in any event avail the appellant for, as we shall proceed to show, the appeal must fail on a second ground also.

This being our view of the law and of the facts, we hold that the application of the 4th of March, 1921, was not an application "for execution" or "a step in aid of execution" and that the application of the 12th of January, 1923, was barred by limitation and the appeal must be dismissed.

[Their Lordships then dealt with the second ground and dismissed the appeal.]

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Dalal.

1926 *March,* 2.

RAM DEVI AND OTHERS (DEFENDANTS) v. GANESHI LAL (PLAINTIFF) AND RAJENDRA KUMAR BHATTACHARYA AND OTHERS (DEFENDANTS).*

Civil Procedure Code, schedule II, paragraph 21—Arbitration —Reference without intervention of court—Insolvency— Matters in dispute between receiver and secured creditors —Effect of award on decrees already passed and suits pending.

During the pendency of insolvency proceedings various litigations arose between the receiver, the secured creditors and the holders under certain transfers, alleged to be fictitious, which had been made by the insolvent, with regard to the realization of assets and the payment of debts. All the parties eventually agreed to refer the whole matter to arbitration without the intervention of the court, the agreement providing "that a decree in terms of the award would be accepted by the parties and that any decree passed by the court during the pendency of the arbitration proceedings would be subject to the award and would be modified in accordance with it." The award subsequently passed directed (1) the parties to modify in accordance with the award the decrees

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* First Appeal No. 64 of 1925, from an order of Nadir Husain, second Additional Subordinate Judge of Aligarh, dated the 18th of March, 1925.

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which might be passed by the courts in the pending suits, and (2) the receiver to bring the insolvent's property, which was revenue paying and ancestral, to sale and realize the sale proceeds through the court. It was found that the objectors to the award, who were plaintiffs in two suits, continued to take part in the arbitration subsequent to the suits. *Held*, that the award was valid and, therefore, binding on the parties. The award was to be deemed an adjustment, under order XXI, rule 2, of the Code of Civil Procedure, of the decrees which had already been passed; and if any suits were still pending, the award might be filed by way of defence and a decree obtained on foot thereof. *Gajendra Singh* v. *Durga Kunwar* (1), and *Mannilal Motilal* v. *Gokaldas Rawji* (2), followed.

Where there is an agreement to refer to arbitration, the court has the power in its discretion to refuse a party the alternative of a court of law, and thus to force him to proceed by arbitration. Parties can deprive themselves of the right of recourse to a court of law by their own act, as, for example, by going on with the arbitration and obtaining an award. *Doleman and Sons* v. *Ossett Corporation* (3), referred to.

THE facts of this case were as follows :—

One Bijai Indar Singh was adjudged an insolvent and a receiver of his property was appointed. The insolvent was out of possession and in the opinion of the receiver some of the properties were fictitiously sold. Litigation therefore arose between the receiver and certain persons who were in possession of the insolvent's property. Finally, the secured creditors, the persons in possession of the property, and the receiver entered into an agreement on the 28th of February, 1923, to refer the matter relating to the amount and the payment of the secured and unsecured debts to arbitration. The first arbitrator died in the following September, and on the 4th of November, 1923, the parties, with the exception of two, appointed Babu

(1) (1925) I.L.R., 47 All., 637. (2) (1920) I.L.R., 45 Bom., 245.
(3) (1912) 3 K.B., 257.

Manni Lal, pleader, as a new arbitrator. The award was made on the 4th of June, 1924.

Ganeshi Lal, one of the parties to the arbitration, applied for the filing of the award under paragraph 21 of the second schedule to the Code of Civil Procedure. This application was opposed by several of the other parties, viz., Musammat Ram Devi, widow of Sheo Prasad, for herself and her minor son, a second Musammat Ram Devi, wife of Bhola Nath and Jai Deo Prasad for himself and his minor nephews. The Court of first instance (Second Additional Subordinate Judge of Aligarh) ordered the award to be filed. Against this order the objectors other than Ram Devi wife of Bhola Nath appealed to the High Court.

