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the decree we have to refer to the judgment, and, as I have already pointed out, the judgment clearly directs that the mortgagor and his representatives would be entitled to redeem. In fact, in the passage quoted by me above from the judgment of the learned Munsif, it is quite clear that the defendant third party was given the right to redeem the plaintiff.

KULWANT SAHAY, J.

Under these circumstances the decision of the learned District Judge is correct and this appeal must be dismissed with costs

No question has been raised in this Court as regards the maintainability of the appeal and the Revision case is also dismissed but without costs.

JWALA PRASAD, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Ross, J.J.

KOKIL SINGH

v.

RAMASRAY PRASAD CHOUDHARY.*

1924.

January, 24.

Arbitration—Agreement to withdraw suit and refer dispute to arbitration—suit accordingly dismissed—application to file award—Civil Procedure Code, 1908 *(Act V of* 1908)*, Schedule II, paragraph* 20*—Award, extension of time for making, effect of—Mistake of law.*

If the parties to a pending suit apply to the court for an order referring the matters in dispute to arbitration the court must keep control over the proceedings up to the end. But it is not necessary for the parties to take this course and there is nothing to prevent them getting the suit dismissed by consent.

* Appeal from Original Order No. 217 of 1923, from an order of B. Shivanandan Prasad, Subordinate Judge of Darbhanga, dated the 12th July, 1923.

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Therefore, where the parties to a suit agreed to refer the matter to arbitration and to have the suit withdrawn, and the suit was accordingly dismissed, *held*, that either party was entitled to apply to have the award subsequently made by the arbitrator filed under paragraph 20 of Schedule II of the Civil Procedure Code, 1908

Nanjappa v. *Nanja Pao*(1), approved.

Shavakshaw D. Davar v. *Tayab Haji Ayub*(2), *Manilal Motilal* v. *Gokal Das Rowji*(3), *Ghulam Khan* v. *Muhammad Hassan*(4), *Tincowry Dey* v. *Fakir Chand Dey*(5), *Vyankatesh Mahadev* v. *Ramchandra Krishna*(6), *T. Venkatachala Reddi* v. *T. Rangiah Reddi*(7) and *Amar Chand Chamaria* v. *Banwari Lal Rakshit*(8), referred to.

Where a matter is referred to arbitration without the intervention of the court any enlargement of the time within which the award is to be made is equivalent to a fresh submission to arbitration.

Stephens v. *Lowe*(9) and *Watkins* v. *Phillpotts*(10), followed.

Arbitrators being judges of law as well as of fact an error of law does not vitiate their award.

Ghulam Khan v. *Muhammad Hassan*(4), followed.

Appeal by the defendant.

This was an appeal from a judgment of the Subordinate Judge of Darbhanga ordering an award to be filed and a decree to be prepared in its terms. The defendant was a *tahsildar* under the plaintiffs and their cosharers. The plaintiffs brought a suit against the defendant for accounts from 1319 to 1324. A registered agreement was entered into between the parties to refer the matter to arbitration and to withdraw the suit and the suit was accordingly dismissed on

(1) (1912) 16 Ind. Cas. 478. (2) (1916) I. L. R. 40 Bom. 386.
(3) (1921) I. L. R. 45 Bom. 245.
(4) (1902) I. L. R. 29 Cal. 167; L. R. 29 I. A. 51.
(5) (1903) I. L. R. 30 Cal. 218. (6) (1922) I. L. R. 49 Cal. 608.
(6) (1914) I. L. R. 38 Bom. 687. (9) (1832) 9 Bingh. 32; 131 E. R. 526.
(7) (1913) I. L. R. 36 Mad. 353. (10) (1825) M'Cl. & Y. 393.

the 27th of February, 1922. The agreement to refer the dispute to arbitration was dated the 25th of February, 1922. It recited the institution of the suit and declared that:

