

I accordingly allow these appeals, modify the judgments and decrees of the lower courts and decree also the plaintiff's claim for cesses with costs throughout.

*Appeal allowed.*

1933

SYED  
MOHAMMAD  
AGHA  
v.  
BAJNATH  
SINGH

## APPELLATE CIVIL

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

JAGANNATH SINGH AND ANOTHER (PLAINTIFFS-APPELLANTS)  
v. MADHO SINGH AND OTHERS (DEFENDANTS-RESPONDENTS)<sup>1</sup>

1934  
October 30

*Civil Procedure Code (Act V of 1908), Schedule II, paragraph 1(2)—Provision in paragraph 1(2) of Schedule II that "application shall be in writing", whether mandatory or merely directory—Reference made on statements of counsel—Award, whether invalid.*

The expression 'Application shall be in writing' in paragraph 1, clause (2) of the second Schedule of the Code of Civil Procedure is merely directory and not mandatory. *Mirza Mohammad Hasan Beg v. Mirza Shakir Beg* (1), *Mahabir v. Manohar Singh* (2), *Waliullah v. Bhaggan* (3), *Shama Sundaram v. Abdul Latif* (4), *Abdul Hamid v. Riaz-ud-din* (5), and *Umed Singh v. Sobhag Mal* (6), referred to.

Where, therefore, the counsel for both parties and the parties to an appeal express a desire that all the points involved in the appeal be referred to the arbitration of a certain person and accordingly the statements of the counsel of the parties are recorded and the case is referred to arbitration, the award is not invalid on the ground that there was no valid reference to arbitration inasmuch as no application in writing was made by the parties to refer the dispute to arbitration.

Mr. D. K. Seth, for the appellants.

Mr. K. N. Tandon, for the respondents.

NANAVUTTY and THOMAS, JJ.:—These are two cross-appeals from a judgment of the learned Additional

\*First Civil Appeal No. 1 of 1933, against the decree of Pandit Krishna Nand Pande, Additional Subordinate Judge of Unao, dated the 29th of September, 1932.

(1) (1923) 11 O.L.J., 142.

(3) (1925) A.I.R., Oudh, 267.

(5) (1907) I.L.R., 30 All., 32.

(2) (1923) I.L.R., 46 All., 208.

(4) (1899) I.L.R., 27 Cal., 61.

(6) (1915) L.R., 43 I.A., 1.

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SINGH

Subordinate Judge of Unao in a suit for partition brought by Jagannath Singh and Sardar Singh.

*Nanavutti  
and Thomas,  
JJ.*

At the hearing of this appeal the learned counsel of both parties and the parties themselves expressed a desire that all the points involved in these appeals be referred to the arbitration of Mr. Ghulam Hasan Butt, an Advocate of this Court. Accordingly the statements of the counsel of the parties were recorded and the case was referred to the arbitration of Mr. Ghulam Hasan. The arbitrator filed his award on the 21st of September, 1934. The result of his award is to confirm the judgment and decree of the trial Court.

The defendants-appellants have filed objections to the award and they have raised two pleas in their objections. In the first place it is contended on their behalf that there was no valid reference to arbitration as required by the Code of Civil Procedure inasmuch as no application in writing was made by the parties to refer the dispute to arbitration (see paragraph 1, subsection 2 of the second Schedule of the Code of Civil Procedure). In our opinion there is no force in this contention. In *Mirza Mohammad Hasan Beg and another v. Mirza Shakir Beg and others* (1) Mr. Justice SAIYID WAZIR HASAN held that the expression "application shall be in writing" in paragraph 1, clause (2) of the second Schedule of the Code of Civil Procedure was merely directory and not mandatory.

Again in *Mahabir v. Manohar Singh* (2) Mr. Justice KANHAIYA LAL held that where the pleaders of both the parties to a pending suit stated that they agreed to a reference to arbitration, and the statements were recorded and an order of reference was accordingly made by the Court, though not upon a written application, the award based upon the reference was valid.

