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read with other enactments passed subsequent thereto. If under the Usurious Loans Act, which was passed after the Negotiable Instruments Act but before the promissory note in question was executed, the court has a discretion to reduce interest in a proper case, there is nothing in section 79 of the Negotiable Instruments Act which excludes such a discretion. The Usurious Loans Act, section 2(3), is applicable to all suits for the recovery of loans advanced after the commencement of that Act. It is quite general and includes not only suits based on bonds but also on negotiable instruments. We are clearly of opinion that section 79 does not exclude the jurisdiction of the court conferred on it by the Usurious Loans Act.

The lower court has found that 30 per cent. simple interest agreed to by the defendant was unreasonable in the circumstances in which the parties were at the time the loan was advanced. Nothing has been shown to us to justify a view contrary to that of the court below in that respect. The rate of interest which has been allowed by the court is *prima facie* reasonable. We hold that the appeal and the cross-objection should both be dismissed. Accordingly the decree appealed from is upheld. The appeal and the cross-objection are dismissed with costs.

REVISIONAL CIVIL.

Before Sir Shah Muhammad Sulaiman, Acting Chief Justice and Mr. Justice Niamat-ullah.

1931 *April*. 1.

PURAN LAL AND OTHERS (PLAINTIFFS) *v.* RUP CHAND AND OTHERS (DEFENDANTS)*

Arbitration—Civil Procedure Code, schedule II, paragraph 5—Appointment of arbitrator by court in contravention of prescribed procedure—Revision—Civil Procedure Code, section 115—"Case decided"—Ground of revision.

A suit having been referred to arbitration, the nominated arbitrators either refused or neglected to act. In course

*Civil Revision No. 135 of 1930.

of time one *B* was appointed arbitrator, but he also refused to act. Two days afterwards the court appointed one *G* as arbitrator and directed the parties to pay Rs. 150 as his remuneration. After *B*'s refusal and before *G*'s appointment neither party had required the other party by notice to appoint arbitrator, nor had the court called upon the parties and given them time to do so.

Held, in revision, that the court had no power to appoint a new arbitrator without following the procedure laid down by paragraph 5 of schedule II of the Civil Procedure Code; and in making such appointment the court acted, if not altogether without jurisdiction, certainly illegally and with material irregularity in the exercise of its jurisdiction so as to bring the case within the scope of section 115 of the Civil Procedure Code.

Held, also, that the appointment of a new arbitrator by the court, when the court was not authorised by law to make the appointment, amounted to a "case decided" within the meaning of section 115 of the Civil Procedure Code, so as to enable the High Court to interfere in revision.

Messrs. *B. E. O'Conor* and *Akhtar Husain Khan*, for the applicants.

Messrs. *Iqbal Ahmad* and *K. C. Mital*, for the opposite parties.

NIAMAT-ULLAH, J.:—This is an application for revision by the plaintiffs and arises out of a suit brought by them for partition of family property. The parties agreed, on the 8th June, 1929, to refer the dispute between them to the arbitration of four persons, including one Madho Ram as an umpire, and an application was presented on the 24th of June, 1929, asking for a reference to the aforesaid arbitration. Accordingly the matter was so referred. Madho Ram refused to act. By an order, dated 23rd August, 1929, the court directed the parties to nominate another arbitrator in place of Madho Ram. Before any nomination could be made by the parties, the plaintiffs applied, on the 2nd September, 1929, praying that the arbitration be superseded. The

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court rejected this application and appointed one Babu Bimal Prasad as an arbitrator by an order, dated 3rd September, 1929. The order itself merely appointed Babu Bimal Prasad as an arbitrator, but it was construed by the lower court as amounting to a reference to Babu Bimal Prasad as the sole referee. It should be mentioned that the arbitrators other than Madho Ram had neglected to act as arbitrators, though they had not positively refused to act as such. Babu Bimal Prasad also refused to act as an arbitrator on the 5th September, 1929. By an order, dated 7th September, 1929, the court appointed Mr. Girraj Bahadur as an arbitrator, directing the parties to pay Rs. 150 as his remuneration. On the 28th November, 1929, the plaintiffs applied for revocation of the reference, expressing their unwillingness to proceed with the arbitration; but that application was rejected. On the 9th December, 1929, the plaintiffs again applied for the revocation of reference. This was also rejected. On the 16th January, 1930, the plaintiffs took objection to the legality of the appointment of Mr. Girraj Bahadur as arbitrator. The application was rejected. Some proceedings took place before the arbitrator after the 16th January, 1930. The present application for revision was filed in this Court on the 7th March, 1930. It appears that the award was made by Mr. Girraj Bahadur on the 12th March, 1930, and filed in due course in the court below.

