APPELLATE CIVIL.

1881
January 11

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

JANKI TEWARI AND OTHERS (PLAINTIFFS) *v.* GAYAN TEWARI AND ANOTHER (DEFENDANTS.)*

Filing private award in Court—Order rejecting application—Appeal—Act X of 1877 (Civil Procedure Code), ss. 2, 525, 526, 540.

Per SPANKIE, J.—An order refusing an application to file a private award in Court is appealable as a decree. *Jokhun Rai* v. *Bucho Rai* (1) and *Hussaini Bibi* v. *Mohsin Khan* (2) impugned and distinguished: *Vishnu Bhau Joshi* v. *Ravji Bhau Joshi* (3) distinguished.

Per STUART, C. J.—An order refusing an application to file a private award in Court on grounds not mentioned in ss. 520 and 521 is a decree and appealable as such.

THE plaintiffs in this suit claimed under s. 525 of Act X of 1877 that an award might be filed in Court. Nine of the defendants, who were sixteen in number, set up as a defence, *inter alia*, that they had not agreed to refer the matter in dispute on which the award had been made to arbitration, and the award had not been made as against them. The remaining defendants confessed judgment. The Court of first instance decided that the matter in dispute on which the award had been made was one which concerned all the defendants; that the defendants who contested the suit were not parties to the agreement to refer and the award was not made as against them; and that, as all the parties concerned were not parties to the arbitration, the award could not be "executed and enforced;" and it "dismissed the suit." The plaintiffs appealed contending that the defendants who contested the suit were parties to the arbitration, and that a decree should have been given to them against the confessing defendants. The lower appellate Court held that the appeal would not lie, relying on the cases which will be found cited below in the judgment of Spankie, J. On second appeal to the High Court the plaintiffs contended that the appeal to the lower appellate Court would lie and the cases relied on by that Court were not applicable.

Mr *Howard*, for the appellants.

* Second Appeal, No. 464 of 1880, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 18th March, 1880, affirming a decree of Munshi Manmohan Lal, Munsif of Ballia, dated the 13th December, 1879.

(1) N.-W. P. H. C. Rep., 1868, p. 353. (2) I. L. R., 1 All., 156.
(3) I. L. R., 3 Bom., 18.

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Mr. *Chatterji*, Munshi *Sukh Ram*, and Babu *Sital Prasad Chatterji*, for the respondents.

The High Court (STUART, C. J., and SPANKIE, J.,) delivered the following judgments:—

SPANKIE, J.—This was an application under s. 525 of the Code of Civil Procedure and was registered as a suit. Nine of the defendants contended, amongst other pleas, that the agreement to arbitrate the dispute between the parties was registered by some, but not by all of those interested; that the award was made nearly five years after the agreement was executed; and that both the agreement and award were in fraud of defendants and the award itself was inconsistent with the agreement. The Munsif admitted the objections of defendants and in his order "dismissed the claim with costs." The Subordinate Judge in appeal held that there was none from an order rejecting an application to file an award. He cited a Full Bench decision of this Court and other cases:—*Jokhun Rai* v. *Bucho Rai* (1); *Hussaini Bibi* v. *Mohsin Khan* (2); *Vishnu Bhau Joshi* v. *Raoji Bhau Joshi* (3). His judgment is based chiefly on the precedent first quoted, and he remarks that he can see no difference between s. 327, Act VIII of 1859, and s. 525 of Act X of 1877. It is urged in second appeal that the authorities cited by the Subordinate Judge do not apply to the present case, and that the appeal does lie to the Judge, who ought to have disposed of the appeal on the merits. The Full Bench decision of this Court certainly does rule that an order granting or rejecting an application under s. 327, Act VIII of 1859, is not a decree, and that it is not appealable. There is a suggestion in the remarks of the Court that an order granting an application to file an award may become a decree if the parties desire that the award should be incorporated in a judgment. Mr. Justice Pearson dissented from the ruling of the majority of the Court, giving his own opinion separately. But I confess that if Act VIII of 1859 were still in force I should feel doubts now of the propriety of the ruling. It is true that in 1876 Mr. Justice Oldfield and I considered ourselves bound by it.—*Hussaini Begam* v. *Mohsin Khan* (2). The lower appellate Court has cited the case in

(1) N.-W. P. H. C. Rep., 1868, p. 353. (2) I. L. R., 1 All., 156.
(3) I. L. R., Bom., 18.

