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So far as we can see, there is nothing to debar the judgment-debtor from urging the legal plea, based on the provisions of the Code of Civil Procedure, that the agreement for payment of enhanced interest is not enforceable in execution.

Accordingly, had we held the present execution application to be within time, we should have taken the view that interest could not be charged at a higher rate than 6½ per cent. per annum. Taking the view we do, however, of the point of limitation, we allow the appeal and dismiss the present application for execution. The judgment-debtor-appellant is allowed his costs in both the Courts.

[*Srivastava, A. C. J. and Smith, J.*]

Appeal allowed

REVISIONAL CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice G. H. Thomas

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September, 11

RUP NARAIN (PLAINTIFF-APPLICANT) *v.* MUSAMMAT NAND RANI AND ANOTHER (DEFENDANTS-OPPOSITE PARTY)*

Civil Procedure Code (Act V of 1908), section 115 and Schedule II, paragraph 1—Suit for restitution of conjugal rights—Suit referred to arbitration—Award—Decree in terms of award—Reference to arbitration of suits for restitution of conjugal rights, if prohibited—Revision against the decree on award, if competent.

An application for revision against an order decreeing plaintiff's suit in terms of an award is not competent. *Ghulam Jilani* v. *Mohammad Hassan* (1), *Baldeo Sahai* v. *Abdur Rahim* (2), and *Pandit Krishna Behari* v. *Mohammad Ismail* (3), relied on.

It is entirely within the discretion of a Civil Court to grant or to refuse to grant a decree for restitution of conjugal rights but it cannot be held that such a suit cannot come within the purview of paragraph 1 of Schedule II of the Code of Civil Procedure and cannot be referred to arbitration even where all parties interested therein agree to have the dispute settled by

*Section 115 Application No. 14 of 1933, against the Order of Babu Kanta Nath Gupta, Munsif of Shahabad, District Hardoi, dated the 14th of December, 1932.

(1) (1901) I.L.R., 29 I.A., 51. (2) (1932) I.L.R., 7 Luck., 642.
(3) (1933) 10 O.W.N., 669.

arbitration. There is no provision of law which excludes such suits from the purview of Schedule II of the Code of Civil Procedure.

Hira v. *Dina* (1), and *Musammat Kalabatu* v. *Prabh Dial* (2), dissented from.

Mr. *K. N. Tandon*, for the applicant.

Mr. *S. D. Misra*, for the opposite party.

NANAVUTTY and THOMAS, JJ.:—This is an application for revision against an order of the learned Munsif of Shahabad in the district of Hardoi, decreeing the plaintiff's suit in terms of the award, but setting aside condition No. 3 in the award.

A preliminary objection has been raised by the learned Counsel for the defendants-opposite parties that no revision lies, and in support of this contention the judgment of their Lordships of the Privy Council in *Ghulam Jilani and others* v. *Muhammad Hussan* (3) has been cited, in which their Lordships held that they were inclined to agree with the view that in the case of an award revision would be more objectionable than an appeal and that if an application in revision were admissible in a case where the decree followed the award of the arbitrator, the finality of any award would be open to question. It was, therefore, held that an application for revision was incompetent.

In *Baldeo Sahai and another* v. *Abdur Rahim* (4) it was held by a Bench of two learned Judges of this Court that no appeal or revision lay against a decree passed in accordance with the award of the arbitrator.

Again in *Pandit Krishna Behari* v. *Mohammad Ismail* (5) it was held by the late Mr. Justice RAZA that the intention of paragraph 15 of Schedule II of the Code of Civil Procedure is clearly to give finality to a decree passed in accordance with the decision of the arbitrator and under clause (*c*) of paragraph 15 even in case of an invalid award, if the party concerned fails to impeach

(1) 37 P.R., 1895. (2) (1918) 45 I.C., 163.
(3) (1901) I.L.R., 29 I.A., 51. (4) (1932) I.L.R., 7 Luck., 642.
(5) (1933) 10 O.W.N., 669.

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it before the Court making the reference or if his objection on the ground of invalidity of the award is disallowed and a decree is passed in accordance therewith, the award becomes final and the decree passed upon it is not open to appeal or revision.

Nanavutty and Thomas, JJ.

In view of these rulings of this Court it seems to us that the plaintiff-applicant Rup Narain is not competent to file this revision against the order of the Munsif of Shahabad, decreeing the plaintiff-applicant's suit in terms of the award.

