

The decree-holder took out execution of his decree and attached, in execution of the decree, the occupancy holding of his tenant. The Court held that the occupancy holding of the tenant could not be seized in execution of a money-decree obtained by the landlord against the tenant. It is true that that view has now been overruled by the Full Bench of this Court; but an issue was raised between the parties in the former execution case whether the occupancy holding of the tenant could be seized in execution of a money decree obtained by the landlord against the tenant. That issue was decided in favour of the tenant and against the landlord. The landlord has now taken another execution of the same decree and his contention is that the view upon which the former execution proceeding was dismissed having been found to be erroneous he ought to be entitled now to maintain execution as against the tenant. It cannot for a moment be urged that the cause of action in the present proceeding is different from that in the former proceeding. If that be so, the decision of the former proceeding operates as *res judicata* between the parties.

The decision of the learned Subordinate Judge is right and must be upheld. This appeal must be dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

REVISIONAL CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

RAGHUNATH SUKUL

v.

RAMRUP RAUT.*

1923.

June, 4.

Civil Procedure Code, 1908 (Act V of 1908), Second Schedule, paragraphs 10 and 12(a)—Arbitration—separate causes of action against several defendants—Suit against all

* Civil Revision No. 10 of 1923, from an order of Babu B. K. Ghosh, Subordinate Judge of Muzaffarpur, dated the 16th November, 1922.

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the defendants jointly—reference to arbitration—minor defendant not represented—validity of award.

The plaintiff sued several defendants for recovery of possession of certain plots of land, the defendants severally being in separate possession of one or more of such plots. One of the defendants died and his minor sons were substituted as his representatives. No written statement was filed on behalf of the minors. Subsequently on a petition filed on behalf of the plaintiff and all the defendants, including the minors, the disputes between them were referred to arbitration. When the plaintiff applied to file the award it was objected on behalf of the minors that it was invalid inasmuch as at the time the reference was made they were minors and were not properly represented in the suit by a guardian *ad litem*. *Held*, (i) that the court had jurisdiction to file the award and pronounce judgment in accordance therewith in so far as it disposed of the matters in dispute between the plaintiff and the defendants other than the minors; (ii) in so far as the award dealt with the interests of the minors it was outside the terms of the reference inasmuch as the minors were not properly parties to the reference, and that the court had power under paragraph 12(a) of the Second Schedule to the Civil Procedure Code to modify the award to the extent that it dealt with the interests of the minors.

Pitam Mal v. Sadiq Ali(¹), followed.

Seth Dooly Chand v. Manuji Musaji(²), distinguished.

The words "all the parties interested" in paragraph 1(1) of the Second Schedule to the Civil Procedure Code do not necessarily mean all the parties to the suit but all the parties interested in any matter in difference between them which they wish to refer to arbitration.

Application by the plaintiff.

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

The suit out of which this application arose was instituted by the plaintiffs against a number of defendants, some fifteen in all, claiming a declaration of title to and recovery of possession of 13 *bighas* 5 *kathas* of land of which they had been dispossessed

(1) (1902) I. L. R. 24 All. 229.

(2) (1917) 25 Cal. L. J. 329.

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by the defendants. The land consisted of numerous plots and the case of the plaintiffs was that each of the defendants had dispossessed them of specific plots, the numbers and areas of which were specified, and that the defendants severally were in separate possession of one or more of the said plots. Although only one suit was brought against the several defendants, there were really separate causes of action against the different defendants severally in respect of the plots of which they separately were in possession. Balgobind Nunia, one of the defendants in the suit having died, his two sons, Nathuni and Manu, were substituted as his representatives in the suit. A written statement was filed on behalf of the other fourteen defendants in which they contended *inter alia* that they were each in separate possession of specific plots bearing a separate rental and that one suit was not maintainable against all of them. No written statement was filed on behalf of Manu and Nathuni, the sons of the deceased defendant Balgobind Nunia.

