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v.  
BHAGOLE.

The appeal is accordingly allowed, the decrees of the courts below are set aside, and the suit is dismissed with costs.

Before Sir Grimwood Mears, Chief Justice, and Mr. Justice Young.

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March, 7.

RIKHAB KUMAR AND ANOTHER (PLAINTIFFS) v. TRIVEDI AND COMPANY (DEFENDANT).\*

*Arbitration—Agreement to refer future differences—Act No. IX of 1899 (Indian Arbitration Act), section 19—Act (Local) No. I of 1912 (U. P. Arbitration Amendment Act), section 2—“Submission”—An abortive arbitration resulting in an invalid award does not exhaust agreement to refer.*

The U. P. Arbitration (Amendment) Act, 1912, section 2 of which modifies the definition of a submission as contained in the Indian Arbitration Act, has no application to an agreement to refer to arbitration, which was alleged to have been executed at Cawnpore, to which the Indian Arbitration Act applied, and which provided that the arbitration was to be made in Calcutta by two European merchants of that place.

An arbitration ending in an award which is set aside as being invalid is an abortive arbitration, and the agreement to refer is not exhausted thereby.

Mr. *Uma Shankar Bajpai*, for the appellants.

Mr. *Shambhu Nath Seth*, for the respondents.

MEARS, C. J. and YOUNG, J.:—The plaintiffs and the defendants entered into a contract for the purchase of certain plate cuttings, the plaintiffs being the buyers and the defendants being the vendors. The plaintiffs, on the 31st of December, 1925, entered into the ordinary form of contract which provided

\* First Appeal No. 143 of 1928, from an order of Raja Ram, Subordinate Judge of Cawnpore, dated the 9th of July, 1928.

for arbitration in the event of any dispute or difference. A dispute arose and the parties each appointed an arbitrator, and after the refusal of the Bengal Chamber of Commerce to act as umpire, they appointed a Mr. Cameron. For reasons which we need not enter into, the High Court of Calcutta set Mr. Cameron's award aside, and thereupon, on the 21st of June, 1927, the defendants nominated Mr. Lee as their arbitrator, he having been the same gentleman who had sat as arbitrator on their behalf before. The plaintiffs objected to this, probably on the ground that Mr. Lee had already expressed his opinion favourably to the defendants. The plaintiffs made various applications to get the appointment of Mr. Lee, who by lapse of time was said by the defendants to have become sole arbitrator, set aside, and failed. Thereupon, on the 10th of February, 1928, the plaintiffs instituted a suit in the court of the Subordinate Judge of Cawnpore, claiming Rs. 5,000 as damages, the damages being, as the plaintiffs contended, the monetary compensation to which they were entitled by a breach of contract arising under this very engagement of the 31st of December, 1925. Thereupon the defendants applied under section 19 of the Indian Arbitration Act to stay the suit, and Mr. Raja Ram, a Judge of great experience in commercial matters, made the order staying the suit. From that order the plaintiffs have appealed here.

We are of opinion that the learned Subordinate Judge came to a right conclusion, and that the matter is, when one examines the terms of the contract, beyond argument.

The first point to be noticed is that the price of the goods was to be paid in Calcutta, and when one

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turns to the arbitration clause, which is No. 4 of the printed form, it is seen at once that the buyers bound themselves to an arbitration, which, by the terms of clause 4, indicated exactly how and where that arbitration was to proceed.

Clause 4 runs as follows:—"If any question, dispute or difference whatsoever shall arise between sellers and buyers touching this contract, then, and in any such case, sellers will be entitled at their option to require buyers to submit the matter in difference either to the arbitration of two European merchants in the trade in Calcutta (one to be appointed by sellers and one by buyers) or, in the event of their differing, of an umpire appointed by such arbitrators before entering on the reference, or to the arbitration of the Bengal Chamber of Commerce. The award of such arbitrators, umpire or Chamber shall be final and binding on both the parties, either of whom will be at liberty to apply that the same may be filed as a rule of court."

