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mortgagor and mortgagee, and it set aside the decree of the Munsif, and directed that the plaint should be returned to the plaintiff in order that it might be presented to the proper Court.

In second appeal the plaintiff contended that the suit should be valued at the mortgage-money, and it had therefore been properly instituted in the Munsif's Court.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Pandit *Bishambhar Nath*, for the appellant.

Pandits *Ajudhia Nath* and *Nand Lal*, for the respondent.

The Court (STUART, C. J. and TYRRELL, J.) delivered the following

JUDGMENT.—This appeal must be allowed. The Court of first instance took a proper view of the value of the subject-matter in dispute; and the lower appellate Court was wrong in reversing the decree on that question only.

We set aside the decree of the lower appellate Court, and finding no force in the other pleas urged before the Subordinate Judge, we restore the decree of the Court of first instance and decree this appeal with costs.

Appeal allowed.

FULL BENCH.

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

DAYA NAND (APPELLANT) *v.* BAKHTAWAR SINGH (RESPONDENT).

Order refusing to file in Court agreement to refer to arbitration—Appeal—Court-fee—Civil Procedure Code, ss. 2, 523—"Decree"

Held by the Full Bench (OLDFIELD, J., dissenting) that an order refusing to file in Court an agreement to refer to arbitration is not appealable.

Per OLDFIELD, J., that such an order is appealable, and the court-fee payable on the memorandum of appeal is an *ad valorem* fee computed on the value of the subject-matter in dispute in the appeal.

Janki Tewari v. *Gayan Tewari* (1) distinguished by STUART, C. J., and followed by OLDFIELD, J.

ONE Daya Nand applied under s. 523 of the Civil Procedure Code to have an agreement to refer to arbitration filed in Court.

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The application was numbered and registered as a suit, under the provisions of the same section, and was eventually rejected by the Court of first instance. The plaintiff appealed from the order rejecting the application to the High Court, paying a court-fee of Rs. 10 on his memorandum of appeal. The taxing officer referred the question as to the court-fee payable on the memorandum to Straight, J., observing as follows :—

"According to the Calcutta High Court ruling in *Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (1)the appeal will not lie at all apparently. If, however, the appeal will lie, then it must be an appeal from a decree [*Janki Tewari* v. *Gayan Tewari* (2)], and in that case [as in F. A. No 79 of 1881 (3)], the fee payable on the memorandum of appeal will be an *ad valorem* fee computed on the value (Rs. 13,495), set forth in the memorandum of appeal—that is to say, a fee of Rs. 580 is payable, and there is a deficiency of Rs. 570 to be made good."

STRAIGHT, J., referred the question raised by the taxing officer to the Full Bench for its opinion.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

The following opinions were delivered by the Full Bench :—

STUART, C.J.—At the hearing of this reference before the Full Bench several of my colleagues appeared to be of opinion that the order refusing to file the award was appealable, seeing that it was synonymous with "decree," as that word is defined in s. 2 of the Civil Procedure Code, and that by s. 523 of the Code it was an order made in an application or proceeding which was directed to be "numbered and registered as a suit". But on further consideration the majority of them have—in agreement with myself, for I have held that opinion throughout—arrived at the consideration that the order in question was not of such a character, and they have therefore answered the question in the negative. To my mind the question before us is a very simple one, and the answer obvious. The order refusing to file the agreement to

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(3) Not reported.

arbitration was distinctly not "the formal expression of an adjudication upon a right claimed or defence set up in a Civil Court," and which "decides a suit or appeal". It was, indeed, suggested that such an order was of the same character as one rejecting a plaint or directing accounts to be taken, which s. 2 provides is within the definition given of "decree." But that is clearly a misapprehension, for these are orders which, although of a preliminary character, necessarily result in the disposal of the suit or appeal, in the case of rejection of the plaint for any of the reasons mentioned in ss. 53 and 54 of the Code of Procedure, and in the case of the accounts to be taken the order going directly to the merits of the suit or appeal. The present order therefore is not a decree, but in the words of the definition rather an order which means "the formal expression of a decision of a Civil Court" other than a decree, as that term is defined in the Code of Civil Procedure.

A case before Spankie, J., and myself—*Janki Tewari* v. *Gayan Tewari* (1)—was referred to as supporting the opposite contention, but that was a totally different case from the present. There the procedure, which in our opinion warranted an appeal, is described in my own judgment, and was in this wise:—"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 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"

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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."

A Calcutta case was cited before us—*Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (1), before Pontifix and Field, JJ.,—and seems directly in point. There it was decided that no appeal lay, and it is noticeable that Pontifix, J., expressed the opinion that the words in s. 523 "to be numbered and registered as a suit were merely intended for administrative purposes."

In the present case there clearly is no appeal, and that being so, it is unnecessary to say anything on the question of the court-fee.

STRAIGHT, BRODHURST, and TYRRELL, JJ.—The primary question raised by this reference is, whether an order passed under s. 523 of the Civil Procedure Code, refusing an application to file an agreement to arbitration, comes within the definition of decree, as mentioned in the interpretation clause of that Act, and is therefore appealable. In other words, is such an order the formal expression of an adjudication upon a right claimed in a Civil Court by which a suit has been decided? Whether prior to the passing of the Contract Act the Courts of India were bound to follow the principle adopted by the Equity Courts in England of refusing to enforce specific performance of a contract to refer, it is not necessary now to consider, for by *Exception* 1 to s. 28 of that Act, specific performance of such agreements was distinctly declared to be enforceable by suit. But when the Specific Relief Act came into operation, this provision was repealed, and the law now stands that no contract to refer a controversy to arbitration shall be specifically enforced, save in the manner provided by Chapter XXXVII. of the Code of Civil Procedure. It therefore seems obvious that the Legislature intended to abolish the right to bring a suit for specific performance, as conferred by s. 28 of the Contract Act, and only to save the minor remedies provided in Chapter XXXVII. of the Code. If they had regarded these remedies as virtually constituting a suit, it is difficult to see what necessity there was for any

