

## APPELLATE CIVIL.

*Before Mr. Justice Lindsay and Mr. Justice Ryves.*

AHMAD NUR KHAN (PLAINTIFF) v ABDUR RAHMAN KHAN  
AND OTHERS (DEFENDANTS).\*

1919  
November, 25.

*Arbitration—Reference made out of court—Refusal of arbitrator to continue the arbitration—Subsequent application to court to file the agreement to refer.*

During the pendency of a suit the parties thereto agreed to refer the matters in dispute to arbitration, and the suit was withdrawn. Before the arbitrator had made his award, one of the parties to the reference died, and the arbitrator, believing himself to have no power to make the representatives of the deceased parties to the proceedings, refused to act any longer as arbitrator.

*Held*, that in these circumstances, inasmuch as the arbitrator could not be compelled to act if he did not wish to do so, the court could not accept an application to file the agreement of reference.

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

*Mr. Nihal Chand* (for *Dr. S. M. Sulaiman*) for the appellant.

The Hon'ble *Dr. Tej Bahadur Sapru*, *Pandit Radha Kant Malaviya*, *Maulvi Iqbal Ahmad* and *Pandit Narmadeshwar Prasad Upadhyaya*, for the respondents.

LINDSAY and RYVES, JJ.:—This appeal has arisen out of proceedings which were taken in the court below under the provisions of paragraph 17, clause 1, of the second schedule to the Code of Civil Procedure.

It seems that there was some dispute between the members of two families descended from two brothers, Bala Khan and Ahmad Nur Khan. A suit relating to this dispute was filed in court and while the suit was proceeding the parties executed an agreement on the 20th of March, 1915, agreeing to refer their dispute to the arbitration of Khan Bahadur Abdur Rahman Khan. The result of the execution of this agreement was that the suit was withdrawn and the arbitrator took upon himself the duty of investigating into and deciding the dispute between the parties. On various dates in the year 1916, the arbitrator examined witnesses and finally the case came up before him again on the 13th of March, 1917. On that date he was informed that

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\* First Appeal No. 178 of 1918, from an order of Suraj Narain Majju, Subordinate Judge of Pilibhit, dated the 8th of June, 1918.

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one of the parties to the dispute, namely, Akhtar-ud-din Khan had died and it would appear that some application was made to him asking him to send notice to the legal representatives of Akhtar-ud-din before any further proceedings were taken. The arbitrator sent out some notices and on the 25th of March, 1917, he put in writing a definite refusal to go on with the arbitration. He said that as one of the parties to the reference had died he had no legal authority to make the legal representatives of the deceased party parties to the proceedings. After this he returned to the parties their documents and nothing more was done. On the 2nd of November, 1917, the present plaintiff appellant filed this application under paragraph 17 of the second schedule of the Code of Civil Procedure asking that the agreement to refer to arbitration might be filed in court. In other words the intention of the appellant is that the court should order the arbitration proceedings to go on as before and should direct the arbitrator to carry out the settlement of this dispute.

The court below has dismissed the application. It is not necessary for us to examine the various reasons which the Subordinate Judge has given in support of his order. It is sufficient to refer to his finding on the third issue, namely, that by reason of the refusal of the arbitrator to act, the deed of reference has become unenforceable.

If the appellant here cannot succeed in showing us that the finding of fact that the arbitrator refused to act is wrong then the order of the court below must be maintained. The learned counsel for the appellant has not found it possible to argue that this finding of fact is erroneous, nor indeed would it have been easy for him to do so in view of the clear statement made by the arbitrator himself when examined as a witness in the case. In the course of his deposition he stated clearly that he had refused to go on with the arbitration, his reason being that, one party to the reference having died, he considered that he had no authority to continue the proceedings. Whether or not the arbitrator was right in supposing that in these circumstances he had no authority to continue to act, is a matter with which we are not concerned. The fact remains that he definitely refused to act and that at the time this application was filed under paragraph 17 his refusal

was still in force. It is quite true that in the course of his examination in court the arbitrator expressed his willingness to resume his functions as arbitrator provided the court would give him an order to that effect. In the first place this offer, if it can be treated as an offer, was only qualified. In the next place we do not think the court had any jurisdiction to give the arbitrator any directions to carry on the proceedings.

The result, therefore, is that we have before us an application to enforce an agreement to refer a dispute to the arbitration of a gentleman who had already declined to act and in these circumstances we hold that it would be quite impossible for the plaintiff to have an order such as he sought in the court below.

Other points are set out in the memorandum of appeal here, but it has been agreed before us that the decision of the point which we have already determined is sufficient to dispose of the appeal. The result, therefore, is that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

[Compare *Shib Charan v. Rati Ram*, I. L. R., 7 All., 20, and *Dukhu v. Bhinak*, Weekly Notes, 1884, p. 209.—Ed.]

*Before Mr. Justice Lindsay and Mr. Justice Ryves.*

MUNDAR BIBI AND ANOTHER (DEFENDANTS) v. BAIJ NATH PRASAD  
(PLAINTIFF)\*

*Cause of action—Suit for recovery of money lent—First suit based on promissory note—Subsequent suit for same relief based on plaintiff's account books.*

Defendants borrowed money from plaintiff and executed a promissory note therefor in his favour. Plaintiff sued upon the promissory note, but the suit was dismissed, not on account of any defect in the promissory note, but owing to the plaintiff's personal default, and this order of dismissal became final.

*Held*, that the plaintiff could not thereafter sue the defendant on the basis of entries in the plaintiff's books of account to recover the same money. *Baij Nath Das v. Satig Ram* (1) referred to.

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

\* First Appeal no. 41 of 1919, from an order of Pratab Singh, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 29th of January, 1919.

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