Now that was part of the agreement on the part of the plaintiffs who wanted to get certain goods from the defendants, and who could only get these goods from the defendants if they entered into that form of contract on which the defendants insisted. The plaintiffs are bound by the promise that they made, and the promise, put in words other than those in clause 4, was that if at any time there should be a dispute between the buyers and sellers, the sellers could, if they wished, force the buyers into an arbitration. That arbitration was to be held in Calcutta and two European merchants were to be the arbitrators, one appointed by each party. In the event of the arbitrators disagreeing, the award was to be made by an umpire, and such award was to be final and

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binding. There were provisions dealing with the failure of the buyers to appoint an arbitrator or to take part in an arbitration, and in that event the sellers were entitled to proceed *ex parte*, and the award so obtained was to have the same legal effect as if the matter had been fought out after contest with arbitrators on each side and an umpire. That was the bargain, and it necessarily follows that if the plaintiffs desire to break away from it and institute a suit, the court must, under section 19 of the Indian Arbitration Act, stay such a suit.

Two points have been taken on behalf of the appellants, and one is that there was no proper submission as required by the U. P. Arbitration Act. The answer is that one must look to the contract. The contract provided for an arbitration in Calcutta in the event of any dispute arising. In our opinion the U. P. Arbitration Act has no application whatever to this matter.

The second point that was put forward was that inasmuch as there had been one arbitration and that had been abortive, the agreement contained in clause 4 of the contract had exhausted itself. There has never been an arbitration, there has been an attempted arbitration, which, when examined by the court, was found not in law to have been an arbitration at all, and that was set aside and swept away. The fact that the parties did endeavour to solve their differences by recourse to arbitration and failed does not, in our opinion, in the slightest degree affect the validity of clause 4, and it is no answer to say that the parties went through, what all of them actually believed at the time was, an arbitration in due form, if, when examined by the court, the arbitration was found to have been of no legal effect.

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The consequence is that this appeal must be dismissed and the suit must be stayed in accordance with the order of Mr. Raja Ram.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

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April, 6.

IMTIAZ BIBI (PLAINTIFF) v. KABIA BIBI (DEFENDANT).\*

*Civil Procedure Code, section 47—Legal representative of deceased judgement-debtor—Claim by legal representative that property is his own and not an asset of the deceased judgement-debtor—Separate suit not maintainable.*

Where the legal representative of a deceased judgement-debtor asserts that the property attached and sought to be sold is his own property, acquired by him under a transfer previous to the attachment, and is not part of the assets of the deceased judgement-debtor, the question is one which comes within section 47 of the Civil Procedure Code. Hence, where no such claim was raised in the execution court and the property was sold and was purchased by the decree-holder, a suit to recover the property, based on such a claim, does not lie. *Seth Chand Mal v. Durga Dei* (1) and *Dulla v. Shih Lal* (2), followed. *Gulzari Lal v. Madho Ram* (3), *Bhagwati v. Banwari Lal* (4) and *Bulaqi Das v. Kesri* (5), distinguished.

Mr. Hem Chandra Mukerji, for the appellant.

Mr. Panna Lal, for the respondent.

SULAIMAN and BANERJI, JJ. :—This case has been referred to a larger Bench on account of an apparent conflict between the case of *Dulla v. Shih Lal* (2) and the case of *Bulaqi Das v. Kesri* (5).

One Abdul Rahman died in 1917 leaving a widow Musammat Kabia Bibi and a daughter as well as three

\* Second Appeal No. 792 of 1926, from a decree of J. N. Mushran, Subordinate Judge of Meerut, dated the 21st of January, 1926, confirming a decree of Mohammad Aqib Nomani, Munsif of Meerut, dated the 17th of August, 1925.

(1) (1889) I. L. R., 12 All., 313. (2) (1916) I. L. R., 39 All., 47.

(3) (1901) I. L. R., 26 All., 447. (4) (1903) I. L. R., 31 All., 82.

(5) (1928) I. L. R., 50 All., 686.