insolvent and some creditors about the same time moved the Insolvency Judge at Hardoi to the same effect. In the sale deed it is stated that the money was required to pay a certain creditor. The creditor himself did not enter the witness box but sent his son to prove a receipt purporting to have been given by him to Tulshi Ram in proof of the payment of the money due to him. But no books of the firm of the creditor were produced before the court nor did Munnu Lal himself enter the witness box.

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Having regard to all the circumstances there appears no doubt whatsoever that the transfer was not *bona fide* and was made with the intention of defrauding the creditors. In the result I dismiss the appeal with costs.

FULL BENCH

Before Mr. Justice Bennet, Acting Chief Justice, Mr. Justice Ismail and Mr. Justice Verma.

GOVIND DAS AND ANOTHER (APPLICANTS) *v.* INDRAWATI AND OTHERS (OPPOSITE PARTIES)*

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Civil Procedure Code, section 115—*"Case decided"—Order setting aside an award in a pending suit.*

An order setting aside an award and superseding the reference to arbitration in a pending suit, with the consequence that the suit is to be tried by the court, does not amount to a "case decided" within the meaning of section 115 of the Civil Procedure Code, and no revision lies from such order.

Messrs. *S. K. Dar* and *M. L. Chaturvedi*, for the applicants.

Messrs. *P. L. Banerji, V. D. Bhargava, Kamta Prasad* and *J. K. Srivastava*, for the opposite parties.

BENNET, A. C. J.:—In this civil revision an issue has been referred to the Full Bench as follows: "Can the court be considered to have decided a case within the meaning of section 115 of the Civil Procedure Code where it has set aside the award and superseded the

*Civil Revision No. 508 of 1934.

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arbitration pending a suit which is consequently to be tried by the court?"

The facts of the case in which this issue arose may be briefly noted. In the court of the Additional Civil Judge at Muttra the parties in original suit No. 33 of 1931 agreed that the suit should be submitted to arbitration under the second schedule of the Civil Procedure Code to arbitrators agreed on by the parties, but the provisions of paragraph 4 were not carried out and no provision was made for a difference of opinion among the arbitrators either by the appointment of an umpire or by declaring that the decision of the majority should prevail. The arbitrators differed and two filed an award in favour of one party and one filed an award in favour of the other party. Both parties made objections and the court held that the awards were not according to law and the court set aside the awards and superseded the arbitration and directed the parties to proceed with the suit before the court itself. Against that order setting aside the awards and superseding the arbitration this civil revision has been filed and objection has been taken that no revision lies as no case has been decided within the meaning of section 115 of the Civil Procedure Code. The case has been referred to a Full Bench because of the differences in the rulings of this Court, some of which have been set out in the order of reference. Accordingly I begin the consideration of this subject by referring to the various rulings which have been cited in this Court.

In *Chattar Singh* v. *Lekhraj Singh* (1) it was held in 1883 by a Bench of this Court that an order under section 521 of the former Civil Procedure Code setting aside an award made on a reference to arbitration in the course of a suit, on the ground of the arbitrators' misconduct is not subject to revision by the High Court under section 622 of the Code. The Court held: "The con-

(1) (1883) I.L.R. 5 All. 293.

tention that the proceeding for arbitration is a decided case in which no appeal lies within the meaning of the section, and therefore open to revision under section 622, is not tenable. The proceeding is of an interlocutory character only, made in the course of a suit; it is part of a case which is still undecided, and in which an appeal lies from the final decree. It was not the intention to allow of revision of interlocutory proceedings, in the course of a suit, which do not determine it. The order, which is the subject of this application, will be open to revision by appeal from the final decree in the suit, and even if section 622 allowed of it, it would be highly inexpedient for us to interfere at this stage of the case."

In *Buddhu Lal* v. *Mewa Ram* (1) there was a case in the court of a Munsif where by the consent of parties the Munsif tried the preliminary issue as to whether he had jurisdiction to try the case and he passed a formal order to the effect that the suit was cognizable by his court. Against that order the defendants applied in revision and a preliminary objection was taken that no revision lay. By a majority of three Judges to two it was held that no revision lay as no case had been decided by the Munsif within the meaning of section 115 of the Civil Procedure Code. On pages 571 and 572 Mr. Justice PIGGOTT pointed out that in the Civil Procedure Code of 1882 section 622 opened as follows: "The High Court may call for the record of any case in which no appeal lies to the High Court, if the court by which the case was decided appears etc." But the present section 115 of the Civil Procedure Code refers to "the record of any case which has been decided", and he said: "It seems to me that the legislature, in redrafting this provision in the present Code has almost gone out of its way to settle a point about which there had been some

(1) (1921) I.L.R. 43 All. 564.