The learned counsel for the plaintiff-applicant, however, has raised an entirely new point of law, which he did not take in his application for revision, and has argued before us that notwithstanding the award and the decree based thereon, it is open to the plaintiff-applicant to challenge the jurisdiction of the Court to refer a suit for restitution of conjugal rights to the decision of arbitrators and in support of his contention he has relied upon a ruling of the Punjab Chief Court reported in *Hira and others* v. *Dina* (1), which was followed by the same Court in *Musammat Kalabatu* v. *Prabh Dial* (2). It is true that in these two cases the Punjab Chief Court held that in a suit for restitution of conjugal rights the court could not refer the dispute between the parties to the decision of arbitrators. We have carefully examined the rulings cited by the learned counsel for the plaintiff-applicant. The ruling reported in *Hira and others* v. *Dina* (1) was a case of a minor husband suing through his father as next friend for the custody of his minor wife, who was being sued through her mother, and it was held in that case that the first Court acted with material irregularity inasmuch as it failed to record an order under section 462 of the Code of Civil Procedure, before allowing the case to be referred to arbitrators by the guardian of the minor defendant and that it was not competent to the Court to delegate to the arbitrators the question as to whether

(1) 37 P.R., 1895. (2) (1918) 45 I.C., 163.

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or not the custody of the wife be decreed. Such a question, specially when either party is a minor, is entirely one within the discretion of the Court.

No authoritative ruling of any High Court in India or of their Lordships of the Privy Council has been cited in support of the broad proposition that a Civil Court is not competent to refer a suit for restitution of conjugal rights to arbitration, if all parties interested therein so desire. In the particular case of *Hira and others* v. *Dina* (1) the parties were minors, and as in the opinion of the Chief Court of the Punjab their interests were not properly safeguarded by the trial court when it referred the suit to the decision of the arbitrators, that Court naturally in the exercise of its revisional jurisdiction set aside the entire proceedings and remanded the case for trial *de novo*. It is true that the rule of law is firmly established that it is entirely within the discretion of the civil court to grant or refuse to grant a decree for restitution of conjugal rights, but it has nowhere been held that a suit for restitution of conjugal rights is not such a suit, as comes within the purview of paragraph 1 of Schedule II of the Code of Civil Procedure and cannot be referred to arbitration, even where all parties interested therein agree to have the dispute settled by arbitration. We are not aware of any provision of law, which excludes suits for restitution of conjugal rights from the purview of Schedule II of the Code of Civil Procedure. Probate proceedings and proceedings in execution of a decree certainly cannot be referred to arbitration, and Schedule II of the Code of Civil Procedure cannot apply to such proceedings. In our opinion the function of the Civil Court to grant or refuse to grant a decree for restitution of conjugal rights is not delegated to arbitrators when such a suit is referred to the decision of arbitrators under the provisions of Schedule II of the Code of Civil Procedure. The Court

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(1) 37 P.R., 1895.

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has ample powers to remit the award for reconsideration to the arbitrators or to refuse to make the award a decree of the Court. Even if it be deemed that to some extent the discretionary powers of the Civil Court to grant or refuse to grant a decree for restitution of conjugal rights have been taken away from it, when such a suit is referred to arbitration, we feel that we are not competent to hold that such suits for restitution of conjugal rights, in the absence of any provision to that effect, do not come within the ambit of paragraph 1 of Schedule II of the Code of Civil Procedure. Except for the two cases, decided by the Punjab Chief Court, and published in unauthorised reports, we have not been referred to a single decision of any High Court in India, upholding the view urged by the learned counsel for the applicant. The applicant himself in the trial court wished the matter to be decided by the arbitration of Pandit Sundar Lal, Vakil, rather than by the Court, and the lower court has decreed the suit of the applicant for restitution of conjugal rights in accordance with the award with one slight modification. We are of opinion that in view of the ruling of their Lordships of the Privy Council in *Ghulam Jilani and others* v. *Muhammad Hussan* (1) this application for revision filed by the plaintiff-applicant is not competent.

Nanavutty and Thomas, JJ.

We accordingly uphold the preliminary objection and dismiss this application for revision with costs.

Application dismissed.

(1) (1901) L.R., 29 I.A., 51(61).