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that we should refuse to entertain the new case at this stage, and should leave it to the plaintiff to bring another suit on the basis of the alleged fresh causes of action, if so advised.

Srivastava, C. J. and Smith, J.

Before taking leave of the case we should note that the counsel for the defendants-respondents did not accept the lower court's finding that they had failed to establish their claim to under-proprietary rights, but in view of the opinion formed by us on the question of limitation we did not hear arguments on that point.

The result therefore is that we uphold the decrees of the lower court on the ground of limitation, and dismiss all the appeals with costs.

Appeal dismissed.

REVISIONAL CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice H. G. Smith

NAUSHAD ALI (APPLICANT) *v.* MOHAMMAD ISHAQ, (OPPOSITE-PARTY)*

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Arbitration—Application by parties to suit agreeing to abide by court's decision to be given after local inspection—Use of word "arbitrator" in application—Court, if appointed arbitrator—Agreement, if legally binding on parties—Schedule II of Civil Procedure Code, if applicable to case—Oudh Civil Rules, Rule 628—Civil Judge acting as arbitrator in contravention of rules—Proceedings, if null and void.

Where the parties to a suit present an application to the court saying that they are desirous of leaving the matter entirely in the hands of the presiding officer, and that they would be bound by whatever decision he should arrive at after making a local inspection, then although the word "arbitrator" is used in the application it is not that the parties meant to appoint the presiding officer as an "arbitrator" in the case but all that the said application comes to is that the parties agreed to abide by the presiding officer's decision, which he should give after making a local inspection, without recording any evidence. There is nothing against the validity of such

*Section 115 Application No. 54 of 1935, against the order of S. Abbas Raza, Munsif, Lucknow District, dated the 4th of February, 1935.

an agreement and there is no reason whatever why such agreement should not be binding on the parties. *Madan Mohan Gargh* v. *Munna Lal* (1), *Sita Ram* v. *Peare alias Alloo* (2) and *Ganga Ram* v. *Jagu* (3), relied on.

The provision of Schedule II of the Code of Civil Procedure are not intended to apply to cases in which the parties to a suit want to appoint the presiding officer of the court, in which the suit is pending, as an arbitrator.

Rule 678 of the Oudh Civil Rules has not the force of law and therefore it cannot be held that the proceedings in a case in which the presiding officer of a civil court acts as arbitrator in contravention of that rule are *ultra vires* owing to a breach of that rule. *Burgess* v. *Morton* (4), referred to.

Mr. *Mohammad Husain,* for the applicant.

Mr. *Iqbal Ali,* for the opposite party.

ZIAUL HASAN and SMITH, JJ.:—This is an application in revision against an order of the learned Munsif of Lucknow dismissing the plaintiff-applicant's suit for the removal of a *parnala* and demolition of a *chhajja* of the defendant's house.

The parties' houses adjoin each other in the village of Paigramau, tahsil Malihabad, of the Lucknow district. The suit was brought by the plaintiff on the allegation that the *parnala* and the *chhajja* in question had been newly constructed by the defendant towards his (plaintiff's) house, and that the water from the defendant's house used formerly to flow towards the south, but that the new *parnala* had been made to cause the flow of water towards the east, that is, towards the plaintiff's house. On the 9th of January, 1935, the learned Munsif framed issues in the case, and fixed 29th January, 1935, for final disposal. On that date the parties presented an application saying that they were desirous of leaving the matter entirely in the hands of the presiding officer, and that they would be bound by whatever decision he should arrive at after making a local inspection. Accordingly the learned Munsif made an

(1) (1928) A.I.R., All., 497.
(2) (1925) A.I.R., All., 558.
(3) (1934) A.I.R., Lah., 176.
(4) (1896) A.C., 136.

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inspection of the locality, and as a result of that inspection he came to the conclusion that the defendant was right in his defence that formerly there was a lane between the houses of the parties towards which the defendant's *parnala* and *chhajja* existed, and that the plaintiff was allowed to include the land of the lane in his house on the express condition that the defendant's *parnala* and *chhajja* were to be left where they were. The suit of the plaintiff was accordingly dismissed.