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controversy; it is the more incumbent upon us to give full effect to the words used according to their plain meaning." He also stated:

"If this view is correct, it follows that whereas all 'cases' are not 'suits', every 'suit' is at least a 'case'. From this I would go on to conclude that where the 'case' in which the revisional jurisdiction of the High Court is invoked happens to be also a 'suit', then this suit is itself the 'case' referred to in section 115 of the Code of Civil Procedure, which requires to be decided before the record is called for. To put the point in another way: holding that the word 'case' in the Code of Civil Procedure always includes a 'suit', I read the relevant portion of section 115 just as if it ran: 'May call for the record of any suit or other description of case which has been decided.' The record of a suit, therefore, should not be called for under this section until the suit has been decided."

In 1924 there is a ruling in *Shah Muhammad Fakhruddin* v. *Rahimullah Shah* (1) in which MUKERJI and DALAL, JJ., applied the Full Bench ruling of *Buddhu Lal* v. *Mewa Ram* (2) and the passages quoted from the judgment of PIGGOTT, J., were applied to an application in revision from an order setting aside an arbitration award, and it was held that no revision would lie as there was no case decided, and it was stated: "If the decision on the merits goes against him he can appeal on the merits of the case and also urge the ground that the trial court ought to have accepted the compromise and the award as final between the parties." In the same volume there is another ruling, *Rudra Prasad Pande* v. *Mathura Prasad Pande* (3) in which SULAIMAN and DANIELS, JJ., applied the Full Bench ruling in a similar manner and held that no revision lay against an order superseding an arbitration award in a pending case.

(1) (1924) I.L.R. 47 All. 121. (2) (1921) I.L.R. 43 All. 564.
(3) (1925) I.L.R. 47 All. 916.

Some years later, in *Bhola Nath* v. *Raghunath Das Mithan Lal* (1), SULAIMAN and NIAMAT-ULLAH, JJ., took a contrary view of the Full Bench case of *Buddhu Lal* v. *Mewa Ram* (2) and held on page 1012 that the Judges were equally divided on the interpretation of the expression "case decided" and the fifth Judge, RYVES, J., confined his judgment to the question whether the decision of a single issue by a subordinate court while the suit was still pending was a case decided and held that it was not; and that therefore the ruling "was no authority in favour of the broad principle that no revision lies from an interlocutory order,"; and the court referred to *Chatarbhuj* v. *Raghubar Dayal* (3), where a revision from an order superseding an arbitration was actually entertained and allowed For these reasons the court held that a revision lay against an order superseding an arbitration before the award. Now the court failed to notice that in the ruling, *Chatarbhuj* v. *Raghubar Dayal,* no objection was taken that there was no case decided and therefore this case cannot be any authority on that point. As regards the judgment of RYVES, J., in the Full Bench case of *Buddhu Lal* v. *Mewa Ram* (2) it is true that he opens his judgment with the statement which has been quoted, but he also stated on page 580: "I agree . . . generally with the reasons given by my brother PIGGOTT."

Some years later, in *Puran Lal* v. *Rup Chand* (4), SULAIMAN, A.C.J., and NIAMAT-ULLAH, J., decided 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" and a revision lay to the High Court. This question, however, was not the same as an order setting aside an award. In the same volume in *Risal Singh* v. *Faqira Singh* (5) SULAIMAN, A.C.J., sitting with KING, J., again applied the Full Bench case of *Buddhu Lal* v. *Mewa Ram* (2) to

(1) (1929) I.L.R. 51 All. 1010. (2) (1921) I.L.R. 43 All. 564.
(3) (1914) I.L.R. 36 All. 354. (4) (1931) I.L.R. 53 All. 778.
(5) (1931) I.L R. 53 All. 1006.

