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That is in our opinion a correct statement of the law and we cannot improve upon the manner in which it has been there expressed. Yet this is obviously the right which the lower appellate court has found to exist in favour of the present plaintiffs. The learned District Judge says in so many words that it cannot be supposed that the cattle of the plaintiffs would travel by any circumscribed and definite route through the jungle. So far from rejecting the report of the Commissioner on the questions of fact observed by him, he seems to accept and endorse it. For this reason also the decree as passed in favour of the plaintiffs cannot be maintained. What we have been asked to do on behalf of the plaintiffs has been to send down an issue as to whether or not, as a matter of fact, the plaintiffs had acquired by prescription a right of easement in the form of a right of way over a circumscribed and definite path through the defendants' jungle. We have considered this argument carefully, but in our opinion no such assertion is specifically made in the plaint and the finding of the lower appellate court is actually against it. We must, therefore, decline to accede to this request. The result is that the appeal prevails. We set aside the decree of the lower appellate court and restore that of the court of first instance with costs throughout.

Appeal decreed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

NAINSUKH DAS, NAGAR MAL (APPLICANT) *v.* GAJANAND, SHYAM LAL (OBJECTOR)*

1920. *December*, 20.

Act No. IX of 1899 *(Indian Arbitration Act), sections* 4, 20—*Civil Procedure Code* (1908), *section* 104 (1) *(f)—Award under Arbitration Act—Order refusing to file—Appeal.*

The parties to a contract for the sale and purchase of cloth agreed to refer a dispute arising thereout to arbitration under the provisions of the Indian Arbitration Act, 1899. A reference was made and an award was pronounced. One of the parties then applied to the District Judge for an order to file the award, but on objection taken by the other party the District Judge refused to file it.

*First Appeal No. 53 of 1920 from an order of L. S. White, District Judge of Cawnpore, dated the 21st of February, 1920.

Held that, in the absence of rules framed by the High Court under section 20 of the Indian Arbitration Act, the procedure prescribed by the Code of Civil Procedure would apply, and an appeal against the order of the District Judge would lie under section 104 (1) (*f*) of the Code. *Campbell and Co.* v. *Jeshraj Giridhari Lall* (1) distinguished. The judgment of PIGGOTT, J., in *Sukhamal Bansidhar* v. *Babu Lal Kedia and Co.* (2) referred to.

THE facts of the case are briefly as follows :—

The appellant entered into a contract with the respondent for the purchase of cloth. There was a dispute arising out of the contract, and the appellant applied to the Cawnpore Piece Goods Association to arbitrate in the matter. The application was on a printed form of the Association. Space was provided for the statement of the applicant's case, and the applicant after stating his case in the space so provided signed the form. The Cawnpore Piece Goods Association then appointed an arbitrator, whose name was entered on the form in the space provided for the purpose, and the arbitrator so appointed fixed a date for the hearing of the case and called upon the objector respondent to state his defence. The objector stated his case in writing on the same form, but on the reverse or back of the paper in the space provided, and then an award followed. The applicant applied to the District Judge to file the award and an objection was taken that the submission was not in writing within the meaning of section 4 of the Indian Arbitration Act, 1899. The District Judge gave effect to the objection and refused to file the award. The applicant appealed.

Mr. *M. L. Agarwala* (with him Mr. *T. N. Chaddha* and Munshi *Panna Lal*), for the respondent, took a preliminary objection that no appeal lay. He contended that the Indian Arbitration Act did not provide an appeal, and the provisions of the Code of Civil Procedure applied only to arbitration under the second schedule of that Code. Reliance was placed upon *Campbell and Co.* v. *Jeshraj Giridhari Lall* (1) and *P. W. Ripley* v. *V. J. Nahapiet* (3).

Babu *Saila Nath Mukerji* (with Mr. *B. E. O'Conor*), for the appellant, contended that section 89 of the Code of Civil Procedure made it clear that proceedings under the

(1) (1917) I. L. R., 45 Calc., 502. (2) (1920) I. L. R., 42 All., 525.

(3) (1912) 17 Indian Cases, 902.

