

**APPELLATE CIVIL.**

Before Das and Ross, J. J.

RAGHUNATH RAI DILSUK RAI

v.

BRIDHI CHAN SRI LAL.\*

1924.

April, 16.

*Award—Appeal—Arbitration with the intervention of the Court—decree passed in terms of award in the absence of defendants—application to set aside decree, whether appeal lies from order rejecting—Code of Civil Procedure, 1908 (Act V, of 1908), section 104 (d), Order IX, rule 13, Order XLIII, rule 1 (d), Schedule 11, paragraph 16 (2).*

There is no appeal from an order refusing to set aside, under Order IX, rule 13, of the Code of Civil Procedure, a decree passed, in the absence of the defendants, in terms of an award made in an arbitration with the intervention of the Court.

Where an application is made to set aside an award but the application is not supported by the applicant it is the duty of the Court, under paragraph 16 (1) of the Second Schedule to the Code of Civil Procedure, to pronounce judgment according to the award, and where judgment is pronounced in such circumstances, the decree passed on the judgment is not an *ex parte* decree.

### Appeal by the defendants.

The matters in dispute between the parties were referred to the arbitration of certain persons by the order of the Court, dated the 30th March, 1922, and, on the 12th July, 1922, the arbitrators filed their award. Under the Limitation Act, the parties had ten days' time to apply to set aside the award. On the 24th July, 1922, the defendants filed their objections and applied for time for summoning their witnesses. The application was refused, and, the defendants withdrawing from the contest, the Court

\* Appeal from Original Order no. 127 of 1923, from an order of B. Ashutosh Mukharji, Subordinate Judge of Dhanbad, dated the 28th April, 1923.

1924. proceeded to pronounce judgment according to the award, and, upon the judgment so pronounced, a decree followed in accordance with law. The defendants RAGHUNATH RAI moved the High Court against the order of the Court DILSUK RAI declining to give them time, and the High Court, in v. BRIDHI CHAN SRI LAL. the exercise of its power of superintendence, remitted the case to the Subordinate Judge with a direction that the Subordinate Judge should give an opportunity to the defendants to establish their case as against the award. The matter then went back to the Subordinate Judge for a fresh enquiry into the grievances of the defendants, and the Court fixed the 20th February for the disposal of the matter. On the 20th February, the defendants applied for adjournment, and the Court adjourned the hearing to the 14th March. There were two further adjournments at the instance of the defendants, and the case was finally fixed for the 19th of April. On that day, the defendants were absent, and the Court proceeded to pass a decree in terms of the award. The defendants then applied for setting aside the decree under the provision of Order IX, rule 13, of the Code. The Subordinate Judge thought that the application was not maintainable, and, in that view, dismissed the application on the 28th April, 1923. Against the order of the 28th April the present appeal was preferred.

*Abani Bhushan Mukerji* and *B. B. Mukerji*, for the appellants.

*Susil Madhab Mullick* and *Siva Narain Bose*, for the respondents.

DAS, J. (after stating the facts, as set out above, proceeded as follows) :—

Now, the first question is, is there a right of appeal? The learned Vakil for the appellants has referred us to the provisions of section 104(f) and Order XLIII, rule 1(d), of the Code. Section 104(f) provides that an appeal shall lie from an order filing or refusing to file an award in an arbitration without the intervention of the Court. Here the arbitration

was with the intervention of the Court. That section has clearly no application to this case. Order XLIII, rule 1(d), gives a right of appeal to a party from an order under Order IX, rule 13, rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*. Here an order has been passed under Order IX, rule 13, rejecting an application from an order to set aside a decree. Two questions, however, arise; first, was the case open to appeal? and, secondly, was the decree passed *ex parte*? It is clear, to my mind, that an order under Order IX, rule 13, is appealable only where the decree sought to be set aside is appealable and is regarded as having been passed *ex parte*. In my opinion, neither of these conditions is satisfied in the present case, and it must follow that the appeal is wholly incompetent.

I will first deal with the question whether the decree passed by the Subordinate Judge in terms of the award was appealable. In my opinion, it is only necessary to refer to the provision of paragraph 16(2) of the second Schedule of the Code to hold that, where the decree is in terms of the award, no appeal lies. It is true that there is a right of appeal where the decree is in excess of or not in accordance with the award; but here the decree is in terms of the award. By the express provision of the statute, this was not a case which was open to appeal. That being so, the order passed by the Court on the application of the appellants to have the decree upon the award set aside is not appealable.

The second point is equally clear. It is asserted by the appellants that as they had no opportunity to place their case before the Court, the decree must be regarded as *ex parte*; but it is nothing of the sort. An *ex parte* decree is a decree passed by the Court in the absence of the defendants where the plaintiff has proved his case; but here the presence of the parties was not necessary to enable the Court "to pronounce judgment according to the award." A party may indeed apply to have the award set aside on one of the

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1924. grounds mentioned in paragraph 15(1); but where no  
 RAGHUNATH such application is made, and where the Court does  
 RAI not remit the award to the reconsideration of the  
 DILSUK RAI arbitrators, there is no option in the Court but  
 v. "to pronounce judgment according to the award."  
 BRIDHI The defendants indeed presented an application for  
 CHAN SRI setting aside the award, but they were not present to  
 LAL, prosecute their application, and the Court dismissed  
 DAS, J. their application for default. Their application  
 having been dismissed, the Court was bound to  
 pronounce judgment according to the award. What  
 happened was, not that an *ex parte* decree was passed  
 against them, but that their application was dismissed  
 for default.

For all these reasons I am of opinion that no  
 appeal lies, and I must dismiss this appeal with  
 costs.

ADAMI, J.—I agree.

## APPELLATE CIVIL.

*Before Jwala Prasad and Kulwant Sahay, J. J.*

DEO SARAN BHARTHI

1924.

April, 24.

DEOKI BHARTHI.\*

*Trust, suit for a declaration of, whether maintainable  
 under section 92, Civil Procedure Code, 1908 (Act V of 1908)  
 —Transfer of Property Act, (Act IV of 1882), sections 122 and  
 123—Essentials of a valid gift.*

Where the plaintiffs brought a suit under section 92,  
 Code of Civil Procedure, 1908, for a declaration that the  
 defendant was acting adversely to the trust and was setting  
 up a title of his own and consequently had committed a breach  
 of the trust and was liable to be removed :

\* Appeal from Original Decree no. 129 of 1921, from a decision of  
 F. G. Rowland, Esq., I.C.S., District Judge of Gaya, dated the 11th  
 March, 1921.