One of the grounds taken in revision has reference to the power of the court to appoint Mr. Girraj Bahadur without previous notice having been given by the defendants to the plaintiffs to nominate an arbitrator, as required by paragraph 5 of schedule II of the Code of Civil Procedure. It is not in dispute that no notice was given by the defendants to the plaintiffs to appoint an arbitrator in place of either Madho Ram or Babu Bimal Prasad. It is argued that Mr. Girraj Bahadur was appointed in continuation of

proceedings following the order of the court dated the 23rd August, 1929, by which time was given to the parties to nominate an arbitrator. It is said that Babu Bimal Prasad refused shortly after his nomination, and the appointment of Mr. Girraj Bahadur by the court must be considered to be part of the proceedings started by the court's order dated the 23rd August, 1929. I am unable to take this view of the matter. The court had to fill up the vacancy caused by the refusal of Madho Ram to act; and when the parties neglected to make a nomination, for which an opportunity was given to them by the order dated the 23rd August, 1929, the court appointed Babu Bimal Prasad. This marked the termination of one stage of the proceedings. It could not at that time be anticipated that Babu Bimal Prasad would refuse, as he subsequently did on the 5th September, 1929. The court should have adopted the procedure laid down by paragraph 5 after Babu Bimal Prasad refused to act as an arbitrator. In the absence of notice by one of the parties to the other to appoint an arbitrator, the court had no power to appoint Mr. Girraj Bahadur in place of Babu Bimal Prasad. This view was taken by a Bench of this Court in *Jagannath Sahu* v. *Chhedi Sahu* (1) and also in *Abdul Ghani* v. *Din Dayal* (2). I am clearly of opinion that the court had no power to appoint Mr. Girraj Bahadur to act as arbitrator without the formalities required by paragraph 5 of schedule II of the Code of Civil Procedure being observed.

It is argued that no case has been decided within the meaning of section 115 of the Civil Procedure Code and therefore no revision can lie. The argument implies that the stage when a case is decided has not yet arrived and will arrive in future when a decree is passed on the foot of the award. I think that the order of the court, dated the 7th September, 1929, appointing Mr. Girraj Bahadur as the arbitrator and

(1) (1928) I.L.R., 51 All., 501. (2) (1919) I.L.R., 41 All., 578.

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making a reference to him, does amount to a "case" decided within the meaning of section 115 of the Code of Civil Procedure. To take any other view would be to put a premium on unnecessary proceedings in which a large number of witnesses may be examined by the parties and the award which the arbitrator might eventually make may be declared by the court to have been made by an arbitrator who had been illegally appointed and had in consequence no jurisdiction. I am, therefore, of opinion that on a reference being made to an arbitrator whom the court had no power to appoint, a "case" should be considered to have been decided within the meaning of section 115 so as to empower this Court to interfere in revision.

It has been argued by the learned advocate for the respondents that great delay occurred in applying for revision and that the applicants had acquiesced in the appointment of Mr. Girraj Bahadur by taking part in the arbitration proceedings before him. I have already referred to no less than two applications having been made by the applicants for revocation of the reference, both of which were dismissed by the court. Finally, they objected specifically to the appointment of Mr. Girraj Bahadur, though the objection made no reference to paragraph 5 of schedule II of the Code of Civil Procedure. In view of these circumstances it cannot be said that the applicants acquiesced in either the appointment of Mr. Girraj Bahadur or the decision of the case by arbitration. It is quite clear that the plaintiffs were throughout anxious to have the matter decided by the court and to have the arbitration superseded. No case of acquiescence, in my opinion, has been made out; and if the appointment of Mr. Girraj Bahadur was invalid so as to make an award made by him to be considered illegal, the applicants are entitled to have the appointment of Mr. Girraj Bahadur set aside by this Court

in revision instead of waiting till such time that an award is made and a decree based thereon is passed by the court.

Niamat-ullah, J.

It has been pointed out that the application for revision is directed against the court's order of the 5th February, 1930, rejecting the plaintiffs' application, dated the 16th January, 1930, which prayed "that the arbitration proceedings may be declared null and void and the case may be heard or any other arbitrator with the consent of the parties may be duly appointed", which order, at any rate, does not amount to a "case" decided within the meaning of section 115. It is not necessary to decide whether the order dated the 5th February, 1930, is one which can be the subject of an application for revision; as I am clear that the court's order, dated 7th September, 1929, by which Mr. Girraj Bahadur was appointed an arbitrator and a reference was made to him is an order which the court had no power to pass. Accordingly, the whole proceedings subsequent to that order must be considered to be tainted with illegality. Consequently, if the order of the 7th September, 1929, can be revised, as I think it can be, all proceedings following that order must necessarily fall through. In this view of the case I allow this application in revision, set aside the order of the court dated the 7th September, 1929, and direct it to proceed according to law.

SULAIMAN, A. C. J.:—This revision purports to be against an order refusing to declare that the arbitration proceedings are null and void. The order is either in the exercise of the discretion of the court or is a decision that in law the arbitration is not void. I am clearly of opinion that no revision would lie from this order. But, as pointed out by my learned brother, it has been brought to our notice that the earlier order of the 7th September, 1929, is open to serious objection. I would, therefore, agree to that

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order being set aside, unless there is any estoppel against the applicants.