The appellants contended that the award was illegal on the face of it and that the court should have refused to file it. The reasons for the alleged illegality were two, (1) that the award gave an illegal direction to the parties for the settlement of pending suits and existing decrees, and (2) that the direction given to the receiver to bring the property to sale and realize the sale proceeds through the court was illegal, having regard to the provisions of section 60 of the Provincial Insolvency Act.

Dr. *M. L. Agarwala*, for the appellants.

Dr. *Surendra Nath Sen*, for the respondents.

The judgement of DALAL, J., after setting forth the facts as above, thus continued :—

It was first urged that the discretion in the award to the parties to modify the decrees duly passed by courts of law amounted to an ousting of the jurisdiction of the court and was therefore illegal. Reference was made to a Bench judgement of the Calcutta High

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Court in *Ram Prosad, Surajmull* v. *Mohan Lal Lachminarain* (1). In delivering the judgement of the Court, MUKERJEE, J., placed reliance on the case of *Doleman and Sons* v. *Ossett Corporation* (2) and explained the views adopted by FLETCHER MOULTON, L. J. and FARWELL, L. J. According to FLETCHER MOULTON, L. J., the law would not enforce the specific performance of an agreement to refer to arbitration, but if duly appealed to, it has the power in its discretion to refuse to a party the alternative of having the dispute settled by a court of law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the court has refused to stay an action or if the defendant has abstained from asking it to do so, the court has seisin of the dispute, and it is by its decision and by its decision alone, that the rights of the parties are settled. It follows that in the latter case, the private tribunal, if it has ever come into existence, is *functus officio*. There cannot be two tribunals each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. The view adopted by FARWELL, L. J., did not carry the right of the jurisdiction of the court to that length. He agreed that the plaintiffs cannot be deprived of the right to have recourse to the court when the agreement is a mere agreement to refer, but he added that they can deprive themselves of such rights by their own act after writ, as, for example, by going on with the arbitration and obtaining an award; but when nothing has been done by them since writ and the only matter relied upon is an award made since writ, without their knowledge or consent, under an agreement antecedent to the action, the plea is in fact and in truth a plea of the agreement and is bad, because there is no act of the

(1) (1920) I.L.R., 47 Calc., 752. (2) (1912) 3 K.B., 257.

plaintiffs subsequent to the writ on which reliance can be placed. It is obvious to us that the present case falls within the exception formulated by FARWELL, L. J. In the agreement itself to refer to arbitration there was a provision that if a case be pending at the time between the parties, relating to debts due by or property belonging to Bijai Indar Singh, it would be deemed to have been disposed of according to the award, meaning that a decree in terms of the award would be accepted by the parties, and that if during the pendency of the arbitration proceedings a decree be passed, the decree of the court would be subject to the award and would be modified in accordance with the award. The appellants, who were plaintiffs in two suits, continued to take part in the arbitration proceedings subsequent to the suits. There was thus, to follow the opinion of FARWELL, L. J., nothing illegal in the arbitrator delivering his award in spite of the decrees of court and directing that the decrees may be modified by the parties in terms of the award. The parties themselves had the decrees of court in contemplation and in anticipation of those decrees had agreed that they would execute the decrees in a particular form and not in the form in which they would be granted by court. As the plaintiff had agreed to such an arrangement, he cannot compel the defendant and judgement-debtor of those decrees to accept the decision of the court.

In our opinion the award is an adjustment of the decrees under order XXI, rule 2, of the Code of Civil Procedure. Both the decree-holder and the judgement-debtor are entitled to draw the attention of the executing court to an adjustment after the decree. So far as we understand the facts of the case, decrees have been obtained by the appellants on foot of two mortgages and the third claim is in itself a decree.