"It has been now agreed that the suit be decided by arbitration." Chaudhary Ram Khelawan Rai was appointed arbitrator. The procedure to be followed in the arbitration was prescribed and the 30th of *Baisakh*, 1329, was fixed as the date on which the award was to be given. It was agreed that if Ram Khelawan Rai should be unwilling or unable to act as arbitrator, then his brother Chaudhary Ram Rup Rai should act as arbitrator on the same terms. On the 11th of April, 1922, a notice was said to have been given by Ram Khelawan Rai to each of the parties, to the effect that on account of illness he would be unable to go to the villages and was unable to act as arbitrator, and therefore he had made over the arbitration agreement to his brother Ram Rup Rai who would act as arbitrator: the parties were directed to go to him with their evidence. On the 2nd of May, 1922, a fresh registered agreement was made between the parties with regard to the arbitration. This agreement recited the suit above mentioned and the previous agreement of the 25th of February. It also recited that Ram Khelawan Rai had expressed his inability to act as arbitrator by notice sent under a registered cover, and therefore, Ram Rup Rai had worked as arbitrator in the presence of the executants up to the 22nd of April and had done a good deal of work in connection therewith. But the arbitrator could not pass his award by the date fixed. It was therefore necessary to execute an agreement for extension of the date and it was agreed that Ram Rup Rai should act as arbitrator and pass his award in accordance with the stipulations of the registered deed of agreement, dated the 25th of February, 1922, by the 29th of *Sawan*, 1329. On the 3rd of August, 1922, the arbitrator made his award which referred to the hearing of the arbitration in the presence of both parties on several dates as attested by the signatures of the parties and

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to the production of the oral and documentary evidence of both parties. It then declared that the defendant was to pay to the plaintiffs Rs. 18,741. The plaintiffs, on the 15th of September, 1922, applied to the Subordinate Judge under paragraph 20 of the second schedule to the Civil Procedure Code, that the award be filed in Court. Cause was shown by the defendant and various objections were taken, but the Subordinate Judge, after going into evidence, overruled the objections and made the order which was the subject of this appeal.

The objections taken before the Subordinate Judge and again in the High Court were objections on grounds both of facts and law. The main objections on facts were first, that Ram Khelawan Rai never refused to arbitrate and that the defendant agreed to the arbitration of Ram Rup Rai on the strength of a false notice which he believed to have been signed by Ram Khelawan Rai, but which in fact was not signed by him; secondly, that the arbitrator refused to accept the defendant's evidence, and, in particular, a *safinama* or acquittance which, if admitted would have shown that he had received a full discharge from the plaintiffs; and, thirdly, that the arbitrator refused to hold a local enquiry as requested by the defendant. The objections in law were, first, that the agreement to refer to arbitration having been arrived at while a suit was pending, and being without leave of the Court, it could be the basis of an award which could be filed under Schedule 2, nor of a certificate of adjustment under Order XXIII, rule 3; and, secondly, that an obvious point of law had not been considered by the arbitrator, namely, that the defendant having been appointed both by the plaintiffs and by their cosharers, the plaintiffs alone could not call him to account.

Sultan Ahmed (with him *Janak Kishore* and *Sashi Sekhar Prasad Sinha*), for the appellant.

K. B. Dutt (with him *Lachmi Kant Jha*), for the respondents.

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Ross, J. (after stating the facts, as set out above, and deciding the objections on facts in favour of the respondents, proceeded as follows) :—