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the case of a revision against an order setting aside an award and held that no revision lay. On the other hand, sitting a little earlier in the same year 1931 SULAIMAN, A.C.J., and NIAMAT-ULLAH, J., held the opposite in a ruling in *Raja Ram* v. *Gopi Nath* (1). In this judgment there was no reference to any previous ruling and it is merely stated that there is no doubt that the setting aside of an award and the supersession of the arbitration proceedings amounted to a termination of one proceeding in the suit and therefore a case had been decided within the meaning of section 115 of the Code of Civil Procedure and a revision lay.

In *Tulshi Ram* v. *Brindaban Das* (2) SULAIMAN, C.J., and BAJPAI, J., held that no revision lies from an order setting aside an award while the suit still remains pending in the court below. In that case the previous decision in *Bhola Nath* v. *Raghnath Das Mithan Lal,* (3) was distinguished on the ground that a revision was allowed against the order because it superseded the reference before the award had been delivered and therefore a revision would lie. I do not consider that any distinction can be drawn between an order superseding a reference to arbitration before the award has been delivered and after the award has been delivered. In either case the result is that the court begins to hear the suit in accordance with paragraph 8 or paragraph 15(2) of the second schedule. The ground on which it has been held in the various rulings that no case has been decided is that the court below is proceeding to hear the suit and this applies in either of these two cases.

These appear to be the cases in this Court in which this question of whether a case has been decided when an arbitration is superseded and an award is set aside has been dealt with. It is not necessary to refer to rulings of this Court in which a revision was allowed under

(1) A.I.R. 1931 All. 721. (2) (1936) I.L.R. 58 All. 946.
(3) (1929) I.L.R. 51 All. 1010.

these circumstances where no objection was taken that a revision did not lie because no case had been decided within the meaning of section 115 of the Code of Civil Procedure. I will now refer briefly to certain Full Bench rulings of this Court dealing with other orders where the words "case decided" have been interpreted.

In *Ram Sarup* v. *Gaya Prasad* (1) it was laid down by a Full Bench that the High Court can interfere in revision with an appellate order directing the setting aside of an *ex parte* decree when the appellate court had no power under the provisions of order IX, rule 13 of the Code of Civil Procedure to direct the case to be re-heard.

In *Radha Mohan Datt* v. *Abbas Ali Biswas* (2) a Full Bench held that a civil revision lay from an order setting aside an *ex parte* decree. On page 630 it was held that the matter was a case decided. There is no doubt that a distinction is to be drawn in the case of an application to set aside an *ex parte* decree because it is made after the suit has terminated in a decree and therefore it is separate from the suit which has already been completed.

In *Gupta & Co.* v. *Kirpa Ram Brothers* (3) a Full Bench held that a mere decision as to the amount of the court fees payable does not amount to a case decided and no revision lies from the order of the court below calling upon the plaintiff to make good the deficiency in the amount of the court fees paid by him.

In *Suraj Pali* v. *Arya Pratinidhi Sabha* (4) a Full Bench held that no revision lay from an order passed under order VI, rule 17 refusing to allow an amendment of a pleading as this did not amount to a case decided. But other amendments, for example the addition or substitution of parties or the striking off of a pleading, may amount to a case decided.

I now turn to consider how this matter of the setting aside of an award and the supersession of an arbitration has been treated by other High Courts.

(1) (1925) I.L.R. 48 All. 175.
(2) (1931) I.L.R. 53 All. 612.
(3) (1934) I.L.R. 57 All. 17.
(4) I.L.R. [1937] All. 17.

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In *Damodar* v. *Raghunath* (1) it was held that an order setting aside an award was not subject to revision under section 622 of the Code of Civil Procedure as it was an interlocutory order and might be a ground of appeal against the decree passed in the suit. That decision followed the decision in *Chattar Singh* v. *Lekhraj Singh* (2). The Bombay High Court confirmed this view in *Chimanbhai* v. *Keshavlal* (3). The Bombay view has also been confirmed in *Nasarwanji Hormusji* v. *Jamshedji Navroji* (4).

In *Ram Sarup* v. *Mohan Lal* (5) it was held by a Bench that no revision lay to the High Court against an order of the court below dismissing the objections to an award. This, however, was the converse case where the award was not set aside but a judgment was given according to the award. But the case law was considered at length on the general subject of orders dealing with objections to arbitration awards and the Lahore Bench considered that the Allahabad view that no revision lay from an order setting aside an award was correct, and this view was followed by a learned single Judge in *Gulab Singh* v. *Dharmpal Dalip Singh* (6).

