

altogether in point. Again the decree-holder taking payment out of court must be regarded as a trustee for the judgment-debtor of the money paid to him. This is the view entertained by the Full Bench of the Presidency Court in the case already cited. That decision notices the case of *Arunachella Pillai v. Appavu Pillai* (1). In that case the Court was not unanimous in taking a different view from that of the Presidency Court, and an examination of it shows that the claims were not identical, as in the Madras suit the plaintiff sued to recover money that was levied in the execution of the decree by the Court, whereas in the Presidency case, as in the one before us, the plaintiff sued to recover the money first paid, for which, as the Court held, the decree-holder must be regarded as a trustee for the plaintiff, and as such he was liable to refund it. Such being our view of the case, we must decree the appeal, and as the Judge has thrown out the case on a preliminary point of law, we reverse his decree and remand the case for re-trial on the merits. Costs will abide the result.

1881

 SHADI
 v.
 GANGASAHA

Cause remanded.

APPELLATE CIVIL.

 1881
 March 4.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

JUALA SINGH AND ANOTHER (PLAINTIFFS) v. NARAIN DAS (DEFENDANT).*

Filing private award in Court—Amendment of plaint taking case out of scope of Ch. 37 of Act X of 1877—Act X of 1877 (Civil Procedure Code), ss. 520(a), 525, 526—Appeal.

By the amendment of the plaint, a case under s. 525 of Act X of 1877 was taken out of the scope of Chapter XXXVII of that Act. *Held* that, this being so, the decree of the Court of first instance was appealable.

Held also, where a private award determined a matter not referred to arbitration, that a claim under s. 525 of Act X of 1877 that such award should be filed in Court was properly dismissed.

THE plaintiffs, who claimed a right of pre-emption in respect of certain buildings purchased by the defendant, and the defendant,

* Second Appeal, No. 979 of 1880, from a decree of R. M. King, Esq., Judge of Saharanpur, dated the 9th July, 1880, reversing a decree of Munsif Baij Nath, Munsif of Muzaffarnagar, dated the 2nd March, 1880.

(1) 3 Mad. H. C. Rep., 188.

1881

—JALAL SINGH
v.
SH. HARAIN DAS.

who denied such right, entered into an agreement in writing to refer this matter to the arbitration of two persons named in such agreement. This agreement, which was dated the 18th May, 1879, provided that the arbitrators should award such portion of such buildings to the plaintiffs as they might think proper, and should fix the price which the plaintiffs should pay to the defendant for such portion. The arbitrators, by an award dated the 1st June, 1879, awarded a certain portion of such buildings to the plaintiffs, directing that they should pay the defendant Rs. 100 for the same. In addition to this they also determined certain other matters which had not been referred to them. The plaintiffs made an application under s. 525 of Act X of 1877 to have the award filed in Court. The defendant objected to the validity of the award on the ground, amongst others, that it had determined matters not referred to arbitration. On the 27th February, 1880, after the first hearing of the suit, the plaintiffs, in pursuance of an order made by the Munsif on the previous day, amended the plaint, by asking that "the award might be enforced and acted upon," that is to say, that possession of the portion of the buildings which had been awarded to them might be given to them on payment of Rs. 100. The Munsif held that, although the arbitrators had determined matters not referred to arbitration, yet, as the suit was not one to have the award filed, but to have it enforced, that part of the award which was upon a matter referred to arbitration might be enforced; and accordingly gave the plaintiffs a decree "for the enforcement of the award" to that extent, directing the plaintiffs to pay Rs. 100 within fifteen days. On appeal by the defendant the lower appellate Court held that, inasmuch as the arbitrators had determined matters not referred to them, the award should not be filed, and it made an order rejecting plaintiffs' "claim to file the award."

On second appeal the plaintiffs contended that the order of the Munsif was not appealable; that the arbitrators had not exceeded their powers; and that, assuming that the award was defective, it should not have been entirely set aside.

Munshi *Kashi Prasad*, for the appellants.

Pandit *Ajudhia Nath*, for the respondent.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

1881

JUALA SINGH
v.
NARAIN D.

PEARSON, J.—The present suit was commenced by an application on the part of the plaintiffs under s. 525 of the Civil Procedure Code. The Munsif, misunderstanding the provisions of that section; required them to amend their plaint, and the Judge finds that the amendment was ordered after the first hearing of the case when such an order could not be legally passed. By the amendment the case was taken out of the scope of Chapter XXXVII of the Code. This being so, there can be no doubt that the Judge had jurisdiction to hear the appeal preferred to him from the Munsif's decree. The first ground of the appeal is, therefore, disallowed. There can be no doubt, we think, that the arbitrators exceeded the powers given to them by the agreement of the parties, dated 18th May, 1879, and that their award determined matters not referred to arbitration. S. 526 of the Code enacts that "if no such ground as is mentioned or referred to in s. 520 or s. 521 be shown against the award, the Court shall order it to be filed." In this case one of the grounds mentioned in s. 520 (a) was shown against the award, and the lower appellate Court was, therefore, in our opinion, justified in dismissing the plaintiffs' claim that the award should be filed. Accordingly we dismiss the appeal with costs.

Appeal dismissed.

CIVIL JURISDICTION.

1881
March 7

Before Mr. Justice Oldfield and Mr. Justice Straight.

DEBI DIAL SINGH AND OTHERS (PLAINTIFFS) v. AJAIB SINGH AND OTHERS
(DEFENDANTS).

*Act X of 1877 (Civil Procedure Code), s. 43—Relinquishment of part of claim—
Mesne profits.*

The plaintiffs sued the defendants for possession of the land upon which certain trees stood, and for such trees, stating that on the 19th June, 1879, the defendants had interfered with their possession of such trees, and had wrongfully taken the fruit thereof. The plaintiffs subsequently sued the defendants for the value of the fruit upon such trees, alleging that on the 19th June, 1879, the defendants had wrongfully taken such fruit. *Held* that, as the cause of action, *i. e.*, the taking of such fruit, was in both suits identical, and the plaintiffs not having claimed the value of such fruit as mesne profits in the first suit, the second suit was barred by the provisions of s. 43 of Act X of 1877.