## REVISIONAL CIVIL.

*Before Mr. Justice Sulaiman and Mr. Justice Daniels.*

1925
*May, 27*

ZAHUR AHMAD AND ANOTHER (DEFENDANTS) *v.* TASLIM-UN-NISSA AND ANOTHER (PLAINTIFFS).*

*Civil Procedure Code, schedule II, rule 17—Arbitration—Reference filed in court ultimately revoked owing to difficulty in finding arbitrators—Acquiescence of parties—Appeal—Revision.*

A Subordinate Judge, in whose court a reference to arbitration of a dispute outside the court had been filed, after various attempts to procure arbitrators who were willing to act, ultimately passed an order revoking the reference and dismissing the case. From this order an appeal was preferred to the District Judge, who entertained it and remanded the case to the court below.

*Held*, on application in revision to the High Court, (1) that no appeal lay to the District Judge, and (2) that as the Subordinate Judge's proceedings in connection with the arbitration had, as a matter of fact, been acquiesced in by the parties, the case was not one in which the final order could be interfered with in revision. *Bhagwan Das* v. *Gurdayal* (1) and *Fazal Ilahi* v. *Prag Narain* (2), referred to.

THE facts of this case sufficiently appear from the judgment of SULAIMAN, J.

Maulvi *Iqbal Ahmad*, for the applicants.

Munshi *Shiva Prasad Sinha*, for the opposite parties.

SULAIMAN, J.—This is a civil revision from an order passed in appeal by the District Judge. It appears that the parties had agreed to refer their disputes to the arbitration of two arbitrators and one umpire. There was considerable delay in the proceedings of the arbitrators, and ultimately the applicants filed an application under schedule II, rule 17, of the Code of Civil Procedure for the filing of the

* Civil Revision No. 169 of 1924.

(1) (1921) 19 A.L.J., 823. (2) (1922) I.L.R., 44 All., 523.

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agreement of reference to arbitration. Notices were issued to the defendants to show cause why the agreement should not be filed, and on the 14th of July, 1923, the court passed an order under rule 17, filing the agreement, and made an order of reference to the arbitrators appointed in accordance with the provisions of the agreement.

An appeal was preferred to the District Judge from the order filing the agreement, and owing to the pendency of the appeal there was at first some delay in the proceedings. The record was not sent to the arbitrators for some time. It appears that subsequently the court came to know that all the arbitrators were not willing to arbitrate, and it invited a list of the arbitrators from the plaintiffs. The arbitrators named by the plaintiffs were not acceptable to the defendants and after hearing objections by both parties the court appointed Babu Raghubir Sahai as the sole arbitrator in the case. This order was made on the 13th of September, 1923. This arbitrator did not make any award, and ultimately on the 27th of September, 1923, the court appointed the Government Pleader as the sole arbitrator. The Government Pleader made an award the very next day but this award, on some ground not necessary to set forth here, was set aside. After this, in December, the court again directed that the two arbitrators named in the agreement should be consulted as to whether they were willing to act or not with the Government Pleader as the umpire. The court was informed that at least one of the two arbitrators was not willing to act. It then passed an order, dated the 24th of October, 1923, revoking the order of reference and dismissing the suit. It was against this order that an appeal was preferred to the District Judge, who has allowed it and remanded the case.

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In revision two points have been urged before us. The first is that no appeal lay to the District Judge who had no jurisdiction to interfere in the case at all, and the second is that even if an appeal lay to him, his order should not be upheld, inasmuch as the order passed by the Subordinate Judge was correct and just.

A preliminary objection was raised on behalf of the respondents that no revision lies from the order of remand passed by the District Judge. This objection cannot be entertained because the District Judge has finally disposed of the matter pending before him.

We are of opinion that this was not a case in which an appeal lay to the District Judge. The Subordinate Judge had previously passed an order filing the agreement. An appeal from that order was preferred and dismissed. The ultimate order passed by him revoking the reference and dismissing the suit would not be appealable unless it came under section 104 of the Code of Civil Procedure. Section 104 (1) (*a*) cannot apply because the order was not one superseding the arbitration where the award had not been completed within the period allowed by the court. The fact was that the court found that as the arbitrators named were not willing to act it was futile to appoint new arbitrators. Nor did it come under subclause (*d*), because the order was not an order refusing to file an agreement to refer to arbitration. An appeal from an order superseding the agreement is limited by the provisions of section 104 (1) (*a*) of the Code of Civil Procedure. The order passed by the Subordinate Judge was of course not a decree and was not appealable as such.

We have, however, been invited to interfere with the order passed by the Subordinate Judge in revision. It is unnecessary in this case to decide the question whether when one of the arbitrators named in the

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agreement has refused to act and has died an agreement can or cannot be filed under rule 17. The parties respectively rely on two cases of this Court. One is the case of *Bhagwan Das* v. *Gurdayal* (1) and the other is *Fazal Ilahi* v. *Prag Narain* (2). In the present case, however, the agreement was filed under rule 17. The agreement having been filed under rule 17, the provisions of rule 19 became applicable. Assuming, therefore, that rule 5 was applicable and the court ought to have proceeded in strict accordance with the provisions of that rule, it cannot be doubted that even if the procedure adopted by the court was irregular, the parties acquiesced in it and waived their objection. The plaintiffs themselves nominated a number of arbitrators and ultimately the court decided to appoint one gentleman as the sole arbitrator. After that the only question was whether, if the arbitrator so appointed refused to act, the court should not appoint another in his place. The order passed by the court would therefore be an order passed under schedule II, rule 5 (2) making an order superseding the arbitration. As there was no suit pending before it, it could not of course proceed with the suit. We are informed that Raza Ahmad has already instituted a suit, to which the other applicant has been made a party, to enforce his rights which were referred to arbitration under the agreement. Under these circumstances we find it difficult to set aside the order of the Subordinate Judge on the ground of irregularity which was acquiesced in, and submitted to, by all the parties.

We accordingly allow this application in revision, and setting aside the order of the District Judge, restore the order of the Subordinate Judge. As no objection was raised before the District Judge that

(1) (1921) 19 A.L.J., 823. (2) (1922) I.L.R., 44 All., 523.

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no appeal lay to him, we direct the parties to bear their own costs of this revision.

DANIELS, J.—I concur. My reason for holding that a revision lies from the order of the District Judge is this. The respondents' objection is that no revision lies because no case has yet been decided. The case had in fact been decided by the Subordinate Judge in a final order from which no appeal lay, and when the District Judge entertained an appeal from that order which he had no jurisdiction to entertain and set it aside, his order is certainly open to revision by this Court.

*Application allowed.*

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*Before Mr. Justice Sulaiman.*

1925
May, 29.

BHAKTA SHIROMANI (DEFENDANT) *v.* SITAL NATH (PLAINTIFF).*

*Master and servant—Servant in default—Servant dismissed without notice, but for good cause—Servant not entitled to wages beyond date of dismissal.*

Where a servant paid by the month is dismissed by his master in the middle of a month without notice, but for a reason which justifies the master in so dismissing him, he is not entitled to wages for the broken part of the month during which he did attend to his duty. *Rughoonath Doss* v. *Mr. T. Halle* (1) and *Ralli Brothers* v. *Ambika Prasad* (2), referred to.

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

Munshi *Bhagwati Shankar*, for the applicant.

The opposite party was not represented.

SULAIMAN, J. :—This is a revision from a decree of a Court of Small Causes. The plaintiff came to court on the allegation that he was employed as a

* Civil Revision No. 43 of 1925.

(1) (1871) 16 W.R., C.R., 60. (2) (1912) I.L.R., 35 All., 132.