

co-sharer will be on behalf of all. It is true that the parties were agreed that they were not members of a joint Hindu family, but the arbitrator having held that there had been no previous partition, the position of the parties was that of tenants-in-common. No exception can be taken to the proposition stated by the arbitrator about the possession of any co-sharer being presumed to be on behalf of all. The plea therefore of an objection to the legality of the award being apparent on the face of it is also without substance, and specially so, in the light of the observations of the Judicial Committee referred to above.

The result is that the application fails and is dismissed with costs.

Application dismissed.

REVISIONAL CIVIL

*Before Mr. Justice Muhammad Raza and Mr. Justice
H. G. Smith*

DURGA PRASAD AND ANOTHER (DEFENDANTS-APPLICANTS) *v.*
BARATI LAL (PLAINTIFF-OPPOSITE PARTY)*

1933
October, 25

Civil Procedure Code (Act V of 1908), section 115, Schedule II, paragraph 5(2)—Court appointing fresh arbitrators—Provisions of Schedule II, paragraph 5(2) not complied with—Order without jurisdiction whether liable to be set aside.

In certain circumstances the court is vested with jurisdiction to appoint a fresh arbitrator, but this authority to appoint does not arise unless the necessary conditions precedent have been fulfilled. Where a court appoints an arbitrator without complying with the prescribed formalities, his action is without jurisdiction or at least tainted with material irregularity. If, therefore, the provisions of schedule II, paragraph 5(2) of the Code of Civil Procedure are not properly complied with, an order appointing fresh arbitrators is liable to be set aside under section 115 of the Code of Civil Procedure by reason of irregularity in procedure. *Abdul Ghani v. Din Dayal* (1),

*Section 115, Application No. 59 of 1932, against the order of B. Bhagwat Prasad, Subordinate Judge of Mohanlalganj, at Lucknow, dated the 6th of April, 1932.

(1) (1919) I.L.R., 41 All., 578.

1933

DURGA
PRASAD
2.
BARATI LAL

Jagannath Sahu v. Chhedi Sahu (1), and *Puran Lal v. Rup Chand* (2), relied on.

Messrs. *Mohammad Ayub, Ghulam Hasan and Akhtar Husain*, for the applicants.

Messrs. *Hyder Husain and Raj Kumar Srivastava*, for the opposite party.

RAZA and SMITH, JJ.:—This is an application under section 115 of the Code of Civil Procedure by two defendants, Durga Prasad and Janeshwar Dass, the opposite party being the plaintiff, Barati Lal. The application is against an order made on the 6th of April, 1932, by the learned Subordinate Judge of Mohanlalganj at Lucknow.

The facts are as follows: The above three parties entered into an agreement on the 28th of May, 1928, to refer to the arbitration of Mr. Salig Ram, Advocate, Lala Gobind Prasad, and Lala Munne Lal, the division of their joint family property. On the 1st of October, 1931, the matter came into court through an application, purporting to be under section 17 of the second schedule of the Code of Civil Procedure, made by Barati Lal. In this application he represented that the division of the property had been completed in July, 1930, but that no final award had been made owing to the fact that Lala Gobind Prasad and Lala Munne Lal had not signed it. He requested that the arbitration agreement of the 28th of May, 1928, be filed in court, and that the arbitrators should be directed to file their award in court on a date to be fixed. Notices were ordered to be issued to the defendants for the 31st of October, 1931, to show cause why the agreement should not be filed. On the date fixed, the defendants did not appear. Apparently the service on Janeshwar Dass was held insufficient, and fresh notice was ordered to go to him for the 14th of November. Mr. Salig Ram filed the agreement on the 31st of October. On the 14th of November, Durga Prasad appeared in person, but Janeshwar Dass was still insufficiently served, and

(1) (1928) I.L.R., 51 All., 501.