Subsequently, on the 25th of January, 1922, the plaintiffs and each of the defendants, including Nathuni and Manu, filed a petition praying that the disputes between them should be referred to arbitration. On that petition an order was passed referring the matters in dispute between the parties to arbitration. After the award was made and signed by the arbitrators it was duly presented for filing in Court; a petition was then filed on behalf of Nathuni and Manu the sons of Balgobind Nunia through Balgobind Raut their uncle, objecting that the reference was invalid inasmuch as they were minors at the time when the reference was made and were not properly represented in the suit by a guardian *ad litem*. The Judge considered that, in these circumstances, there was no proper reference within the meaning of clause 1 of the Second Schedule of the Code and that he had no jurisdiction to receive and file the arbitration award. He accordingly rejected it and ordered the suit to proceed.

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Noresh Chandra Sinha and Sheonandan Roy, for the petitioners.

S. P. Varma, for the opposite party.

DAWSON MILLER, C. J. (after stating the facts of the case, as set out above, proceeded as follows):—

The question for determination is whether the Court had jurisdiction to file the award and pronounce judgment in accordance therewith in so far as it disposed of the matters in dispute between the plaintiffs and defendants other than Nathuni and Manu. The determination of this question depends upon the proper construction to be placed upon the first clause of the Second Schedule of the Code. That clause provides as follows :

“(1) Where in any suit all the parties interested agree that any matters in difference between them shall be referred to arbitration they may, at any time before judgment is pronounced, apply to the Court for an order of reference. (2) Every such application shall be in writing and shall state the matter sought to be referred.”

It must be borne in mind that there was no objection to the arbitration award taken by any of the parties except the defendants Nathuni and Manu, but the learned Subordinate Judge was of opinion that the whole award was void and was not effective against any of the parties. The petitioners do not contend that the award was effective against the two objectors who in fact were minors at the time when they were substituted in place of their deceased father. They contend, however, that the award is binding upon the other defendants and that it ought to have been accepted in so far as it deals with the matters in dispute between the petitioners and those defendants, and that judgment ought to have been pronounced in accordance therewith. In my opinion the petitioner's contention is right. There were in fact a number of matters in difference between the plaintiffs and the various defendants to the suit. It can hardly be suggested that the submission to arbitration is bad on the ground that it does not refer to arbitration all the matters that may be in dispute between the parties. The clause

in terms provides that where all the parties interested agree that any matter, in difference between them, shall be referred to arbitration they may apply to the Court for a reference; and sub-clause (2) provides that the application shall state the matter sought to be referred. It may well be that some of the parties are interested in certain of the matters in dispute only, whilst others are interested in other matters, and I can see no reason why, where all the parties interested in one or other of the matters in difference between them agree to refer their disputes to arbitration, they should not be entitled to do so even if there are other matters still to be determined in the suit. It is contended on behalf of the objectors, however, that the words "all the parties interested" mean all the parties interested in any part of the subject-matter of the suit and unless all the parties to the suit agree there can be no reference to arbitration upon any point. I do not think that this is the proper interpretation to the clause. In my opinion the words "all the parties interested" do not mean necessarily all the parties to the suit, but all the parties interested in any matter in difference between them which they wish to refer. In the present case, although the plaintiffs were interested in the whole subject-matter of the suit, the defendants, respectively, were interested only in separate and specific plots in respect of which the suit was brought. They had no interest at all in the plots claimed from the other defendants. I can find nothing in the wording of the clause to prevent any of the parties submitting to arbitration the matters in dispute between them merely because some other parties to the suit, who have no interest in that subject-matter, have not concurred in the reference. I assume of course that all the parties interested in the subject-matter of the reference have agreed to refer that subject-matter to arbitration. The ground upon which the objection is based is that Nathuni and Manu were not properly parties to the suit at all as they were not represented by a guardian *ad litem* and, therefore, no effective

