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But as regards his money claim, assuming that the consideration was paid as alleged by him, we do not think it equitable or proper that he should be relegated to a fresh suit. The whole of the circumstances on the strength of which the appellant founds his cause of action are fully disclosed in the plaint, and if supported by evidence go to establish the justice of his demand, whether we regard it in the light of a suit for compensation in damages for breach of the contract, or for money had and received for the plaintiff's use, or for money lent. The case must be remanded to the Judge, under s. 562 of the Procedure Code, in order that he may determine it upon the merits. The Judge will of course in hearing the appeal not consider the case in respect of those defendants who did not question the decision of the first Court by appealing. Costs of this appeal will be costs in the cause.

Cause remanded.

CIVIL JURISDICTION.

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February 8.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Oldfield.

BHAGIRATH (PLAINTIFF) *v.* RAM GHULAM (DEFENDANT).*

Arbitration—Evidence given by party on oath proposed by opposite party—Award in accordance with such evidence—Judgment in accordance with award—Validity of award—Appeal—Act X of 1877 (Civil Procedure Code), ss. 520, 521, 522—Act X of 1873 (Oaths Act).

The plaintiff in a suit, which had been referred to arbitration, offered before the arbitrator to be bound by the evidence of the defendant given on a certain oath. With the arbitrator's consent the defendant accepted such offer, and gave evidence on such oath. The arbitrator made an award in accordance with the evidence so given. The plaintiff objected to the award, not on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, but on the ground that the procedure of the arbitrator had been illegal. The Court disallowed this objection, and gave a judgment and decree in accordance with the award.

Held by STRAIGHT, J., that such decree, being in accordance with the award, was not appealable.

Held by STUART, C. J., that the award not being open to objection on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, and the decree being in accordance with the award, the decree was not appealable.

* Application, No. 179 of 1881, for revision under s. 622 of Act X of 1877 of a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 25th July, 1881, reversing a decree of Pandit Gopal Sahai, Munsif of Farukhabad, dated the 14th June, 1881.

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Held by OLDFIELD, J., that the procedure adopted by the arbitrator being illegal, not being warranted by the Oaths Act, and there being in reality no award, within the meaning of the Civil Procedure Code, the decree therefore was appealable.

Per STUART, C. J., that the procedure of the arbitrator did not require to be warranted by the Oaths Act, as he was entitled by virtue of his office to proceed as he did.

THE plaintiff in this suit sued the defendant for Rs. 133, being the principal sum and interest due on a bond. The parties to the suit, being desirous that the case might be referred to the arbitration of one Madan Gopal, joined in applying to the Court of first instance for an order of reference. In this application they agreed to accept and abide by the decision of the arbitrator. The Court referred the case to the decision of the arbitrator. The plaintiff offered before the arbitrator to be bound by what the defendant might state after having been sworn on "Mahadeo." The arbitrator thereupon sent the parties, with a muharrir and a chaprasi, to a temple, and there the defendant, placing his hand on "Mahadeo," swore that he did not owe the plaintiff anything. Then he was brought back before the arbitrator, and made the same statement before him. The arbitrator thereupon decided that the plaintiff's claim should be dismissed. The plaintiff objected to the award on the ground that the procedure of the arbitrator, in swearing the defendant on "Mahadeo," and basing his award on the defendant's evidence so given, was improper, and his award was bad. The Court of first instance disallowed this objection, and gave judgment in accordance with the award, dismissing the plaintiff's suit. The plaintiff appealed, and the lower appellate Court held that the award was void, as based on evidence not legally binding. Its reasons for so holding were as follows:—"There are, however, other points in the case. The oath was not administered by the arbitrator. He sent a muharrir and chaprasi with the defendant to "Mahadeo." Under s. 10 of the Oaths Act, presuming the arbitrator could administer the oath on "Mahadeo," he could issue a commission to administer the oath and record the evidence of the person sworn. It may be said that the muharrir formed a commission but he did not record the evidence of the defendant. It seems to the Court that it was the intention of the plaintiff that the defendant should give his evidence with

his hand on "Mahadeo;" in fact that as a person gives evidence holding Ganges water in his hand, so should the defendant swear and depose with his hand on "Mahadeo." If this was the intention of the plaintiff, then the statement of the defendant was not recorded in a manner which would be binding on him."

The defendant applied to the High Court to set aside the decree of the lower appellate Court on the ground that it had exercised a jurisdiction not vested in it by law, in hearing an appeal from the decree of the Court of first instance, which had given judgment in accordance with the award; and that the lower appellate Court had acted erroneously in setting aside the award, merely because the procedure of the arbitrator had been irregular. The application came for hearing before STRAIGHT, J., and OLDFIELD, J.

Babu *Jogindro Nath Chaudhri*, for the plaintiff.

Mr. *Niblett*, for the defendant.

The learned Judges differed in opinion on the point whether the decree of the Court of first instance was appealable, delivering the following judgments:—

STRAIGHT, J.—I am of opinion that the first objection taken in this petition for review is a good one, and that no appeal lay from the decree of the Munsif passed upon the basis of the award to the Judge. It is admitted on both sides that such decree is neither in excess of, nor out of accordance with, the award, and such being the case I hold that the prohibition contained in the last paragraph to s. 522 of the Procedure Code is a positive and absolute bar. I entirely dissent from the view that it is competent for a Court of appeal to go behind an award for the purpose of ascertaining whether it has been formally and properly made. The only tribunal to look into or interfere with it is the Court that has directed the reference to arbitration, and then only within the limits specifically provided by ss. 518-520 and 521 of the Procedure Code. If the contention to the contrary were correct, the prohibition of s. 522 would became virtually useless, for an appeal might be preferred in almost every arbitration case in order to open up the proceedings of the arbitrator. Save in so far as its orders "superseding an arbitrator" or "modifying or correcting an award" or

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its decree on an award "exceeds or is not in accordance therewith," there is no appeal from the Court referring a case to arbitration. The policy and propriety of this legislation appear to me indisputable, and nothing to my mind could be more mischievous than to interfere with the finality which the law obviously intended should be given to proceedings in arbitration. I would allow this application with costs, and reversing the decision of the Judge restore that of the Court of first instance.