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support of its view. In my judgment there I expressed myself as follows :—"Where one of the parties denies that he had referred any dispute to arbitration, or that an award had been made between himself and the other party, it seems to me that sufficient cause has been shown why the award should not be filed. The applicant for its admission should be left to bring a regular suit for the enforcement of the award." These remarks would imply that when an application has been refused full relief could be obtained by a regular suit, and that an appeal was unnecessary or undesirable. Since this judgment was delivered Act VIII of 1859 has been repealed and Act X of 1877 now governs our procedure. The lower appellate Court remarks that there is no real difference between s. 327 of the old and s. 525 of the present Code. This doubtless is so, though there is some difference to which I will presently refer, and the purpose of chapter VII of one Code and chapter XXXVII of the other is, in the opening words of the Full Bench decision of this Court, "to render the procedure in matters of arbitration as simple as possible, and to confine within the narrowest limits the power of appeal." But the design of the Legislature was to confine within the narrowest limits an appeal against the award. In s. 326 of Act VIII of 1859, which permitted agreements to refer disputes to arbitration to be filed in court, it is provided as follows:—"If no sufficient cause be shown against the agreement, the agreement shall be filed and an order of reference shall be made thereon." The previous provisions of the chapter, so far as they are not inconsistent with the terms of the agreement, are made applicable "to all proceedings under an order of reference made by the Court and to the enforcement of such award." In the corresponding sections of the present Code, 523 and 524, the foregoing provisions of the chapter are similarly made applicable to the award of arbitration and to the enforcement of *the decree* founded thereupon. I particularly refer to the change of the word *decree* in lieu of *award*, because it was a point in the ruling of the Full Bench respecting s. 327 that neither an order granting an application to file an award nor the rejection of such an application were appealable, inasmuch as such orders were not decrees and no appeal was provided for them as orders. In s. 327 it was provided that "if no sufficient cause be shown against the award, the

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award shall be filed, and may be enforced as an award made under the provisions of this chapter". In s. 526 of the present Code it is provided that "if no ground such as is mentioned or referred to in s. 520 or 521 be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter." Here then though there is no particular difference between ss. 327 and 525 there is a material difference of procedure between the latter portion of ss. 327 and 526. S. 327 of Act VIII of 1859 does not indicate the objections to an award that might be taken. It is enough if sufficient cause be shown. In s. 526 the grounds of objection must be those mentioned or referred to in ss. 520 and 521. Where the objections under s. 520 are sustained an award may be remitted for reconsideration. If they are sustained under s. 521, the award may be set aside. Now in s. 514 provision is made for superseding the arbitration and in s. 518 for modifying or correcting an award. It is noteworthy that under these sections the orders are appealable as such by clauses (25) and (26), s. 588 of the Act, but orders under ss. 520 and 521 are not so appealable. The reason for this would appear to be that under s. 514 no award has yet been made, and under s. 518 the interference of the Court with an award is very limited; there must be no interference with the decision on the matter referred. When however the award has been reconsidered and completed under s. 520, or when objections have been preferred under s. 521 and have been disposed of, it remains for the Court to give *judgment*. So, "if no ground such as is mentioned or referred to in s. 520 or 521 be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter." We must turn to s. 522 in order to ascertain how effect is given to an award "under the provisions of this chapter." The section runs:—"If the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application has been made to set aside the award, or if the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to give judgment according to the award." Upon the judgment so given a decree shall follow, and shall be enforced in manner

provided in the Code for the execution of the decree, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

Applications alike under s. 523 and 525 are to be registered as suits. The application to file an agreement under s. 523 is to be made to any Court having jurisdiction in the matter to which the agreement relates; that under s. 525 "to the Court of the lowest grade having jurisdiction over the matter to which the award relates." These words are not to be found in s. 327 of Act VIII of 1859. The applications alike in ss. 523 and 525 are at *once* to be registered as suits before notice is given to the other side. In this respect they differ from s. 326 and 327 of Act VIII of 1859, under which notice is given before the application is registered as a suit. This circumstance may seem unimportant, but the difference seems to me to indicate that such applications were really to be dealt with from the moment they were received as suits, and that the orders on the award under them were to have a final character. The procedure adopted, the use of the word decree in s. 524, the mode in which effect is to be given to the award, seem to me to point to distinguish the ultimate orders from those orders appealable under s. 588 of the Code, and bring them under the definition of s. 2 of the Act, wherein decree means the final expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal: an order rejecting a plaint, or directing accounts to be taken, or determining any question referred to in s. 244, but not specified in s. 588, is within the definition. An order rejecting a plaint is appealable as a decree, and in this respect an order rejecting an application to file an award may be regarded as a decree. It *decides* the suit. If the application be granted the suit is similarly decided, and an appeal would lie when the decree was in excess of, or not in accordance with, the award. To that extent appeals under this chapter are confined, when the decree is in accordance with the award. But where the award is allowed to be filed, the order referring it is also a decree, and would be appealable under s. 540 of the Code. Nowhere else is there any express provision to the contrary, therefore

