish to express myself somewhat cautiously on this point, because I think it necessary to distinguish between an illegality apparent on the face of the award and an allegation of misconduct on the part of the arbitrator. I can conceive of cases in which it might amount to misconduct on the part of an arbitrator, dealing with a reference covering a large number of matters, to announce to the parties a final decision upon one of those matters and at a later stage to revise that decision, in spite of the protest of one of the parties affected by it. We are not called upon to consider whether the arbitrator in the present case was guilty of any misconduct of this kind. The simple point is whether the final award made by the arbitrator in respect of these residential houses, as embodied in paragraph 18 of the award, is on the face of it illegal. The paragraph is somewhat curiously worded. The arbitrator does not content himself with merely announcing his final decision on the point, but goes into a detailed recital of the negotiations between the parties and so forth which had preceded his final decision. He evidently felt that this question of the residential houses was one of the most difficult of those with which he had to deal, and he gives in the most candid manner his reasons for finding the point a difficult one to determine. He says that on the 13th of

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June, he proposed to determine it in a certain way, but that only two days later, *i. e.*, on the 15th of June, upon some suggestion made to him, he decided that one of the parties alone should take both the houses concerned, provided compensation, which he assessed at Rs. 7,000, was paid down within a week to the opposite party. He then notes that this payment was not made within the period which he had fixed, but that the party required to make it asked for more time and finally tendered the money after the date which he had fixed. The opposite party then refused to accept the tender and asked the arbitrator to take up the question of the division of the houses *de novo* and to give his own decision on the point. The arbitrator says that, if he were looking at the matter as a pure question of law, he could not deny that the party who had been required to pay Rs. 7,000, had a reasonable cause for asking for extension of time, but the fact remained that the negotiations which had ended in the proposal to allot both the houses to one party upon prompt payment of this compensation had broken down and that the matter was referred back to him to be decided upon his honour and conscience. In a somewhat quaint phrase, which seems quite unnecessarily to have excited the derision of the learned Subordinate Judge, the arbitrator says in effect that the voice of conscience compelled him to re-consider his decision and to make a division of the houses in a certain way. This he proceeds to do in detail. I was about to add that he does this before signing the award on the 12th of August, 1918, but I am at once brought up by the fact that one of the objections taken by the respondent in this Court was that the award was never really signed by the arbitrator at all. This may serve to illustrate the practical inconvenience of the course adopted by the court below in taking out these two issues from the rest and attempting to decide them separately. As the matter stands, however, I am obliged to deal with it as if the question of fact had been determined, for purposes of argument, in favour of the appellant in this Court, that is to say, as if there were no doubt that the arbitrator did in fact formally sign this award, embodying his final decision on the question of division of the house property, on the date which that document purports to bear, namely, the 12th

of August, 1918. In fact I am bound to take the document as it stands and to determine simply whether its 18th paragraph, embodying the arbitrator's decision on the question of the houses, is open to an objection on the score of illegality apparent on the face of the award itself. I feel quite unable to accept the view of the court below on this point. It seems to me that this question must clearly be answered in the negative.

The other point taken in connection with the same issue presents to my mind a good deal more difficulty, but I have come to the conclusion that the decision of the court below cannot be affirmed. The arbitrator had to deal with the assets of a certain cloth business, and those assets he avowedly desired to distribute equally between the parties. For some reason or other the quantity of cloth which he actually assigned to one party was of greater value than that which he assigned to the other, and he desired to order the party receiving the larger quantity of cloth to make such payment in cash as would equalize the division so far as this particular item of the joint property was concerned. In so doing he obviously fell into a mistake arising out of pure confusion of mind. He should have seen that, in order to equalize the division of this particular item in the assets, the party receiving the larger quantity of cloth should be required to pay to the opposite party one-half of the excess value. Instead of so directing, he has ordered payment of the whole of the excess value, thereby obviously making the division between the parties, so far as this particular item is concerned, unequal precisely to the same extent as it would have been if he had awarded the cloth itself in unequal shares and given no direction at all as to payment of compensation. The contention for the respondent, which has been accepted by the court below, is that, although the arbitrator would have been quite within his powers if he had divided the cloth unequally between the two parties, nevertheless, seeing that he avowedly set out to make an equal division, but has in fact made an unequal division, he has been guilty of an illegality, and that this illegality is apparent on the face of the award. I ought to note at once that the sum of money involved is a trifling one compared with the value of the properties with which the arbitrator had to deal. It comes to only Rs. 238-14-0. In the