(2) (1931) I.L.R., 53 All., 778.

a fresh notice was ordered to be issued to him for the 5th of December. On that date, the defendants were both absent after service, and the following order was passed:

1933
 DURGA
 PRASAD
 v.
 BARATI LAL

"Issue order of reference to Mr. Salig Ram, Advocate, and two others. Award to be filed on 9-1-1932. Plaintiff to pay process fees in two days."

*Raza and
 Smith, JJ.*

On the 9th of January, 1932, the defendant No. 1, Durga Prasad, appeared in person. Mr. Salig Ram applied for an extension of time. The time was extended till the 28th of January. On that date the defendants did not appear. The plaintiff, Barati Lal, made an application that instead of Munne Lal and Gobind Prasad some other persons be appointed arbitrators, "as probably they are not inclined to arbitrate." The order passed on this application was:

"Serve duplicate of the application on Munne Lal and Gobind Prasad and put up on 15-2-1932 for disposal."

We were informed that notices were sent to the defendants as well as to the arbitrators, but we find nothing on the record to show that that was done. On the 15th of February, a vakil appeared for Munne Lal and Gobind Prasad, and he said that they were prepared to give their award, but all the papers were in the possession of Mr. Salig Ram, and they could not draw up their award without them. It was then ordered that Mr. Salig Ram should bring all the papers on the following day, and that Gobind Prasad should be produced before the court by his vakil on that same day. Munne Lal, it was noted, was said to be at Bombay. On the 16th of February, Mr. Salig Ram produced the arbitration proceedings, and the papers were ordered to be handed over to Gobind Prasad with a direction to file his award on the 3rd of March. Mr. Salig Ram was ordered to file his award also on that date. Nothing was said in the order about Munne Lal. On the 3rd of March, the defendants were absent.

1933

DURGA
PRASAD
v.
BARATI LAL

*Raza and
Smith, JJ.*

Gobind Prasad applied for time to file his award. Mr. Salig Ram said that his award was ready, but he wished before filing it to see the award of Gobind Prasad and Munne Lal. The case was then adjourned to the 18th of March, on which date the award was ordered to be filed. On the 18th of March, the defendants were absent, and so were Gobind Prasad and Munne Lal. Mr. Salig Ram was present. The learned Subordinate Judge wrote that sufficient time had been given to Gobind Prasad and Munne Lal to file their award, and that it appeared that they did not want to arbitrate. He proceeded to pass the following order:

“Issue notice to defendants for 6-4-1932 to show cause why Gobind Prasad and Munne Lal should not be removed and another person be appointed in their stead. Plaintiff to pay process fees in two days.”

On the 6th of April, Durga Prasad appeared in person, Janeshwar Dass was absent, after service held sufficient. Mr. Salig Ram was present. Munne Lal and Gobind Prasad were absent. Durga Prasad put in an application objecting to the appointment of fresh arbitrators, and asked for two months' time. On that application the learned Subordinate Judge passed the order against which this application in revision has been made. He pointed out in his order that neither Munne Lal nor Gobind Prasad, nor their Counsel, attended the court on the 18th of March, and were again absent on the 6th of April. Accordingly he proceeded to appoint Babu Ram Prasad, a Pleader, and Babu Shankar Sahai, an Advocate, as arbitrators in their places, but he limited their proceedings to “the items which are still to be decided.” It was directed that they should file their award on or before the 30th of April, 1932. It was ordered that Munne Lal and Gobind Prasad should be directed to return the papers that had been given to them, and that those papers should be made over to the newly appointed arbitrators.

