

APPELLATE CIVIL.

*Before Mr. Justice Wazir Hasan and Mr. Justice A. G. P.
Pullan.*

HAKIM BASHIR AHMAD (DEFENDANT-APPELLANT) v.
SAIYED SADIQ ALI (PLAINTIFF-RESPONDENT).*

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August, 26.

Construction of documents—Agreement between parties that court should decide the case and adopt any procedure it liked and consenting that the decision shall be binding on them—Appeal against the decision of court, whether lies—Contract Act (I of 1872), section 28, applicability of—Civil Procedure Code (Act V of 1908), section 96.

Where under an agreement the parties in clear and emphatic terms give their consent to the decision of their dispute by the Court, to the procedure which the court was to adopt in the matter of coming to a decision on the merits of the case then before it and they also gave their consent that such a decision will be binding on them, it is tantamount to saying that the decision shall be final and no right of appeal will be exercised by either of the parties. Such an agreement has all the necessary elements of a valid contract, it is supported by consideration and is free of any taint of undue influence, mistake or misrepresentation and is legally binding on the parties and it is equally binding on the conscience of the parties, *Moonski Amir Ali v. Maharanee Inderjeet Singh* (1), relied on.

The agreement is not one by which any party is restricted absolutely from enforcing his rights under or in respect of any contract and section 28 of the Contract Act does not apply to such an agreement.

The right of appeal given by section 96, Civil Procedure Code, is clearly made subject to "any other law for the time being in force" and one of such laws being the law of contract, no appeal would lie where the parties enter into a valid and enforceable agreement making a decision final between them. Sub-clause 3 of section 96 which provides that no appeal shall lie from a decree passed by the Court with the consent of parties, is not limited to decrees passed in consequence of an adjustment under order 23, Civil Procedure Code, and there-

*Second Civil Appeal No. 42 of 1929, against the decree of M. Humayun Mirza, Subordinate Judge of Lucknow, dated the 12th of October, 1928, upholding the decree of Babu Hiran Kumar Ghoshal, Munsif, South Lucknow, dated the 18th of May, 1928.

(1) (1871) 14 M.I.A., 203.

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may be other decrees than decrees on adjustment passed by the court with the consent of parties. *Ramachandra Deo Guru v. Chaitana Sahu* (1), relied on. *Sankaranarayana Pillai v. Ramaswami Pillai* (2), *Pisani v. Attorney General for Gibraltar* (3), *Burgess v. Morely* (4), *Saiyad Zain v. Kalabhai Lallubhai* (5), and *Nidamarthi Mukkanti v. Thammana Ramayya* (6), referred to.

THE case was originally heard by MISRA, J., who referred it to a Bench consisting of two Judges. His order of reference is as follows :—

MISRA, J. :—The only question involved in the case is whether in view of an agreement arrived at between the parties in the trial court there was left any right of appeal to the parties against the decision of that court. It will appear that on the day of the trial parties closed their case with the following joint statement as noted down by the trial court in its proceedings :—

“At this stage the parties agree to leave the case for decision to the court. They agree that they will not produce any oral or documentary evidence. They agree to abide by the decision of the court whatever it may be. They give to the court power to take into account the documents already on the record and to summon any evidence it likes. They do not put any sort of limitation on the powers of the court.”

The learned Subordinate Judge in whose court the appeal was filed from the decision of the trial court has held that the agreement to his mind amounts to an abandonment of the right of appeal of both the parties, either on the point of law or on fact. Reliance has been placed by him on a decision of a single Judge of the Allahabad High Court in *Ballabh Das v. Sri Kishen* (7), and on a decision of the Madras High Court reported in *Sankaranarayana Pillai v. Ramaswami Pillai* (8).

(1) (1920) 18 A.L.J., 625.

(2) (1922) I.L.R., 47 Mad., 39.

(3) (1874) L.R., 5 P.C., 516.

(4) (1896) A.C., 136.