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The observations of Mr. Justice WALSH in a case where the matter in dispute was referred to arbitration during the pendency of an appeal without the intervention of the court and the appellate court was desired to pass a decree in terms of the award, may be quoted [*Gajendra Singh* v. *Durga Kunwar* (1)] :—

"Speaking for my own part, I am not satisfied that any question of law arises at all. The agreement before us is such that upon general principles of law I am not satisfied that it is necessary to apply any provision of the Code. The provisions of the Code only apply to such proceedings as purport to be taken thereunder. It happens from time to time that things are done by the consent of parties without reference to any special provision of the Code. It also happens sometimes that the parties are governed by some general principles of law, analogous to a provision in the Code, which is not actually to be found in the Code. The most familiar illustration of that is where there is a binding decision in interlocutory proceedings, in the course of a suit, and one of the parties seeks to question it at a later stage. The Privy Council have held that the decision between the parties in the course of a suit is governed by the principles of *res judicata*, independently altogether of the special provisions of section 11 of the Code, and indeed there is no provision of the Code which applies to it."

In that case, which was heard by a Bench of three Judges, the majority of Judges held in favour of the award being binding on the parties.

We have dealt so far with the modification of decrees of court. If any suits are pending, the award may be filed by way of defence and a decree can be obtained on the basis thereof. Such was the opinion of a Bench of the Bombay High Court in *Manilal Motilal* v. *Gokaldas Rawji* (2). In his judgement FAWCETT, J., quoted FARWELL, L. J., in *Doleman and Sons* already referred to, that it is always possible to settle the differences between the parties as they please.

(1) (1925) I.L.R., 47 All., 637. (2) (1920) I.L.R., 45 Bom., 245.

Now we come to the second objection. Under section 60 the receiver cannot sell ancestral and immovable property paying revenue to Government but has to submit a statement to the Collector who may act under paragraphs 2 to 10 of the third schedule of the Code of Civil Procedure and farm or manage the property and pay the income to the receiver. The parties to these proceedings however are all secured creditors and the order of adjudication does not bind them. It is enacted in section 28, which details the effect of an order of adjudication, that nothing in that section shall affect the power of any secured creditor to realize or otherwise deal with a security in the same manner as he would have been entitled to realize or deal with it as if this section had not been passed. Section 47 deals with rights of secured creditors who can realize the security and prove only for the balance due. They can of course prove for the whole debt on relinquishing the security, but in the present case the secured creditors have obtained decrees and there is no allegation that they have relinquished the security. The arbitrator who was a man of law has provided for the receiver failing to sell the property within a certain time (which has long expired by now) by empowering the decree-holders to bring the property to sale in execution of the decrees, to realize the sale proceeds in terms of the award and to get the decrees struck off as having been satisfied in full. The Insolvency Act has no provision to prevent secured creditors from acting accordingly. We, however, do not suggest that this should be done. Possibly the better way would be to obtain the insolvent's discharge under section 38 and deal with the property outside the jurisdiction of the insolvency court. The receiver will then cease to be a receiver under insolvency but he is a person vested by the

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arbitrator with authority to sell the property under the arbitration provisions and would be able to sell the property under the terms of the award.

[The last objection dealt with an alleged error on the face of the award, in ignoring the admitted priority of certain debts, but the Court held that this *objection* failed, and continued :—]

The learned Subordinate Judge has written an able judgement and we are in entire agreement with the findings recorded by him. The appeal is dismissed with costs.

WALSH, J.—I have read the judgement of Mr. Justice DALAL and agree with it, and with the order proposed.

Appeal dismissed.

Before Mr. Justice Daniels and Mr. Justice King.

1926 *May*, 25.

BIJAI INDAR SINGH (OBJECTOR) *v.* CHARAN SINGH (OPPOSITE PARTY).*

Act No. V of 1920 (*Provincial Insolvency Act*), *sections* 4, 28, 34—*Insolvent—Permission to institute suit against undischarged insolvent not inclusive of permission to execute the decree.*

Inasmuch as the entire property of an insolvent, when once an order of adjudication has been made, vests in the court or the receiver, it follows that permission given to a creditor to institute a suit against an insolvent does not imply permission to execute the decree which may be obtained against the property of the insolvent.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. *G. W. Dillon*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

DANIELS and KING, JJ. :—This appeal arises out of an order passed in execution proceedings against a

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* Second Appeal No. 433 of 1926, from a decree of J. Allsop, Additional Judge of Aligarh, dated the 2nd of December, 1925, confirming a decree of Mirza Nadir Husain, Second Additional Subordinate Jndge of Aligarh, dated the 21st of March, 1925.