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Indian Arbitration Act (1899) did not prevent an appeal. Section 104 (1) (*f*) clearly provided an appeal against an order refusing to file an award. That section clearly gave a right of appeal in an arbitration without the intervention of the court; and "without the intervention of the court" included proceedings under the Indian Arbitration Act (1899). The Act of 1899 is a much earlier Act and section 89 of the Code clearly shows that its existence had not been overlooked when the Code of 1908 was enacted. If it had been the intention of the Legislature to include only arbitration under the second schedule nothing could have been easier than to say so. The use of the expression "an order filing or refusing to file an award" refers particularly to arbitration under the Indian Arbitration Act, because in an arbitration without the intervention of the court under the second schedule of the Code a decree promptly follows the filing of an award and a right of appeal has been expressly taken away. Therefore an appeal against the *filing of an award* under the Code is not provided for. The alteration of the wording of the clause in the Code of 1908 is also significant. When the Code of 1882 was enacted there was no Arbitration Act, and the Legislature in order to provide an appeal against orders passed by courts acting under the Arbitration Act had intentionally altered the words of section 588 of the old Code of Civil Procedure. In *Sukhamal Bansidhar* v. *Babu Lal Kedia and Co.* (1) this point was left open by this Hon'ble Court.

On the merits, the submission made was on the usual form provided by the Cawnpore Piece Goods Association. The appellant signed after stating his case and the respondent signed it on the reverse. The mere fact that the respondent's signature appears on the reverse makes no difference. The respondent knew that he was referring the matter to arbitration or consenting to such reference and produced witnesses before the arbitrator.

Munshi *Panna Lal*, for the respondent.—

The written submission should have been clear and unequivocal. The mere fact that the respondent stated his case does not show that he intended to submit to the decision of the arbitrator.

(1) (1920) I. L. R., 42 All., 525.

The mere fact that the parties at one time considered the proceedings valid and binding cannot estop my client from challenging the validity of the submission on the ground that the submission was not in writing; *Rukhanbai* v. *Adamji* (1).

Babu *Saila Nath Mukerji*, for the appellant, was not heard in reply.

PIGGOTT and WALSH, JJ. :—This is an appeal from an order by the District Judge of Cawnpore, dated the 21st of February, 1920, refusing to file an award. The application on which the order was made was presented by one of the arbitrators at the request of the successful party in the arbitration, namely, the present appellant. An objection was made to the application by the present respondents on the ground that there had been no valid submission.

A preliminary objection was raised at the hearing of the appeal, on the ground that no appeal lies. On the face of the order it is clearly one within the express provision of section 104 (1) (*f*) of the Code of Civil Procedure, being "an order refusing to file an award in an arbitration without the intervention of the court." The District Judge decided that this section does not apply to the arbitration award, as the award purports to have been under the Arbitration Act, IX of 1899. There is nothing in that Act to support this view and it is to be noted that the Civil Code was re-enacted some years later than the Arbitration Act. In support of the preliminary objection an authority has been cited, *Campbell and Co.* v. *Jeshraj Giridhari Lall* (2), in which the Calcutta High Court held that section 104 of the Civil Code did not apply. That case is distinguishable. The award had been filed by the Registrar of the High Court as a ministerial act, in accordance with the rules of the Calcutta High Court. Subsequently a rule was applied for through a Judge of the High Court asking that the award should be set aside. This rule was discharged, but the award had been filed and there had been no order of the High Court refusing to file it. Section 20 of the Arbitration Act enables the various High Courts in India to frame rules as to the filing of awards and all proceedings consequential thereon or incidental thereto. Such

(1) (1908) I. L. R., 33 Bom., 69. (2) (1917) I. L. R., 45 Calc., 502.

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rules would, of course, when made have the effect of a statute, but it follows that the practice provided by the various High Courts in India for proceedings under the Arbitration Act may vary. The Allahabad High Court has made no rules. The natural result of this is that parties themselves, and the lower courts alike, follow the ordinary and familiar procedure usually adopted under the statutory rules of the Code. The practice is to apply for an order to file the award and the court adjudicates upon such application. This is the converse of the practice in Calcutta, as appears from the judgment of the Chief Justice. But there is nothing in the Arbitration Act rendering such practice as has been followed in this case, and in any other case in Cawnpore, incompetent, and procedure of some kind is obviously necessary to enable the court to exercise the power of remitting or setting aside an award under either section 13 or 15 of the Act. We think that the procedure adopted in this case was legitimate and proper and probably the only proper procedure available. The Judge had therefore jurisdiction to make the order which he did, and the order being one refusing to file the award it is appealable under section 104 (1) (*f*).