(5) (1899) I.L.R., 23 Bom., 752.

(6) (1902) I.L.R., 26 Mad., 76.

(7) (1926) A.I.R., All., 90.

(8) (1922) I.L.R., 47 Mad., 39.

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In second appeal it is contended before me that the principle of law laid down in these cases is not correct, and that in face of the provisions of section 96 of the Code of Civil Procedure which provides an appeal in all cases except where it is provided in the Code itself or by any other law for the time being in force that there shall be no appeal, it is not open to the parties by such an arrangement to deprive each other of the right of appeal which is conferred upon them by this express provision of law. As this is an important question of law and ought to be authoritatively decided by this Court, I refer the appeal for decision to a Bench of this Court under section 14(2) of Act IV of 1925.

Messrs. *M. Wasim* and *Zahur Ahmad*, for the appellant.

Mr. *Mahabir Prasad Srivastava*, for the respondent.

HASAN and PULLAN, JJ. :—This is the defendant's appeal from the decree of the Subordinate Judge of Lucknow, dated the 20th of October, 1928, confirming the decree of the Munsif South Lucknow, dated the 18th of May, 1928. The plaintiff brought the suit out of which this appeal has arisen for a declaration of certain easement rights in relation to his residential house. The proceedings in the suit while it was pending in the court of first instance abruptly terminated under an agreement of the parties. That agreement was as follows :—

“At this stage the parties agree to leave the case for decision to the court. They agree that they will not produce any oral or documentary evidence. They agree to abide by the decision of the court whatever it may be. They give to the court power to take into account the documents already on the record and to summon any

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evidence it likes. They do not put any sort of limitation on the powers of the court.”

In pursuance of this agreement the court pronounced its decision and it happened to be in favour of the plaintiff. From the decision of the first court the defendant preferred an appeal to the Court of the Subordinate Judge of Lucknow, who, on a preliminary objection taken by the plaintiff, held that the appeal was incompetent. He accordingly dismissed the appeal.

In second appeal it is contended that the agreement on its construction does not preclude the defendant from exercising his right of appeal which is given to him by law, that is section 96 of the Code of Civil Procedure, 1908, and secondly that, in any event, the decision of the court being neither a decision of an arbitrator nor on a settlement or adjustment of the claim, as contemplated by order XXIII, rule 1 of the Code of Civil Procedure, the decree of the court of first instance was appealable, notwithstanding the agreement.

The learned advocate for the appellant cited the decision of the High Court of Madras in *Sankaranarayana Pillai v. Ramaswamiah Pillai* (1). This decision, if we may respectfully say so, is exhaustive in its nature and deals with cases decided both in England and in India bearing on the question now being considered. Reference was made to the decision of their Lordships of the Judicial Committee in the case of *Pisani v. Attorney General for Gibraltar* (2) and to the decision of the House of Lords in *Burgess v. Morley* (3). Amongst other cases reference was also made to the case of *Saiyad Zain v. Kalabhai Lallubhai* (4) and *Nidamarthi Mukkanti v. Thammana Ramayya* (5).

(1) (1922) I.L.R., 47 Mad., 39.

(2) (1874) L.R., 5 P.C., 516.

(3) (1896) A.C., 186.

(4) (1899) I.L.R., 23 Bom., 752.

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Little need be said on the question of construction of the agreement, which we have reproduced *in extenso* in the foregoing part of this judgment. We think that the words are clear and emphatic. The parties gave their consent to the court, to the procedure which the court was to adopt in the matter of coming to a decision on the merits of the case then before it and they also gave their consent that such a decision will be binding on them. This is tantamount to saying that the decision shall be final and no right of appeal will be exercised by either of the parties. This being our construction of the agreement in question, we think that there is nothing in general principles which will have the effect of permitting any one of the parties to resile from the agreement. Reference in this connection was made to the provisions of section 28 of the Indian Contract Act, 1872. We are of opinion that that section has no application to the present case. The agreement with which we are concerned in the present case is not an agreement by which any party "is restricted absolutely from enforcing his rights under or in respect of any contract." In the first place there is no absolute restriction placed on any party from enforcing his rights. Indeed the rights were in controversy between the parties in the suit in which the agreement was arrived at. What was restricted was the right to challenge the propriety of the decree of the court of first instance. That clearly was a right in a rule of procedure provided by law. Secondly the case in which the agreement was made was not a case to enforce rights under or in respect of any contract.