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submission to arbitration on their part was possible. The logical result of this situation will be that in so far as they were concerned there was no reference to arbitration at all. They, however, were in no way concerned with the matters in dispute between the plaintiffs and the other defendants and *ex hypothesi* they were not even parties to the suit. The arbitrators, however, have made an award not only in respect to the matters properly referred but in respect to the matters in dispute between the plaintiffs and the two minors which were not validly referred at all. Must it be said then that the whole award is bad merely because the arbitrators have dealt with matters outside the term of the reference in so far as the reference was legal and binding? The answer to this question appears to me to be contained in clause 12 of the Schedule. That clause provides that the Court may, by order, modify or correct an award (a) where it appears that a part of the award is on a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred. The rules in the Schedule clearly contemplate a case where the arbitrators in making their award have gone outside the legitimate subject-matter of the reference. If that part of the award, which deals with matters outside the reference, can be separated from the other part, without affecting the decision on the matters referred, the Court may in such a case modify or correct the award. In my opinion the course which the learned Subordinate Judge should have taken was to modify the award in so far as it dealt with the interests of Nathuni and Manu and to give effect to the rest of it which dealt with the interests of the other parties with which the objectors were in no way concerned.

Certain cases in which the interpretation of the first clause of the Schedule has been under consideration were referred to in support of the objector's contention. In none of those cases were the facts similar to the present. In each of them where the submission was

held to be bad, it was on the ground that certain parties interested in the subject-matter of the reference had not been parties to the submission. In *Seth Dooly Chand v. Mamuji Musaji* (1) the suit was against the members of a partnership to recover certain moneys. All the matters in difference between the parties in the suit including the question of costs were submitted to arbitration. Two of the defendants, one of whom was a member of the partnership and clearly interested in the subject-matter referred, were not parties to the submission. It followed, therefore, that all the parties interested in the matters in difference which were submitted to arbitration had not agreed to the reference. The Court accordingly set aside the award on the ground that no valid reference had been made. The award in that case directly affected the interest of the partner who had not joined in the submission and made him liable with the other partners for the payment of a certain sum of money. Without his concurrence the interests of the partners, as a whole, could not be referred to arbitration as they were jointly interested with him.

It is significant that the clause under the present Code differs from that in section 506 of the Code of 1882. The previous section read as follows :

“ If all the parties to a suit desire that any matter in difference between them in the suit be referred to arbitration they may at any time before judgment is pronounced apply.....to the Court for an order -- reference.”

Some doubt arose as to whether it was necessary before a reference could take place under that section that all the parties to the suit should concur in the submission or whether a submission was valid if made with the concurrence of all the parties interested in the matter submitted. In *Pitam Mal v. Sadiq Ali* (2) it was held that the words “ all the parties to a suit ” in section 506 of the Code of 1882 referred to the succeeding words of the same section ‘ any matter in difference between them in the suit ’ and did not

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necessarily include parties who never put in any appearance in the Court and between whom and any of the parties to the submission there was not in fact any matter in difference in the suit. The wording of the present Code appears to me to set the matter at rest in accordance with the decision arrived at by the Allahabad Court in the last mentioned case. In my opinion it is not necessary that all the parties to a suit should concur in an application for an order of reference in order to make the submission valid. It is only necessary that all the parties who are interested in the subject-matter of the reference should have joined in the submission.

The order of the learned Subordinate Judge will be set aside and the case will be remitted to the lower Court to deal with it under clause 12 of the Second Schedule of the Civil Procedure Code with directions to separate such part of the award as deals with the interests of Nathuni and Manu from the other part of the award and to give effect to the award in so far as it deals with the matters in difference between the plaintiffs and the other defendants by filing the same and pronouncing judgment in accordance therewith.

The petitioners are entitled to the costs of this application and to the costs of the objection petition in the lower Court.

KULWANT SAHAY, J.—I agree.

REVISIONAL CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

RAMBHANJAN SINGH

v.

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June, 5.

Code of Civil Procedure, 1908 (Act V of 1908), Order VII, rule 11, Order IX, rules 8 and 9—Dismissal for default, application for restitution, grounds for

* Civil Revision No. 59 of 1923, from an order of D. H. Kingsford, Esq., I.C.S., District Judge of Shahabad, dated the 11th November, 1923, affirming an order of Babu Sheonandan Prasad, Subordinate Judge of Shahabad, Arrah, dated the 22nd July, 1923.