Within ten days of the order of dismissal the plaintiff filed an objection purporting to be one under Schedule II, paragraph 15 of the Code of Civil Procedure. This objection was dismissed by the learned Munsif.

It is contended before us that the learned Munsif had no jurisdiction to act as arbitrator in the case, and that therefore the procedure adopted by him was null and void. Reliance is placed on rule 678 of the Oudh Civil Rules, which says—

"No Judge or ministerial office of a civil court shall accept the office of arbitrator in any civil action without the permission of the Government being first obtained."

It is argued that since the learned Munsif acted as arbitrator in contravention of this rule, the proceedings must be held to be null and void. We do not agree with this contention. In the first place, we are not satisfied that rule 678 of the Oudh Civil Rules has the force of law, as is contended by the learned advocate for the applicant, and therefore we cannot hold that the proceedings in the case were *ultra vires* owing to a breach of that rule. In the second place, although the word "arbitrator" was used by the parties in their application of the 29th of January, 1935, the agreement was no more than to abide by the decision of the court, arrived at as the result of a local inspection, without recording any evidence, and there is nothing, in our opinion, against the validity of such an agreement. The facts of the present case are very similar to

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those of *Madan Mohan Gargh* v. *Munna Lal* (1). In that case also the parties put in an application before the presiding officer of the court in which the suit was pending to the effect that the court might give any decision it liked after inspecting the locality, and in that case also it was argued that as no permission of Government had been obtained, the Additional Subordinate Judge could not act as arbitrator. Referring to certain Government regulations by which officials are forbidden to act as arbitrators without having obtained permission from Government, the learned Judges who decided the case remarked—

"We may say at once that, in our opinion, the existence of these regulations should not influence us in deciding this case. They are departmental regulations for the breach of which (if there has been a breach) the Judge can be taken to task by his superior officers; but the regulations do not constitute a rule of procedure applying to the trial of suits in the civil courts of these Provinces."

The learned Judges in support of their view quoted the following passage from *Burgess* v. *Morton* (2):

"It has been held in this House that where with the acquiescence of both parties a Judge departs from the ordinary course of procedure and, as in this case, decides upon a question of fact, it is incompetent for the parties afterwards to assume that they have then an alternative mode of proceeding, and to treat the matter as if it had been heard in due course."

and after referring to the case of *White* v. *Duke of Buccleuch* go on to say—

"In none of these cases did the House of Lords say anything to suggest that it is improper for a Judge to try a question of fact by some method other than that prescribed by the law governing his court, if the parties request him to do so."

We are also of opinion that the provisions of Schedule II of the Code of Civil Procedure were not intended to apply to cases in which the parties to a suit want to appoint the presiding officer of the court, in which the suit is pending, as an arbitrator, nor do we think, in

(1) (1928) A.I.R., All., 497. (2) (1896) A.C., 136.

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spite of the use of the word "arbitrator", in their application of the 29th of January, 1935, that the parties to this case meant to appoint the learned Munsif as an arbitrator in the case. As said above, all that the said application comes to is that the parties agreed to abide by the learned Munsif's decision, which he should give after making a local inspection, without recording any evidence and we see no reason whatever why this agreement should not be binding on the parties. We are supported in our view by the cases of *Sita Ram* v. *Peare alias Alloo* (1) and *Ganga Ram* v. *Jagu* (2).

It was also contended that the learned Munsif should have made a note of the result of his local inspection, and that as he did not do so his procedure was illegal, or at least irregular. We cannot accept this argument either. There was nothing in the application of the 29th of January, 1935, requiring the learned Munsif to record notes of his local inspection, nor was the recording of notes incumbent upon him under the law.

Next, it was urged that all the points arising in the case and mentioned in the three issues framed were referred to the learned Munsif for arbitration, but that he has not dealt with them separately. In the first place, we have already said that it was not actually a reference to arbitration, and in the second the learned Munsif has in his short order of the 4th of February, 1935, recorded findings on all the points raised in the case.

We see no force in this application, and it is dismissed with costs.

Application dismissed.

(1) (1925) A.I.R., All., 558. (2) (1934) A.I.R., Lah., 176.