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course of the argument on this point we were referred to a number of decisions, of which I desire to mention two only. The case of *Mustafa Khan* v. *Phulja Bibi* (1) does no more than lay down this principle, that the court has no power to amend an award made in a matter referred to arbitration without the intervention of the court. It must either allow the application to file the award, thus making the entire award a decree of court, or reject that application altogether, thereby referring the parties back to the position in which they stood before the agreement to refer to arbitration was entered into. In the course of their decision in the above case the learned Judges referred to an older case, that of *Allarakhia Shivji* v. *Jehangir Hormasji* (2). On the face of it that case seemed to me decisive against the respondent. The learned Judges of the Bombay High Court had before them an award in which, by an obvious and palpable mistake, the arbitrator had given one of the parties Rs. 4,000, in excess of what he had intended to give. The learned Judges came, with undisguised reluctance, to the conclusion that they had no authority either to refer the matter back to the arbitrator, or to correct the obvious error into which he had fallen. But the point to be noticed is that, finding themselves tied down to the two alternatives noticed in the Allahabad decision, the alternative which they adopted was to file the award, that is to say, to make it a decree of court as it stood, including the gross and palpable mistake in favour of one party and to the detriment of the other. The learned counsel for the respondent has very keenly contended that it would not be right to treat the decision of the Bombay High Court in this matter as an authority against him, because that decision was pronounced under the Code of 1859, and undoubtedly several of the provisions of that Code regarding arbitration, and more particularly as to arbitration without the intervention of the court, were amended when the Code of 1882 was passed and have been further amended in the present Code of Civil Procedure (Act V of 1908). Under the Code of 1859 the court was bound to file the award if no sufficient cause be shown against it. Those words are perfectly general, and the decision as it stands certainly implies that the learned Judges

(1) (1905) I. L.R., 27 All., 526. (2) (1873) 10 Bom., H. C. Rep., 391.

did not consider the fact of the arbitrator's having fallen into a confusion of mind, and made a clerical or arithmetical error, a sufficient cause against the award. In arriving at this conclusion they no doubt based their decision mainly on the wording of certain sections of Act No. VIII of 1859. The fact remains, however, that they seem to have acted on the broad view that, when parties submit a particular matter to the final decision of an arbitrator selected by themselves, they take their chance of his making a clerical or arithmetical error, just as much as they take their chance of his misinterpreting a document or refusing to believe the oral evidence of a perfectly trustworthy witness. At any rate the question now before us is to be decided with reference to the words of the relevant paragraphs of the second schedule to the present Code of Civil Procedure (Act No. V of 1908). There are only two paragraphs which have been suggested as applicable. The court below has applied clause (*c*) of paragraph 14, holding that this arithmetical confusion into which the arbitrator fell is an objection to the legality of the award. It seems to me that it was no more illegal for the arbitrator to make a mistake in arithmetic than it would be illegal for him to disbelieve a truthful witness, or to be misled by the falsehood of a plausible liar. I find myself unable to concur in the opinion that this mistake amounts to an illegality, or that the objection founded upon it can be correctly described as an objection to the legality of the award. As an alternative to this contention the learned counsel for the respondent relied upon the concluding words of paragraph 15 (1) (*c*). This clause gives it as a valid ground for setting aside an award its having been made after the issue of an order by the court superseding the arbitration and proceeding with the suit, or after the expiration of the period allowed by the court *or being otherwise invalid*. These last words must, I think, be held to relate to some matter *ejusdem generis* with those preceding, and I come back in substance to the same opinion as I have already expressed upon the other contention put forward on behalf of the respondent. I do not see that an award can be said to be otherwise invalid, within the meaning of this particular paragraph, because it contains a palpable arithmetical mistake.

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I ought perhaps to notice that, besides supporting the decision of the court below on the grounds on which it has proceeded, the learned counsel for the respondent asked us to take into consideration certain matters which in his opinion show that the arbitrator had left undetermined one of the points referred to him for arbitration. I do not think that this is a contention which can fairly be taken in the present appeal. It was at the request of the objector to the award, that is to say, of the party appearing as respondent before this Court, that the court below confined its decision entirely to the second and fourth issues, and what we have to determine is whether we agree with or dissent from the decision on those two issues. It is not really open to the respondent to raise a fresh issue here. Moreover, I think that, as the matter was laid before us in argument, there did not seem to me to be any real reason for holding that the arbitrator had failed to determine any of the matters covered by the reference. For these reasons I would set aside the decision of the court below and return the case to that court, in order that it may proceed to determine the rest of the issues fixed by it and to inquire into the objections taken to the award on their merits.

WALSH, J :—I agree that this case must go back for a proper trial. It seems to me that the lower court has wholly misconceived the functions of a tribunal which has to decide whether an award in a private arbitration should be filed or not, and has adopted in this case a procedure which much too frequently inflicts great hardship upon litigants, and is upon every ground to be deplored. We have listened this morning to arguments in support of this decree, which, to put the matter succinctly, invited us to ignore the principles which have been laid down for years by the Privy Council, and which are elementary and ought to be familiar to every legal practitioner. The respondent before us resisted the filing of this award by a document setting out his grounds of objection which amounted in number to no less than 17. The first of them went to the root of the transaction, if there was any substance in his case at all ; and one would have thought that he would have put it, as he did in his enumeration of his grounds, in the forefront of the litigation. It alleged