No doubt, the application is filed rather late, i.e., about six months after the passing of that order; but it cannot be said that the applicants acquiesced in it and that their conduct amounted to estoppel. On several occasions they protested against the arbitration and applied to the court for its revocation. It is quite clear to my mind that if there has been a grave illegality or material irregularity, it would be open to the applicants to challenge the award on that ground even after a decree in terms of it has been passed. It would, therefore, be a saving of time, labour and money if, on being satisfied that the decree will have to be set aside, we were to interfere even at this stage. In the case of *Jagannath Sahu* v. *Chhedi Sahu* (1) it has been held by a Bench of this Court that the appointment of a new arbitrator which is not authorised is a "case" decided within the meaning of section 115 of the Civil Procedure Code. As the Full Bench case of *Buddhu Lal* v. *Mewa Ram* (2) is not directly against this view, I am not prepared to differ.

Sulaiman, A. C. J.

It may be assumed in favour of the respondents that the court had power to appoint one arbitrator in place of the four when they neglected to act; and it may, therefore, be assumed that the appointment of Babu Bimal Prasad was not necessarily irregular. But when Babu Bimal Prasad refused to act, the court, without waiting for the defendants to serve a notice on the plaintiffs or without giving time to the parties to appoint a fresh arbitrator, proceeded to appoint Mr. Girraj Bahadur as the sole arbitrator and fixed a fee for him. This was on the 7th September, 1929.

There is certainly authority for the view that if the procedure laid down in paragraph 5, schedule II, as regards the giving of notice and the opportunity to the other party to be heard, is not followed, the court

(1) (1928) I.L.R., 51 All., 501. (2) (1921) I.L.R., 43 All., 564.

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has no power to appoint a new arbitrator. It is, however, not necessary for me to decide in this case whether the court would be acting without jurisdiction and its order would be *ultra vires* if that procedure had not been followed. It may well be said with equal force that the rule as to notice and the opportunity to the opposite party to be heard is a rule of procedure, and the failure to comply with it would not amount to want of jurisdiction. I have, however, no doubt in my mind that the act of the court would be illegal and there would be material irregularity in procedure so as to bring the case within the scope of section 115.

Sulaiman, A. C. J.

As pointed out by my learned brother, there were several irregularities in this case. Not only was no notice served by the defendants on the plaintiffs calling upon them to nominate an arbitrator in place of the one who had refused to act, but there was even no opportunity given to the plaintiffs to be heard. It has been contended on behalf of the respondents that inasmuch as on a previous occasion the plaintiffs had failed to nominate an arbitrator and the court had to appoint Babu Bimal Prasad, the subsequent proceedings, consequent upon the refusal of Babu Bimal Prasad, in which the court appointed Mr. Girraj Bahadur must be considered to have been in the same continuation. This contention cannot be accepted. When the court passed a definite order appointing Babu Bimal Prasad on the 3rd September, 1929, the previous proceedings came to an end; and a fresh right to serve notice on the opposite party arose when Babu Bimal Prasad in his turn also refused to act. I, therefore, agree that it was the duty of the court to wait for a week after the service of a fresh notice or, at any rate, to give sufficient time to the parties to nominate an arbitrator in place of Babu Bimal Prasad before it formally appointed Mr. Girraj Bahadur. Another irregularity was that no formal application was made to the court by the defendants requesting

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the court to appoint some one as arbitrator on the ground that the plaintiffs had failed to nominate one. As already pointed out, no date was fixed for the disposal of this matter and the parties were not heard before the order appointing Mr. Girraj Bahadur was passed. The order, therefore, has been both unfair and unjust to the plaintiffs, and I agree that it ought to be set aside.

Sulaiman, A. C. J.

FULL BENCH.

Before Sir Shah Muhammad Sulaiman, Acting Chief Justice, Mr. Justice Mukerji and Mr. Justice Boys.

1931
April, 8.

RAM SARAN DAS (DEFENDANT) *v.* YUDHISHTIR PRASAD AND ANOTHER (PLAINTIFFS)*

Civil Procedure Code, order XXXII, rule 6—Security bond for withdrawing money deposited in court in favour of minors decree-holders—Hypothecation bond in name of court—Assignment of security bond by the court in favour of the beneficiaries—Whether registered deed of transfer necessary—Transfer of Property Act (IV of 1882), section 2(d)—Registration Act (XVI of 1908), section 17(2) (vi).

Where a court obtained under order XXXII, rule 6 of the Civil Procedure Code, a security bond which hypothecated immovable property to secure a proper disposal of money, due to minors, deposited with it, an assignment of the security bond in favour of the minors on their attaining majority in order to enable them to realise the money from the surety need not be made by way of a regularly stamped and registered deed of sale, but may be made by an order passed by the court.

An assignment of the security bond by the court to another person amounts really to an authorisation of such person by the court to sue upon it, and is not necessarily a transfer of an interest in immovable property. Even if the assignment were to be deemed to amount to a transfer, which would ordinarily have to be effected by a registered document, there would

*First Appeal No. 11 of 1929, from a decree of Zorawar Singh, Subordinate Judge of Aligarh, dated the 18th of September, 1928.