Decisions in the High Courts in India have mainly proceeded on two lines, one, that there is no right of appeal, if the agreement is considered to be an adjustment of a suit within the meaning of order XXIII of the Code of Civil Procedure, and secondly if the effect of the agreement is to constitute the court an arbitrator

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in respect of the controversy in the suit. We are of opinion that it is not necessary that an agreement to support the exclusion of the right of appeal must always rest on one or the other of the two grounds just now mentioned. If the agreement is not void by the effect of any rule of law, we see no reason why it should not be enforced as an agreement. We have already rejected the contention that section 28 of the Indian Contract Act, 1872, makes the agreement void. This agreement has all the necessary elements of a valid contract. It is not disputed that it is supported by consideration and is free of any taint of undue influence, mistake or misrepresentation. We think that it is legally binding on the parties and, according to the decision of their Lordships of the Judicial Committee in the case of *Moonshi Amir Ali v. Maharanee Inderjeet Singh* (1), it is equally binding on the conscience of the parties.

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The only matter which now remains to be considered is the argument that section 96 of the Code of Civil Procedure gives a right of appeal to every party who feels aggrieved of the decision of the Court of first instance and that this right is not subject to any contract which may exist between the parties. It appears to us that there are two answers to this argument. The right of appeal is clearly made subject to "any other law for the time being in force." One of such laws is the law of contract. According to that law a party is entitled to the benefits of an agreement if it is a valid and enforceable agreement. We have already said that the agreement before us is of such a nature. Another answer is that sub-section (3) of section 96 of the Code of Civil Procedure 1908 clearly provides that no appeal shall lie from a decree passed by the court with the consent of parties. As against the applicability of this sub-section, the argument on behalf of the appellant is that there is "no decree passed by the court with the consent of parties" in the present case, because there was no adjust-

(1) (1871) 14 M.L.A., 203.

ment of the suit under order XXIII of the Code of Civil Procedure. We are unable to accept this argument. Sub-section (3), to which reference has just now been made, does certainly include decrees passed in consequence of an adjustment under order XXIII of the Code of Civil Procedure but the sub-section is not limited to that class of decrees only. There may be other decrees than decrees on adjustment, passed by the court with the consent of parties, and the decree in the case before us was such a decree. There can be no doubt on a proper construction of the agreement that the parties gave their consent to a decree which the court may pass in the subject matter of the controversy involved in the suit. This being so, we are of opinion that the appeal in the court below was incompetent and so is the second appeal in this Court. This view would seem to be in accordance with the view of their Lordships of the Judicial Committee in *Ramachandra Deo Garu v. Chaitana Sahu* (1).

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The appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

*Before Sir Louis Stuart, Kt., Chief Judge and Mr. Justice
 Bisheshwar Nath Srivastava.*

GANGA PERSHAD (PLAINTIFF-APPLICANT) v. RAM
 NARAIN AND OTHERS (DEFENDANTS-OPPOSITE PARTY).*

*Civil Procedure Code (Act V of 1908), section 115—Award set
 aside for technical misconduct and trial started by court—
 Revision against the order setting aside the award,
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Where a court sets aside an award on the ground of technical misconduct by the arbitrator and resumes the hearing of the suit held, that it cannot be said that there has been a

*Section 115 Application No. 29 of 1928, against the order of Mohammad Abdul Azim Siddiqi, Additional Subordinate Judge of Lucknow, dated the 6th of April, 1928.

(1) (1920) 18 A.L.J., 625.