Similarly in *Waliullah v. Bhaggan* (3) a learned Judge of this Court held that an award could not be set aside

(1) (1923) 11 O.L.J., 142.

(2) (1923) I.L.R., 46 All., 208.

(3) (1925) A.I.R., Oudh, 269.

merely because the reference to arbitration was not made in writing.

In Sir Dinshaw Mulla's Commentary on the Code of Civil Procedure (10th edition, 1934, at page 1260) we find the learned commentator making the following observations on the phrase that the "application shall be in writing."

"The provision requiring the application to be in writing is directory only, and not imperative; hence an award is not invalid merely because the application for the order of reference was not made in writing. See *Shama Sundaram v. Abdul Latif* (1) and *Abdul Hamid v. Riaz-ud-din* (2). In a recent case before the Judicial Committee where the agreement was in writing but it was not signed by one of the parties, it was held that paragraph 1 of this Schedule did not require that the writing should of necessity be signed, see *Umed Singh v. Sobhag Mal* (3)."

We are, therefore, clearly of opinion that there is no force in the first ground taken in the objections of the defendants that there was no valid reference to arbitration as required by the Code of Civil Procedure.

In the second place it is contended on behalf of the defendants that the award is vague and indefinite. In our opinion the award is very clear and precise and is expressed in very terse language. There is nothing unclear and indefinite about it. The plaintiffs were granted a decree for partition of one share out of two and a half shares in the properties mentioned in lists 1 and 3 and in the properties entered at nos. 5, 6, 8, 9 and 10 of list 2, attached to the plaint in the suit filed by the plaintiffs against the defendants. Obviously the balance of the properties entered in these lists would necessarily go to the defendants.

There is, therefore, no force in these objections and we accordingly dismiss them, confirm the award and

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(1) (1899) I.L.R., 27 Cal., 61. (1907) I.L.R., 30 All., 32.

(3) (1915) L.R., 43 I.A., 1.

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decree these two appeals in terms of the award, which will form part of the decrees of this Court.

*Appeal dismissed.*

## REVISIONAL CIVIL

*Before Mr. Justice C. M. King, Chief Judge*

1935  
March 22

KHUSHI RAM (JUDGMENT-DEBTOR—APPLICANT) v. RAM SUMER (DECREE-HOLDER—OPPOSITE PARTY)\*

*Limitation Act (IX of 1908), section 14 and Article 182—'Proper Court' in Article 182, meaning of—Decree passed by Subordinate Judge sitting as Judge, Small Cause Court—Plaint filed by decree-holder in Munsif's Court for declaration that certain property is liable to be attached and sold in execution of decree before transfer of decree to that Court for execution—Execution of decree—Plaint in declaratory suit, whether can save limitation under Article 182, Limitation Act.*

Where a decree-holder obtained his decree from the Court of the Subordinate Judge sitting as a Judge of a Court of Small Causes and afterwards filed a suit in the Munsif's Court for a declaration that certain property was liable to be attached and sold in execution of his decree, *held*, that the plaint of the declaratory suit can be treated as an application to take some step in aid of execution of the decree, but as the execution of the decree had not been transferred to the Munsif before the filing of the declaratory suit the Court of the Munsif cannot be held to be the Court whose duty it was to execute the decree and cannot be held to be the 'Proper Court' within the meaning of Article 182 of the Limitation Act and clause (5) of that Article will not apply for the purpose of saving limitation. Section 14 of the Limitation Act was also not applicable to the case. *Sheo Ram v. Ram Bharosey* (1), referred to.

Mr. *Ramapat Ram*, for the applicant.

Mr. *Radha Krishna*, for the opposite party.

KING, C.J.:—This is a judgment-debtor's appeal arising out of an order passed in execution proceedings.

\*Section 25 Application No. 19 of 1934, against the order of Pandit Damodar Rao Kelkar, Subordinate Judge (as Judge of Small Cause Court), Partabgarh, dated the 1st of November, 1933.

(1) (1929) 26 O.C., 71.