

view expressed in *Nawab Mirza Muhammad Bakar Ali Khan v. Muhammad Bakar* (1) which was followed in *Chhotey Lal v. Devi Brij Rani* (2) and that therefore the principle of *stare decisis* applies. I must therefore bow to this consideration and following the principle of *stare decisis*, answer the questions referred to the Full Bench in the way they have been answered by the Hon'ble CHIEF JUDGE.

BY THE COURT—The first part of the question is answered in the affirmative and the second part in the negative.

REVISIONAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice J. J. W. Allsop

MOHAR SINGH (PLAINTIFF-APPELLANT) v. AMAR SINGH
(DEFENDANT-OPPOSITE PARTY)*

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October, 6

Civil Procedure Code (Act V of 1908), Schedule II, paragraph 1—Arbitration—Reference to arbitration—Commissioner appointed by court for recording evidence of certain witnesses—Parties presenting an application to Commissioner, addressed to court, that they had agreed to refer the case to arbitration—Presentation of application, whether valid—Court, whether justified in referring case to arbitration on that application.

Where a commissioner was appointed by a court for the examination of certain witnesses and on the date fixed by the commissioner for examination of the witness, the parties presented to the commissioner an application addressed to the court trying the suit stating that the parties had agreed that the matter in difference between them should be referred to the arbitration of three persons named in the application and the commissioner thereupon verified the correctness of the application and forwarded the application for reference to arbitration together with the proceedings recorded by him to the court, held, that the commissioner was an officer of the court and in

*Section 115, Application No. 103 of 1932, against the order of M. Mohammad Tufail Ahmad, Munsif of Utraula, district Gonda, dated the 26th of September, 1932.

(1) (1907) 10 O.C., 291.

(2) (1929) 6 O.W.N., 1042.

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the circumstances the presentation of the application to him, addressed to the court which was seized of the case, was valid and constituted sufficient compliance with the provisions of rule 1, schedule II of the Code of Civil Procedure and the court had therefore every authority to make a reference thereon. *Asutosh Deb Sarkar v. Apurba Kumar Deb Sarkar* (1), distinguished.

Mr. *Mohammad Ayub*, for the applicant.

Messrs. *Ghulam Hasan* and *Iftikhar Husain*, for the opposite party.

SRIVASTAVA and ALLSOP, JJ.:—This is an application for revision of the order dated the 26th of September, 1932, passed by the Munsif of Utraula, district Gonda.

In a suit pending in the court of the Munsif of Utraula the plaintiff applied for examination of some witnesses in Punjab by a commission. The application was granted and the Subordinate Judge of Pahlia, district Gujerat, was requested to appoint a commissioner for the purpose. The commissioner so appointed fixed the 16th of September, 1932, for examination of the plaintiff's witnesses. On that date the parties did not put in an appearance before the commissioner until a late hour when they informed him that they had agreed to refer their disputes to arbitration. They also presented before the commissioner an application addressed to the Munsif of Utraula, stating that the parties had agreed that the matter in difference between them should be referred to the arbitration of three persons named in the application. The commissioner thereupon recorded the statements of the parties who verified the correctness of the application. On the same date the commissioner forwarded the application for reference to arbitration together with the proceedings recorded by him to the Munsif of Utraula. On the 22nd of September, 1932, the plaintiff stated that though the parties had filed the application before the commissioner for the case being referred to arbitration, yet the plaintiff was

(1) (1909) 4 I.C., 370.

not willing now to make the reference. It was con-
 tended before the learned Munsif that the application in
 question had never been properly presented to the court,
 and that the court had therefore no authority to make
 a reference under paragraph 1, schedule II of the Code
 of Civil Procedure. The Munsif disallowed the conten-
 tion and held that the application which was handed to
 the commissioner in Punjab fully complied with the
 requirements of paragraph 1, schedule II. It is this
 order of the learned Munsif which forms the subject of
 the application for revision before us.

It is not denied by the learned Counsel for the appli-
 cant that all the parties to the suit were present before
 the commissioner on the 16th of September, 1935, and
 that all of them agreed to make the reference to arbitra-
 tion. The only contention urged before us is that this
 application was never properly presented to the court
 as required by rule 1 of schedule II of the Code
 of Civil Procedure. The contention is much too
 technical and disingenuous and in our opinion has no
 substance. No doubt the commissioner was appointed
 for the purpose of examining the plaintiff's witnesses,
 but being so appointed he was in the position of an
 officer of the court and had authority to act as such in
 all matters connected with or arising out of the examina-
 tion of witnesses which he was required to carry out.
 On the date fixed for the examination of the witnesses
 the plaintiff stated before him that he did not want to
 examine any witnesses because the parties had agreed to
 get their disputes decided by certain arbitrators chosen
 by them. When the parties under these circumstances
 presented to him the application under rule 1 of
 schedule II, addressed to the court which was seized of
 the case, we are of opinion that the presentation was
 valid and constituted sufficient compliance with the
 provisions of rule 1, schedule II of the Code of Civil
 Procedure. Reliance was placed on behalf of the appli-
 cant on rule 18 of Chapter II of the Oudh Civil Rules.

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This rule only provides that applications required by law to be made by a party in any court must be made either by the party himself, his pleader or his recognized agent. In this case the application in question was admittedly presented to the commissioner by the parties to the suit. The presentation therefore does not offend against the provisions of this rule.

Reference was also made to the decision of the Calcutta High Court in *Asutosh Deb Sarkar v. Apurba Kumar Deb Sarkar* (1). The report does not show whether the application in that case was addressed to the commissioner or to the court. Further, the facts of that case are very different from those of the present one. When the application for reference was made in the case above referred to, the parties were under the impression that the arbitrator would act without fees. It was discovered later on that he would not act without remuneration. So, in the events which happened, there was never any final agreement between the parties.

We are therefore of opinion that the order passed by the lower court is correct, and must be upheld. As we are of opinion that this application has no substance on the merits, it is not necessary for us to decide the objection raised by the opposite party that the application did not lie under section 115 of the Code because there was no "case" within the meaning of section 115 of the Code of Civil Procedure.

The application therefore fails and is dismissed with costs.

Application dismissed.

(1) (1909) 4 I.C., 370.