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CHAIRMAN
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MUNICIPAL
COMMISSIONERS OF
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DAS, J.

re-erecting must fall within the scope of section 237 and therefore of section 241. In such a case the Commissioners may require any land belonging to the owner to be added to the street provided that they make full compensation to the owner for any loss caused to him: but when he is neither building nor re-building the house the erection of a boundary wall does not in my opinion fall within the scope of section 237. That being so, the Commissioners had no power to frame a bye-law under section 241 relating to the erection of a boundary wall apart from its erection as part of the scheme of erection or re-erection of the house itself. This view is supported by the decision of Mukherji, J. in *Corporation of Calcutta v. Benoy Krishna Bose*(¹).

I would allow this appeal, set aside the judgment and decree of the Court below and restore the judgment and decree of the Court of first instance. The plaintiffs are entitled to their costs throughout.

Ross, J.—I agree.

APPELLATE CIVIL.

Before Coutts and Macpherson, J. J.

MAHABIR PRASAD BHAGAT

v.

BALKRISHN DAS.*

1921.

August, 4.

Code of Civil Procedure, 1908 (Act V of 1908), Order V, rules 13 and 25, Order IX, rule 13, Order XXX, rule 3, Schedule II, paragraph 21—Suit against members of a firm—notice, method of service of—Arbitration—ex-parte decree, application to set aside—“Decree” whether includes decree passed on award—Review—whether judge’s successor may alter administrative order.

In a civil proceeding by one of three members of a firm against the other two, Order V, rule 25, governs the service of notice, etc., and not Order V, rule 13, or Order XXX, rule 3.

* Civil Revision No. 90 of 1921.

(1) (1910) 12 Cal. L. J. 476.

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Where an *ex-parte* was drawn up in accordance with an application to file an award, and an application against the *ex-parte* decree was made under section 151, Order XLVII, rule 1, and Order IX, rule 13, of the Code of Civil Procedure, 1908, which was registered by the Subordinate Judge as an application under Order XLVII, rule 1, held, that the successor of the Subordinate Judge was competent to direct the application to be registered under Order IX, rule 13.

Order IX, rule 13, applies to proceedings under Schedule II, paragraph 21.

The decree referred to in paragraph 21(2) is a decree in a suit within the meaning of section 2(2).

The facts of the case material to this report were as follows :—

Balkishun Das was the proprietor of the firm of Ghasiram Balkishun Das. Ghasita Lall was the manager of the firm and held a general power of attorney from Balkishun. The firm being in need of money Mahabir Prasad Bhagat advanced money to the firm. An agreement was reached whereby Balkishun, Ghasita and Mahabir were each to receive one-third of the profits of the firm. Subsequently, Mahabir being dissatisfied with Ghasita Lall's accounts, a dispute arose, and this dispute was referred to arbitration under a registered agreement. On the 11th June, 1920, the arbitrators made an award and on the 17th June Mahabir applied to the Court under paragraph 20, Schedule II, of the Code of Civil Procedure, to have the award filed and a decree prepared in accordance therewith. Notice of the application was served on Ghasita Lall. Balkishun Das was then in England. On the 21st July the matter was disposed off *ex-parte*. The award was filed, and the decree prepared in accordance with it was signed on the 30th July. Ghasita Lall then filed a petition on the 8th August which purported to be under Order IX, rule 13, Order XLVII, rule 1, and section 151 of the Code of Civil Procedure. The Subordinate Judge ordered the petition to be registered as an application for review. The Subordinate Judge was then transferred and was

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succeeded by Lala Damodar Prasad. On the 18th December Ghasita Lall filed a petition stating that the petition of the 8th August was not solely a petition for review. Lala Damodar Prasad ordered the petition of the 8th August to be registered as an application under Order IX, rule 13. On the 5th February, 1921, the *ex-parte* decree was set aside on the ground of fraud and non-service of summons on Balkishun Das. Against this order Mahabir moved the High Court.

Manuk (with him *C. M. Agarwala* and *Ragho Prasad*), for the petitioner.

Kulwant Sahay and *Bimola Charan Sinha*, for the opposite party.

Courts, J.—This is an application in revision against the order of the Subordinate Judge of Patna, setting aside a decree made under Schedule II, Paragraph 21, to the Civil Procedure Code.

It appears that in the town of Barh there was a firm named Ghasiram Balkishun Das which carried on an agency business. After the death of Ghasiram, Balkishun Das became the sole owner but he lived for the most part in England and his manager Ghasita Lall who held a general power of attorney from him conducted the business. Balkishun Das being in England there was a difficulty about money and an arrangement was come to with the present petitioner Mahabir Prasad Bhagat that he should supply funds to the firm, that Ghasita Lall should continue to act as manager, that Mahabir, Balkishun and Ghasita Lall should each receive a five annas four pies share in the profits, and that Mahabir should get interest at six *per cent.* on all sums advanced by him. After this arrangement was come to Balkishun Das returned to England. Mahabir Bhagat was dissatisfied with Ghasita Lall's accounts with the result that there were disputes which were eventually referred to arbitrators under a registered *ekrarnamah*. The arbitrators gave their award on the 11th June, 1920. Mahabir Bhagat then filed a petition under Schedule II of the Civil

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Procedure Code in the Court of the Subordinate Judge at Patna for filing the award and for the drawing up of a decree in accordance therewith. On this application a notice was issued to Balkishun Das and Ghasita Lall to shew cause why this should not be done. No cause was shown and a decree was passed in terms of the award on the 21st July, 1920. Ghasita Lall then filed a petition which is the subject-matter of the application now before us. The application was filed under section 151, Order XLVII, rule 1, and Order IX, rule 13, of the Code of Civil Procedure on behalf of himself and Balkishun Das to have the decree set aside. The petition was registered by the then Subordinate Judge Mr. Zahur under Order XLVII, rule 1, and notice was ordered to issue. After passing this order Mr. Zahur was transferred and was succeeded by Mr. Damodar Prasad who, on the 18th December, 1920, directed that the petition should be registered under Order IX, rule 13. The matter was then heard by Mr. S. C. Sen and the decree set aside on the ground that notice on Balkishun Das had not been served as required by Order V, rule 25. It is against this order that the present application has been made.

