

MISCELLANEOUS CIVIL

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

IMTIAZ KHAN (PLAINTIFF-APPELLANT) *v.* DOST MOHAM-
MAD KHAN AND OTHERS (DEFENDANTS-RESPONDENTS)*

1933
July, 25

Civil Procedure Code (Act V of 1908), Schedule II, paragraph 1
—Arbitration—Suit for possession of tenancy plots against
several defendants—Some defendants absent and suit tried
ex parte against them—All parties interested not agreeing
that the matter be referred to arbitration—Award, if valid.

Held, that where all the parties interested have not agreed that
the matter be referred to arbitration, any award that may have
been given is invalid.

Where, therefore, in a suit for possession of tenancy plots two
out of the three defendants did not appear and proceedings
were *ex parte* against them but they were highly interested
parties and in no sense merely parties *pro forma* the reference
to arbitration at the instance of the plaintiff and the third
defendant who alone had appeared and contested the suit and
the award pronounced on the basis of it were null and void.
Haswa v. Mahbub (1), and *Potita Pavana Panda v. Narsinga*
Panda (2), relied on.

Mr. *Hakimuddin*, for the appellant.

Mr. *D. K. Seth*, for the respondents.

RAZA and SMITH, JJ.:—This is an appeal from a
decision by the learned Additional Subordinate Judge
of Partabgarh.

By the decision under appeal the learned Additional
Subordinate Judge set aside a decree passed by the
learned Munsif. The Munsif's decree was based upon
an award made by the arbitrator. The plaintiff in the
suit was one Imtiaz Khan, who sued the widow of his
deceased brother, Musammat Amraula, and her sons,
Auser Khan and Dost Mohammad Khan, for recovery

*Miscellaneous Appeal No. 2 of 1932, against the order of M. Moham-
mad Abdul Haq, Additional Subordinate Judge of Partabgarh, dated the
18th of November, 1931, setting aside the decree of Babu Kali Charan
Agarwal, Munsif of Partabgarh, dated the 29th of July, 1931.

(1) (1911) 8 A.L.J.R., 645.

(2) (1919) I.L.R., 42 Mad., 632.

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of possession over certain tenancy plots in village Behrapur in the district of Partabgarh. The two sons, Auser Khan and Dost Mohammad Khan, did not appear to contest the suit, and proceedings were started *ex parte* against them. Their mother, however, and Imtiaz Khan came to an agreement that the matter should be referred to arbitration and it was so referred, and, as has been already mentioned, the Munsif's decision was based upon the award of the arbitrator. As a formality the statement of one witness was recorded, and the decree based on the award was made binding on the remaining defendants, Auser Khan and Dost Mohammad Khan (defendants Nos. 2 and 3 respectively). Afterwards the defendant No. 3, Dost Mohammad Khan, applied for the setting aside of the *ex parte* proceedings against him, but as he did not pay the amount of the costs demanded, his application was dismissed. He then went in appeal, raising various points, amongst them being that the reference to arbitration was illegal, and that the award was null and void. The learned Additional Subordinate Judge in the end concluded that the reference to arbitration and the award pronounced on the basis of it were null and void, and he accordingly set aside the decree of the Munsif, and remanded the case to him for trial according to law as against all the defendants. It is against this order that the plaintiff has now come here in appeal.

The difficulties in this case have all arisen from the fact that the learned Munsif did not appreciate the necessity of complying fully and completely with the provisions of paragraph 1 of the Second Schedule of the Code of Civil Procedure. In the first place, no application was made to him in writing that the matter should be referred to arbitration, although sub-clause (2) of the paragraph in question runs:

“Every such application shall be in writing and shall state the matter sought to be referred.”

We may mention also that in his order referring the matter to arbitration the learned Munsif did not set out clearly the matter sought to be referred. He thus totally ignored the provisions of sub-clause (2) of paragraph 1 of the Second Schedule.

As to the application not being in writing despite the use of the word "shall" in the sub-clause, there are a number of authorities, which we need not set out, holding that that provision is directory, and not mandatory. We feel bound to say that these rulings do not seem to be in accord with the clear phraseology of this sub-clause, but we do not think it necessary to express any definite opinion on the point, or to lay down a contradictory view, because in our opinion the matter can be decided on another ground.

That ground is that all the parties interested in the present matter did not agree that the matter should be referred to arbitration. It is true that Auser Khan and Dost Mohammad Khan, defendants Nos. 2 and 3, did not appear, and proceedings were *ex parte* against them, but it is clear from the pleadings that they were highly interested parties, and in no sense merely parties *pro forma*. In this connection there is a long chain of authorities, of which we may cite only two, namely those reported in *Haswa v. Mahbub and another* (1) and *Potita Pavana Panda and others v. Narsinga Panda and others* (2), in support of the position that where all the parties interested have not agreed that the matter be referred to arbitration, any award that may have been given is invalid. The head-note of the former of the two rulings cited runs as follows:

"The question whether a party is interested or not in a reference to arbitration depends upon his position at the time when the reference was made. The Code does not contemplate a reference to arbitration between the plaintiff and one defendant,

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and a trial between the plaintiff and another defendant.

A suit was brought against two persons. The plaintiff and one of the defendants referred the matters in dispute to arbitration. The award was given by two of the arbitrators whereby the non-joining defendant was exempted from the plaintiff's claim and the suit was dismissed. Objections were taken to the award but they were overruled and a decree was passed in accordance with the award: Held, that the reference was invalid and the award which followed thereon was not a valid award."

In the second of the above two rulings, the head-note runs thus:

"Where a suit was referred to arbitration at the instance of some of the parties thereto, but a defendant against whom relief was claimed in the plaint who was *ex parte* in the suit did not join in the reference though he had an interest in the subject matter of the reference, and a decree was passed in accordance with the award of the arbitrators,

Held, that the Court had no jurisdiction to make the order of reference under Schedule II, rule 1 of the Code of Civil Procedure, that the decree was invalid and should be set aside, and that the suit should be proceeded with on the merits.

If a person is *ex parte* in a suit, he does not thereby cease to be a party interested in the reference."

We find, incidentally, that the formal oral evidence which the Munsif recorded as against the *ex parte* defendants was vague and unreliable.

In these circumstances we are of opinion that the order of the learned Additional Subordinate Judge was perfectly correct, and must be upheld. We accordingly dismiss the appeal with costs.

Appeal dismissed.