In Calcutta it was held that an appeal lay under another provision of the law from the order (which in that case was an order of a High Court Judge), so that the point of practice became of no importance. It is clearly desirable on every ground that such an order as the one now in question should be open to review in the High Court and that this Court should as far as possible control the courts below upon questions of principle and practice arising out of arbitration proceedings, keeping in mind the settled principle that decisions of law and of fact by arbitrators, if honestly and regularly reached, cannot be re-opened. The question now before us was left open by a Bench of this Court similarly constituted in the case of *Sukhamal Bansidhar* v. *Babu Lal Kedia and Co.* (1), and the passage from the judgment of Mr. Justice PIGGOTT on p. 538 is very much in point. He says :—"Section 11 of Act No. IX of 1899 speaks in very general terms of the arbitrators or umpire causing the award to be filed in the court, and the wording of section 15 which follows leaves

(1) (1920) I. L. R., 42 All. 525.

it at least open to the contention that unless the court either remits the award for reconsideration to the arbitrator or umpire or sees reason for setting it aside, the award will be filed, as it were, automatically, without any express order of the court to that effect, and will become enforceable as if it were a decree by reason of the provisions of section 15 aforesaid. I wish to say, to begin with, that I do not stand committed, by the order which we are about to pronounce, to any final decision as to whether an appeal would or would not lie from a proceeding of a competent district court which merely recorded a finding, by way of a declaration, that a certain paper presented to the court on a certain date through a certain agency was a valid award by a properly constituted umpire or arbitrator under the provisions of Act No. IX of 1899. The order before us is one which expressly purports to file the award. Its operative portion is as follows:—"It is ordered and decreed that the award be filed.' The learned District Judge, therefore, in dealing with this case did not take the alternative view which I have above suggested, but definitely conceived that the award of the sole arbitrator would not be filed and become operative as a decree of the court unless he passed a formal order directing it to be filed. On this state of things my view is that, if the order of the court below is a good one, it is an appealable order."

That passage is directly in point and it is clear from what PIGGOTT, J., said in that case that if he had been pressed to consider the point of law as to whether an appeal lay or not and to dismiss the application which was made in revision on that ground alone he would have held that an appeal lay. As a matter of fact an application was made to another court with reference to the decision in the case from which we have just cited, and leave was asked from the High Court to appeal to the Privy Council upon the ground that this Court had no jurisdiction to interfere in revision. That leave was refused on the ground that the respondents in the hearing in revision had refused to argue the point, which was left open for further consideration. That fact is alluded to in the judgment of WALSH, J., where he says that if an appeal did lie, a question which he declined to consider, no revision could be entertained.

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This point also appears to have arisen in *P. W. Ripley* v. *V. J. Nahapiet* (1). It does not appear from the inadequate report of the decision in that case whether the *ratio decidendi* turned upon any point of practice. If the court in Burma intended to lay down a rule of universal application that no order of the kind now under appeal could be covered by section 104, we are unable to agree with their view.

Upon the merits we are of opinion that the respondent in this case, who was a member of the Association and had been a claimant himself in at least one prior case, submitted to arbitration by a written agreement. What happened was that the claimants, the present appellants, submitted to the Association a claim against the respondent which they signed and sent to the Association. The arbitrators appointed by the Association laid the document before the respondent and he wrote thereon in his own hand and over his signature his answer to the claim. He was well aware that the object of the document was to lay before the arbitrators in writing the difference which was to be decided between the parties. We are clearly of opinion that the document constituted a written agreement to submit the present difference to arbitrators within the meaning of section 4(*b*) of the Arbitration Act. The case is even stronger than that in which a similar view was taken by the Court of Appeal in England in *Baker* v. *The Yorkshire Fire and Life Assurance Co.* (2). The plaintiff there wanted to sue upon a fire assurance policy which had been signed and sealed by the Company, and which contained an arbitration clause, but which he himself had not signed. As he was affirming the document, it was held against him that there was a written agreement to submit the differences of the contracting parties to arbitration.

The appeal must be allowed with costs and the application to file this award must be remitted to the Court of the District Judge of Cawnpore to be dealt with according to law.

Appeal allowed and cause remanded.

(1) (1912) 17 Indian Cases, 902. (2) (1892) 1 Q. B., 144.