The first point urged in support of the application is that Mr. Damodar Prasad had no jurisdiction to register the application under Order IX, rule 13, when it had already been registered under Order XLVII, rule 1, by his predecessor. There is no force in this contention. The application was made both under Order IX, rule 13, and Order XLVII, rule 1, and registration is purely a ministerial act in regard to which the Subordinate Judge had complete jurisdiction.

The second point urged is that Order V, rule 25, does not apply in such a case as the one before us and that, if any provision of the Civil Procedure Code does apply it is Order V, rule 13, or Order XXX, rule 3. Order V, rule 13, deals with suits relating to business or work against a person who does not reside within the local limits of the jurisdiction of the Court.

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and it clearly does not apply, because this is not a case of a suit against a firm but against Balkishun and Ghasita Lall in their individual capacities. Order XXX, rule 3, also does not apply because this rule deals with cases where persons are sued as partners in the name of their firm and if any rule applies it is rule 25 of Order V. This rule runs as follows :

"Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate."

It has been found by the learned Subordinate Judge that Ghasita was not empowered to accept service. It is clear then that this rule applies. Moreover the question whether Order V, rule 25, or some other rule applies to the case is a question of law which the Subordinate Judge has jurisdiction to decide. He has jurisdiction to decide rightly or wrongly and with his decision on a point of law we are not entitled to interfere in revision.

The last point urged is that Order IX, rule 13, does not apply to cases under paragraph 21 of Schedule II, and that consequently the Subordinate Judge's order is without jurisdiction. Schedule II, paragraph 21, runs as follows :—

"(1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award."

"(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award."

Now it is contended that Schedule II is complete in itself and that the ordinary rules which govern suits do not apply. There is no authority for the contention but the argument is that Order IX, rule 13, applies only to suits; that a proceeding under paragraph 21 is not a suit and that a decree made under paragraph 21(2) is not a decree such as is contemplated in the Code. It is true that there is no mention of the word

suit in paragraph 21, but under paragraph 20, where any matter has been referred to arbitration without the intervention of the Court and an award has been made thereon any person interested in the award may apply to the Court having jurisdiction over the subject matter that the award be filed in Court; and sub-clause (2) of paragraph 20 runs as follows :—

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"The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants."

It seems clear then that when an application is made it is to be treated as and becomes a suit and that the decree upon the judgment which is pronounced according to the award becomes a decree under section 2 of the Civil Procedure Code. Section 104 which deals with appeals from orders has been referred to as showing that the decree mentioned in paragraph 21(2) of Schedule II is an order and not a decree. By sub-clause (f) an appeal lies against an order filing or refusing to file an award in an arbitration without the intervention of the Court. This, however, does not refer to the decree but to the order referred to in sub-clause (i) of paragraph 21. Section 104 therefore does not assist the petitioner. The decree referred to in paragraph 21 then in my opinion is a decree in a suit and Order IX, rule 13, applies to such a case.

For the reasons I have given therefore this application in my opinion fails and I would dismiss it with costs.

MACPHERSON, J.—I agree to the order proposed.

The best view would seem to be that the provisions of the Code apply, so far as may be, to proceedings under Schedule II, save where a special procedure is laid down in the Schedule. An example of a special provision in the Schedule (probably with a view to court-fee) is the use of the term "filing an application" instead of "presenting a plaint", but it does not follow from this variation of terms or from the issue of a

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notice instead of a summons that it was the intention of the legislature that the application when registered as a suit should be anything different from a suit under the Code so far as regards procedure in other matters. So also there being nothing repugnant in the subject or context of paragraph 21(2), it is reasonable to hold that 'decree' in that provision has the meaning set out in section 2(2).

The question is, however, not altogether free from doubt and the legislature might well intervene to make clear its intention in this regard.

Application dismissed.

REVISIONAL CRIMINAL

Before Jwala Prasad and Ross, J.J.

SHAMLAL KALWAR

v.

KING-EMPEROR.*

1921.

November. 8.

Code of Criminal Procedure, 1898 (Act V of 1898), sections 227, 228, 229, 230, 231, 255, 256, 257 and 342—Alteration of or addition to charge—recall of prosecution witnesses—examination of the accused, whether necessary.

When, after the examination of the accused under section 342 of the Code of Criminal Procedure before being called upon to enter on his defence, an alteration is made in the charge, or a new charge is added, it is not incumbent upon the court to re-examine the accused under that section even though some of the witnesses have, after the alteration of or addition to the charge, been recalled under section 231 and examined with reference to such alteration or addition.

The facts of the case material to this report were as follows :—

The six petitioners were accused of rioting and of stealing certain gram and wheat which the servant of one Sant Lall was conveying on three carts and of

* Criminal Revision No. 506 of 1921.