It is urged for the applicants that the provisions of schedule II of the Code of Civil Procedure were not complied with by the learned Subordinate Judge. It is represented that the notice to the defendant No. 2 was not sufficiently served, and that the defendant No. 1 was only served on the 4th of April, 1932. As regards the notice to the defendant No. 2, it appears to have been served by affixation on the 4th of April. The notice to the defendant No. 1 was served on the 31st of March, and not on the 4th of April, 1932. It, therefore, appears that even if the defendant No. 2 be taken to have been sufficiently served, the seven clear days prescribed by section 5(2), schedule II had not elapsed after the service of the notices on Durga Prasad and Janeshwar Dass when the learned Subordinate Judge passed his order of the 6th of April, appointing fresh arbitrators in the places of Munne Lal and Gobind Prasad. It is urged that in these circumstances the appointment of the fresh arbitrators was *ultra vires*. Reference was made to three decisions of the Allahabad High Court, *Abdul Ghani v. Din Dayal* (1), *Jagannath Sahu v. Chhedi Sahu* (2) and *Puran Lal and others v. Rup Chand and others* (3). In all those three cases orders appointing arbitrators were set aside under section 115 of the Code of Civil Procedure by reason of irregularities in procedure.

In our opinion the order of the learned Subordinate Judge appointing fresh arbitrators cannot be sustained. As was remarked in the ruling reported in *Abdul Ghani v. Din Dayal* (1), "it is not to be doubted that in certain circumstances the court is vested with jurisdiction to appoint a fresh arbitrator. But this authority to appoint does not arise unless the necessary conditions precedent have been fulfilled." In the present case the provisions of section 5(2) of the second schedule were not properly complied with. Where a court appoints an arbitrator without complying with the prescribed

1933

 DURGA
 PRASAD
 v.
 BARATI LAL

*Rana and
 Smith, JJ.*

(1) (1919) I.L.R., 41 All., 578 (580). (2) (1928) I.L.R., 51 All., 501.
 (3) (1931) I.L.R., 53 All., 778.

1933

DURGA
PRASAD
v.
BARATI LAL

Raza and
Smith, JJ.

formalities, his action, according to the view of the Allahabad High Court in *Jagannath Sahu v. Chhedi Sahu* (1), is "without jurisdiction or at least tainted with material irregularity." A similar view was taken in the case reported in *Puran Lal v. Rup Chand* (2) in which the two previous Allahabad decisions, to which we have made reference, were followed.

The result is that we allow this application with costs. The learned Subordinate Judge must now take up the case and decide it according to law.

Application allowed.

APPELLATE CIVIL

*Before Sir Syed Wazir Hasan, Knight, Chief Judge and
Mr. Justice Bisheshwar Nath Srivastava*

1933
October, 26

BACHCHEY LAL (DEFENDANT-APPELLANT) v. GUNDOO MAL
(PLAINTIFF-RESPONDENT)*

*Accounts—Settlement—No allegation of fraud or coercion
—Accounts, when can be opened.*

Where the case is one of parties having gone into accounts and settled them after ascertainment of the exact balance and there is no allegation of any fraud or coercion and all that is alleged by the defendant is that the settlement is vitiated by certain mistakes justifying the reopening of the accounts, which, however, he fails to make out, no question of the examination of the account books arises and the court cannot go behind the settlement arrived at between the parties and reopen the accounts. *Williamson v. Barbour* (3), *Henry McKellar v. John Wallace* (4), and *Bhagwan Bakhsh Singh v. Joshi Damodarji* (5), relied on.

Mr. B. K. Dhaon, for the appellant.

Messrs. M. Wasim and Makund Behari Lal, for the respondent.

HASAN, C.J. and SRIVASTAVA, J.:—This is a defendant's appeal against the decree, dated the 27th of

*Second Civil Appeal No. 166 of 1932, against the decree of Babu Mahabir Prasad Varma, Subordinate Judge of Lucknow, dated the 27th of February, 1932, confirming the decree of Saiyid Yaqub Ali Rizvi, Munsif, North Lucknow, dated the 22nd of August, 1931.

(1) (1928) I.L.R., 51 All., 501 (503). (2) (1931) I.L.R., 53 All., 778.

(3) (1878) 9 Ch.D., 520.

(4) (1853) 5 M.L.A., 372.

(5) (1919) I.L.R., 42 All., 230.