that the award was not the work of the arbitrator at all. The arbitrator, be it observed, was then dead. Having regard to the fact that the arbitrator set out in the award with great care his relationship with the parties, his personal intimacy with them, and the advantages which he enjoyed in his acquaintance with the lady members of the family as being the reason why he had been specially selected for this duty, it is to me absolutely unintelligible why the present respondent adopted the position that he did in the court below unless he had no case, because all those recitals by the arbitrator would be shams and frauds if there is anything in his first objection. What he did was to invite the learned Judge to step into what I can only describe as a trap, and to decide as a preliminary point his so-called points of law, giving the go-by to the obvious fact that if his real answer were true there would be an end both of the award and of any legal argument. The learned Judge has fallen into the trap—the fact, as I have said, is to my mind to be deplored—and has allowed himself, although his duty was to try and decide the case raised by the parties, to wander off into these highly technical and unsubstantial points. And this is the reason above all others that I deplore the tendency to arrogate to themselves, as I think the lower courts are too fond of doing, the functions of a court of appeal from the arbitrator. Nothing is easier than to be wise after the event, and for a trained lawyer weighing ingenious arguments by expert counsel to pick holes in an elaborate document drawn up by a layman, a friend of the parties doing his best to carry out the request made to him by them and to give them a decision on a variety of complicated matters and so save them from prolonged litigation. That is the reason why the Legislature has always carefully provided that, alike on matters of fact and on matters of law decided by an arbitrator, there shall be no appeal, and the Privy Council in Indian cases and the House of Lords in English cases has almost exhausted itself in trying to make this clear to the trial courts. The issues which were ultimately tried were whether the arbitrator decided points not submitted to him and whether there was any illegality on the face of the award? As regards some of these points to my mind they are so trumpery that they are difficult to answer. In one

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instance it is complained that the arbitrator set apart a provisional sum for payment to a third person out of the assets of the family. Of course that does not affect and could not affect the rights of the third party. How in the world it can be suggested that the arbitrator had no jurisdiction to make such a direction I am utterly at a loss to understand. The point was an idle one. Similarly with regard to the point, whether for reasons good, bad or indifferent does not matter in the least because an arbitrator has a perfect right to go wrong, that he gave directions with regard to the jewellery of the daughter of a deceased brother of the family. Here he was deciding matters of fact in dividing property and distributing the assets of the joint family. I am surprised to find it suggested that that was a matter outside the jurisdiction of the arbitrator. Then it is said about the poor man that he changed his mind in the course of his consideration of some point before he came to his final decision about it. It is a perfectly childish complaint to my mind. The only point which gave me any trouble at all was the suggestion that an obvious mistake of arithmetic on the face of the award might amount to illegality. I agree with all that my brother has said about this matter. My only difficulty really arose from my acquaintance with the practice of the English Courts in such cases, but there again I am satisfied that English Courts have wider powers both as regards amending or remitting to the arbitrator an award, when there has been something of that kind, although, be it observed, they have on a motion to set aside the award sometimes refused to interfere in such cases. The frequency with which these cases occur in which some one of the parties, dissatisfied with the decision of an arbitrator, endeavours to re-open it by hook or by crook in the trial court leads me to cite once more what the Privy Council has said upon the subject. Lord MACNAGHTEN in *Ghulam Khan* v. *Muhammad Hassan* (1) says:—"The time has long gone by since the courts of this country showed any dispostion to sit as a Court of Appeal on awards in respect of matters of fact or in respect of matters of law." He is there referring to the

(1) (1901) I. L. R., 29 Calc., 167 (183.)

English courts and he cites the case of *Adams* v. *Great North of Scotland Railway Co.* (1), in which Lord HALSBURY says:—"Where the parties have selected their judge, in such cases you have to show a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the court can interfere with his award. The parties had agreed to accept the arbitrator's decision upon the question of law as well as his decision upon facts." Lord MACNAGHTEN in the case I have already referred to says:—"They (arbitrators) may have erred in law, but arbitrators may be judges of law as well as judges of fact, and an error in law certainly does not vitiate an award." *A fortiori* an error in fact, and therefore an error in arithmetic, cannot vitiate an award.

I agree entirely with what my brother has said about the distinction to be observed between illegality on the face of the award, and misconduct by the arbitrator. There may of course be mistakes so palpable and gross that they afford strong evidence of misconduct, but, speaking for myself at any rate, in this case I hold strongly the view that the court below ought not to allow any of the questions already raised and disposed of in this appeal to be raised afresh under the guise of a suggestion of evidence of misconduct by the arbitrator.

With regard to costs we think that the whole of this useless litigation as it has been up to the present point, is due to the defendant's counsel inviting the trial court to discuss his so-called law points and contrary to the usual practice the defendant must pay all the costs of the proceedings up to this stage together with the costs of this appeal.

PIGGOTT, J.—I agree as to costs.

BY THE COURT.—The appeal is allowed, the case remanded to the court below for decision on the merits. The appellant will get costs in this Court.

Appeal allowed and cause remanded.

(1) (1891) L. R., A. C., 31 (39).