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an appeal is admissible under that section. The Bombay case—*Vishnu Bhau Joshi* v. *Raoji Bhau Joshi* (1)—cited by the lower appellate Court refers also to s. 327 of Act VIII of 1859, but if I am right in my view as expressed above, it, like the Full Bench decision of this Court (2), would not apply to the present case and procedure under Act X of 1877. The learned counsel Mr. Howard in maintaining that an appeal would lie referred us to the case of *Boonjad Mathoor* v. *Nathoo Shahoo* (3). In that case the application was made under s. 327 of the Code. It was held that the award was not a valid and final award and that the decree passed thereon was not final and that an appeal would lie. This judgment supports my view of the case now that, where there is an order on the award, the order is a decree and not an order. If the opinion I have formed on the state of the law now since the introduction of Act X of 1877 be correct as observed above, the order granting and the order rejecting an application under s. 525 are alike decrees, and the order rejecting the application is appealable as a decree. I would decree the appeal and remit the case to the lower appellate Court to be tried on its merits. Costs to abide the result.

STUART, C.J.—I am clearly of opinion that the Judge ought to have entertained the appeal which was taken to his Court in this case, and that the authorities to which he refers do not apply. If it was really intended to exclude such an appeal the procedure provided by ss. 525 and 526 should have been carefully followed, and how such plain directions can be misunderstood it is not easy to comprehend. But the present case, although the remedy intended appears to have been that provided by s. 525 and the other sections of the Code which constitute chapter XXXVII, was conducted in this way. A pleading in the form of a plaint was filed and it prayed that after the necessary requisites of the law have been fulfilled the arbitration award may be ordered to be filed, and that after its being filed it may be duly acted upon, and all this without the least reference to the directions provided by s. 526. In this form the Munsif entertains the case, takes evidence, and ultimately records a judgment dismissing the claim on grounds such as these,—that all the property referred to arbitration had not

(1) I. L. R., 3 Bom., 18. (2) N.-W. P. H. C. Rep., 1868, p. 353.
(3) I. L. R., 3 Calc., 375.

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been dealt with in the award, and that the arbitration agreement had not been executed by all the parties named therein. Such having been the procedure adopted for the conduct and disposal of the suit by the Munsif, there was really no case for the application of s. 522, and therefore none for the exclusion of an appeal to the Judge, the Munsif adopting a different line of inquiry from that provided by the Procedure Code for arbitration cases, and giving a decision and order by which he dismissed the claim, and making a "decree" within the meaning of that term as defined by s. 2 of Act X of 1877, for it was clearly an adjudication or order which decided the suit in the form in which it had been taken cognizance of by him, and therefore such an order dismissing the claim was clearly a decree within the meaning of s. 540, and was appealable to the Judge. Under these circumstances the case must go back to the Judge to be restored to his file and to be disposed of on the appeal to him; costs to abide the result.

Cause remanded.

CIVIL JURISDICTION.

1881
January 11

Before Mr. Justice Pearson and Mr. Justice Straight.

KINLOCK (DEFENDANT) *v.* THE COLLECTOR OF ETAWAH AS MANAGER OF MAUZA SAMAYAN ON BEHALF OF THE COURT OF WARDS (PLAINTIFF).*

Rent—Produce of Land—Hypothecation—Purchaser—Act XVIII. of 1873 *(N.-W. P. Rent Act), s.* 56.

The purchaser of the unstored produce of land in the occupation of a cultivator, with notice of the lien created on such produce by s. 56 of Act XVIII. of 1873, takes such produce subject to such lien. S. A. No. 1393 of 1870 decided on the 4th February 1871 (1) and *Achul* v. *Gunga Pershad* (2) followed.

THE plaintiff in this suit claimed from the cultivators of certain land and one Kinlock, who had purchased at a sale in execution of a decree the produce of such land, Rs. 136-15-0 representing the amount of rent payable in respect of such land by such cultivators for the years 1284 and 1285 fasli. The plaintiff stated

* Application. No. 77B. of 1880, for revision under s. 622 of Act X of 1877 of a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 22nd May, 1880, affirming a decree of Babu Sanwal Singh, Munsif of Etawah, dated the 2nd September, 1879.

(1) Unreported. (2) N.-W. P. H. C. Rep., 1867, p. 73.