(1) I. L. R., 7 Calc., 490.

alteration in the law as it stood, whereas the anomaly now presents itself, if proceedings under s. 523 of the Code are to be regarded as amounting to a suit, that while an agreement to refer cannot be specifically enforced by suit, it may nevertheless be enforced by some other proceeding, which though not in name is in effect a suit for all practical purposes. It is impossible to suppose that such a glaring inconsistency could have been overlooked. Indeed the only reasonable inference is that it was intended to restore the English principle, which s. 28 of the Contract Act had temporarily disturbed, namely, that specific enforcement of contracts to refer to arbitration by suit should not be permitted, while saving to parties the remedy *short* of a suit which is to be found in s. 523 of the Civil Code. The provisions therein contained are analagous to those contained in s. 17 of the Common Law Procedure Act of 1854, and their object obviously is, by facilitating the filing of agreements to refer, to bring the reference under the cognizance and control of the Court, and by s. 524 of the Code to make the foregoing provisions of Chapter XXXVII, "so far as they are consistent with any agreement so filed," applicable "to all proceedings under an order of reference made by the Court under s. 523, and to the award of arbitration, and to the enforcement of decree founded thereon." Under all these circumstances we find it impossible to hold, that a "special proceeding" under s. 523 of the Code amounts to a suit, and it follows as a necessary consequence that orders passed in pursuance of that section are not decrees. Hence we must answer the first question put to us by this reference in the negative, and in this view of the matter the second need not be considered.

OLDFIELD, J.—The first question raised in this reference is whether an order disallowing an application to file an agreement to refer to arbitration under s. 523, Civil Procedure Code, is appealable, and the answer will depend on whether such an order is a decree within the meaning of s. 2, Act X. of 1877.

A decree is defined to be "the formal 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;" and an order rejecting a plaint is under

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the section within the definition. Now the order in question is an adjudication upon a right, for by the provisions of s. 21, Specific Relief Act, and s. 523, Civil Procedure Code, the parties to an agreement to refer a controversy to arbitration have a right to have the agreement enforced, and it is only when sufficient cause is shown why the agreement should not be filed, that the Court can refuse to order it to be filed, and to make an order of reference.

The order in question also seems to me to be an adjudication which, so far as regards the Court expressing it, decides the suit.

The proceedings taken under ss. 523 and 524 appear to me to come within the meaning of the term "suit" in s. 2, for s. 523 directs that "the application shall be in writing, and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the other or others of them as defendant or defendants, if the application have been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants", and notice is given to the parties to the agreement to show cause why the agreement should not be filed, and if no sufficient cause be shown, the Court may cause the agreement to be filed, and shall make an order of reference thereon, and nominate the arbitrator when he is not named in the agreement, and the parties cannot agree as to the nomination, and the foregoing provisions of Chapter XXXVII., so far as they are consistent with any agreement so filed, are made applicable to all proceedings under an order of reference made by the Court under s. 523, and to the award of arbitration, and to the enforcement of the decree founded thereupon.

There is thus a direction that the application to file an agreement to refer to arbitration shall be dealt with as a suit between the parties, and the proceeding has all the essentials in form and substance of a suit: the Court may, on sufficient cause shown, disallow the application, or cause the agreement to be filed, and make an order of reference, on which an award will follow, and judgment be passed on the award followed by a decree, and which can be enforced as a decree.

It has been contended that these directions are only for convenience, but the result remains that the proceeding is dealt with

as a suit and becomes a suit for all purposes of the Civil Procedure Code, for the word "suit" in s. 2 must be taken to mean and include a proceeding which the Code itself in another section refers to and directs to be dealt with as a suit.

The adjudication also decides the suit so far as the Court expressing it, for it disallows the right claimed to enforce the agreement, and is tantamount to a dismissal of the suit.

The order will, in my opinion, therefore come within the definition of a "decree" given in s. 2, Code of Civil Procedure, and be appealable.

The question before us whether the proceeding under s. 523 is a suit cannot be affected by the repeal of the 2nd clause of *Exception* 1, s. 28, Contract Act. That law allowed a suit to be brought for specific performance of a contract to refer a dispute to arbitration, and it was repealed by the Specific Relief Act, which by s. 21 enacts that "save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced." There is nothing in the mere repeal of the 2nd clause, *Exception* 1, s. 28 of the Contract Act, to prevent the procedure prescribed by the Civil Procedure Code being considered to be a "suit" within the meaning of the word in s. 2 of the Code, and that is the only point for consideration.

The case of *Janki Tewari* v. *Gayan Tewari* (1) decided by Stuart, C.J., and Spankie, J., supports the view I take. In that case the application had been made under s. 525, Act X. of 1877, for filing an award in Court, and the Court disallowed it, and it was held by the High Court that an appeal would lie from the order, on the ground that it was a decree within the definition in s. 2. Mr. Justice Spankie in his judgment in that case observes:—"Applications alike under ss. 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.

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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 ss. 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."

The grounds of the decision in that case apply equally to an order disallowing an application to file an agreement to refer a dispute to arbitration under s. 523, for if the order rejecting the application to file an award under s. 525 is a decree within the meaning of s. 2 and appealable, then on similar grounds the order disallowing the application to file an agreement to refer a dispute to arbitration will also be a decree and appealable.

My answer therefore to this reference is that the order is a "decree," as defined in s. 2, Act X. of 1877, and that an appeal will lie from it: and with regard to the second question that arises, that the fee payable is an *ad valorem* fee computed on the value of the subject-matter in dispute in the appeal.