In *Ganga Pershad* v. *Ram Narain* (7) it was held that no revision lies in respect of an order setting aside an arbitration award as there has been no case decided.

In connection with this matter reference may be made to the provisions of section 104(1) of the Code of Civil Procedure in which in the six cases (*a*) to (*f*) the Code has provided for an appeal from certain orders passed by a court in regard to arbitration proceedings. The first of these provisions (*a*) provides for an appeal from "an order superseding an arbitration where the award has not been completed within the period allowed by the court." This refers to an order passed under schedule II, paragraph 8. Now the present order setting

(1) (1902) I.L.R. 26 Bom. 551.
(2) (1883) I.L.R. 5 All. 293.
(3) (1923) I.L.R. 47 Bom. 721.
(4) A.I.R. 1932 Bom. 232.
(5) (1933) I.L.R. 14 Lah. 715.
(6) A.I.R. 1936 Lah. 538.
(7) A.I.R. 1929 Oudh, 493.

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aside the award comes under paragraph 15 and the Code did not provide for an appeal to be brought against that order as a separate order. If the Code had intended that there should be at that stage a reference to the courts above in regard to an order passed under paragraph 15 superseding the arbitration and setting aside the award then it appears to me that the Code would have provided an appeal under section 104(1). As the Code did not make this provision it appears that the Code did not intend that such an order should be the subject of reference to the courts above, at any rate at that stage. The view that the order does not amount to a case decided within the meaning of section 115 has been taken in a number of rulings of this High Court and appears to me to be a reasonable view. It is no doubt difficult to distinguish between orders which have been held in various Full Bench rulings to amount to a case decided and others which have been held not to amount to a case decided and it is not easy to lay down any hard and fast distinction. From the practical point of view there may in some cases, as some Judges have pointed out, be an advantage in allowing an application in revision from an order setting aside an award and superseding the arbitration, as if the High Court allowed the application in revision under section 115 the award would be upheld and the expense of the suit before the court would not arise. But such cases would doubtless be seldom, because orders passed under paragraph 15 are passed on the merits and it would be rare for a court to pass such an order which would violate the provisions of section 115 of the Code of Civil Procedure. To permit the matter to be brought in revision before the High Court at that stage would mean a postponement of the trial of the suit for a period of about two years and this would cause in every case where an application is made delay and loss to the parties. The balance of convenience therefore is certainly against permitting such applications to be made.

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I hold that the reply to the issue should be in the negative and that the court cannot be considered to have decided a case within the meaning of section 115 where it has set aside the award and superseded the arbitration pending a suit which is consequently to be tried by the court.

ISMAIL, J.:—I agree.

VERMA, J.:—I agree.

APPELLATE CIVIL

Before Mr. Justice Bennet, Acting Chief Justice, and Mr. Justice Verma

1938 *July*, 28

CHIMMAN LAL AND OTHERS (PLAINTIFFS) *v.* ZAHUR UDDIN (DEFENDANT)*

Municipalities Act (Local Act II of 1916), *sections* 116(*b*), 118, 124(1)—*Well and adjoining land dedicated to public use for specified purposes—Whether "public well"—Whether proprietary rights of municipality therein—Property held by municipality "on any trust"—Sale by municipality void—Civil Procedure Code, order XLI, rules* 17, 30—*Dismissal of appeal on the merits though non-appearance of appellant.*

Where it appeared that the owner of a well and some land adjoining it had made a dedication or wakf in favour of the public, i.e. that the public had a particular right of user to use the well and the adjoining land for the purpose of certain fairs and festivals,—

Held that it was a "public well" within the meaning and operation of section 116(*b*) of the Municipalities Act, 1916, and no question could therefore arise of the Municipal Board having acquired proprietary rights in the property by virtue of the words "shall vest in and belong to the Board" in that section. Even if the section had been applicable, the word "vest" therein was to be understood in a restricted and not in a wide sense, as laid down by the Privy Council in *Maharaja of Jaipur* v. *Arjun Lal* (1), and the Municipal Board would not be entitled to sell the property.

Further, the well and the land appurtenant to it came within the words "property entrusted to its management and control"

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*Appeal No. 106 of 1935, under section 10 of the Letters Patent.

(1) I.L.R. [1937] All. 901.