OLDFIELD, J.—This case has come before us on a petition for revision under s. 622, Civil Procedure Code, on the ground that the Judge had no jurisdiction to entertain an appeal from the decree, which it is alleged was passed in accordance with an award of an arbitrator made under the provisions of the Code of Civil Procedure.

On the question how far an appeal is prohibited, I would observe that it is only when the decree follows a judgment in accordance with an award that an appeal does not lie under s. 522, Civil Procedure Code. *Primâ facie* there is a right of appeal from every original decree, but this right has been taken away by s. 522 in case of a decree following a judgment in accordance with an award. Before, however, a Court of appeal is in a position to apply this provision in s. 522, it is necessary that it satisfy itself that there is an award which can rightly be so considered, that the thing called an award is an award which the Code of Procedure contemplates, and an appellate Court must so far look behind the decree. If there is nothing which is properly an award, there can be no final decree such as s. 522 refers to. Such I believe has been the view of the law taken by the Courts, and I may refer to *Sunt Lall* v. *Bubboojee* (1) and *Boonjad Mathoor* v. *Nathoo Shahoo* (2).

In the case before us, I find from the Judge's judgment that the matter in dispute, *viz.*, a claim for Rs. 34-10-0 on a bond was referred to arbitration at the instance of the parties, and while before the arbitrator the "plaintiff agreed to be bound by what the defendant might swear having placed his hand on Mahadeo; the defendant was sent with a muharrir and chaprasi to the temple of

(1) N.-W. P. S. D. A. Rep., 1863, vol. ii., p. 42.

(2) I. L. R. 3 Calc. 375.

Mahadeo and then came back when his evidence was recorded, and on his statement as thus recorded the award was given."

The procedure thus adopted is that allowed by the Indian Oaths Acts, but it is by that Act confined to Courts of Justice, and not extended to arbitrators, and necessarily so, because it is inconsistent with the position of an arbitrator, and the material objection to the procedure adopted in this case is that it is inconsistent with a reference to arbitration.

A reference to arbitration contemplates that the arbitrator shall exercise his own judgment on the evidence, but when the parties agree to be bound by the oath of a particular person, the decision is taken out of the arbitrator's hands, and in fact he ceases to act as arbitrator, the arbitration is superseded, and the decision made is not that of an arbitrator, so as to be an award within the meaning of the Code of Procedure. This is the serious and I think fatal objection; there has been no award in this case, and in consequence no final decree under s. 522.

The appeal was therefore properly entertained. The Judge, besides holding the procedure illegal, has found that the reference to oath was not made in the manner contemplated so as to be binding, and he has remanded the case for fresh disposal, and I would not interfere.

In consequence of the learned Judges who first heard the application differing in opinion, the case was referred to the learned Chief Justice, who delivered the following judgment:—

STUART, C. J.—In this case the arbitration was directed by order of the Court in which the suit was instituted, and an award has been made and there has been a decree thereon. The record shows that there were no objections to the award on the grounds stated in ss. 520 and 521. It appears to have been made in accordance with the arbitrator's view of the evidence, which consisted of the deposition or statement on oath of the defendant given on the application of the plaintiff himself. As to the procedure in other respects relating to the conduct of such an arbitration under Chapter XXXVII. of Act X. of 1877, we may assume that it was followed, and indeed there is nothing to show it was not. That being so, and the procedure directed by s. 522

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having been also observed, it is clear that there is no appeal from the Munsif's order made according to the award. I therefore concur in the opinion of Mr. Justice Straight and in the order he proposes.

This is sufficient for the disposal of the case, but as other matters have been discussed in connection with the arbitration proceedings, I think it right to state that in my opinion the arbitrator, in disposing of the case as he did on the oath of the defendant, was fully justified in the course he adopted. It has been objected that he was not warranted by the Oaths Act (X. of 1873) in accepting the defendant's deposition, although it is not denied that a "Court" could act upon such evidence. That Act, however, need not be imported into the case; it does not take away from arbitrators any powers as to taking evidence or otherwise which they had previously possessed; but even if it applied to and governed this case, what took place was quite consistent with a reasonable application of the provisions of that Act. An arbitrator is entitled to conduct the proceedings in the arbitration and to determine questions of evidence according to his own views of the exigencies of the case before him, and if one of the parties to the arbitration records by written application or otherwise his willingness to rest his case upon his opponent's deposition, the arbitrator can make his award accordingly. In the present case it was the plaintiff himself who applied by petition to the Court that the case might be determined, or in other words that an award might be made, in accordance with the evidence of his opponent, and this course was adopted. The arbitrator was clearly entitled to adopt such procedure and to make his award in accordance with the defendant's oath. His powers in this respect appear to me to fall within the principle recognised in the English case of *Hagger* v. *Baker* (1), referred to on page 647 of Mr. Russell's learned and well known work on the powers and duties of arbitrators, 4th edition, 1870, where it was held that an award would not be avoided even if the arbitrator were erroneously to reject admissible or receive inadmissible evidence. Indeed to hold otherwise would be to open the door to all the mischiefs and inconveniences pointed out in the opinion of Mr. Justice Straight.

Application allowed.

(1) 14 M. and W. 9.