I now turn to the objections to the order of the Subordinate Judge in point of law. The contention of the appellant is that there cannot be a reference to arbitration out of Court when a suit is pending, because in a pending suit the arbitrator gets his authority both from the parties and from the Court; and that if the parties decide to refer a pending suit to arbitration they must apply to the Court for an order of reference and keep the suit pending so that the Court may have control over the arbitration. A number of cases were referred to in the argument. In the leading case, *Ghulam Khan* v. *Muhammad Hassan* (1), the Privy Council observed that : " Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit.....all proceedings from first to last are under the supervision of the Court." In *Tincowry Dey* v. *Fakir Chand Dey* (2) Maclean, C. J., said that section 523 (paragraph 17 of Schedule II) does not apply to a case of reference to arbitration where there is pending litigation. In *Vyankatesh Mahadev* v. *Ram Chandra Krishna* (3) it was said that " Where the Court is seized of a cause its jurisdiction cannot be ousted by the private and secret act of parties, and if they, after having invoked the authority of the Court, and placed themselves under its superintendence, desire to alter the tribunal and substitute a private arbitrator for the Court, they must proceed according to the law laid down in the first sixteen clauses of the second schedule." In *T. Venkatachala Reddi* v. *T. Rangiah Reddi* (4) it was held that paragraph 17 of the second schedule to Civil Procedure Code covers only cases

(1) (1902) I. L. R. 29 Cal. 167; L. R. 29 I. A. 51.
(2) (1903) I. L. R. 30 C. 218.
(3) (1914) I. L. R. 38 Bom. 687.
(4) (1913) I. L. R. 36 Mad. 353.

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where parties without having recourse to litigation agree to refer their difference to arbitration; and that an agreement to refer to arbitration in a pending litigation made without the intervention of the Court could not be filed under paragraph 17 of the second schedule. In *Shavakshaw D. Davar* v. *Tyab Haji Ayub* (1) it was held that a decree could not be made on an award under Order XXIII, rule 3. But Macleod, J., went on to observe as follows: "An arbitration between the parties to a suit without an order of the Court has not been excluded and must, therefore, come under the provisions which deals with arbitrations without the intervention of the Court. I do not see myself why the words "without the intervention of the Court" should not refer to cases where the agreement of reference is made out of Court although the parties to the agreement are already parties to a suit, and, in my opinion, section 89 is now conclusive on the question." The learned Judge, therefore, allowed the application to be treated as an application under paragraph 21. In *Manilal Motilal* v. *Gokal Das Rowji* (2), however, the same learned Judge came to the conclusion that that order was wrong; but he did not agree with the trial Judge who had said that an award in a reference by the parties to a suit without the intervention of the Court could not be a valid award. In *Amar Chand Chamaria* v. *Banwari Lall Rakshit*(3) Rankin, J., has expressed the opinion that the rules in paragraphs 20 and 21 cannot be applied in such a case. The authority is clear that no assistance can be obtained from Order XXIII, rule 3. As to paragraph 20 of the second schedule these decisions, in my opinion, have no application to the present facts. On the 25th of February, 1922, the following petition was filed before the Court in the suit:

"On the advice of well wishers it has been agreed by the parties to get the suit decided by arbitrators. The petitioners have therefore

(1) (1916) I. L. R. 40 Bom. 386. (2) (1921) I. L. R. 45 Bom. 245.
(3) (1922) I. L. R. 49 Cal. 608.

executed an *ekrarnama* dated 25th February 1922. Therefore they do not like to prosecute this case. This suit may be dismissed without trial. Costs may be borne by the parties."

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On this the Subordinate Judge passed the following order:

"The suit is dismissed in terms of the *solehnama*."

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This order is final and cannot be questioned now: and, in any case, I can see nothing illegal in it. I see no reason why the suit should not have been withdrawn by consent of the parties. The suit then was at an end; but the agreement to refer to arbitration stood. There is nothing illegal in such an agreement being made pending litigation [*Nanjappa* v. *Nanja Rao* (1) where it was held that there may be an agreement to refer to arbitration in a pending suit without the intervention of the Court. *See* also *Shavakshaw D. Davar* v. *Tayab Haji Ayub* (2) and *Manilal Motilal* v. *Gokal Das Rowji* (3) quoted above]. Paragraph 1 of the second schedule is not mandatory, it is permissive. If the parties apply to the Court for an order of reference then the Court must keep control over the proceedings up to the end. But it is not necessary for the parties to take this course and there is nothing to prevent their getting the suit dismissed by consent. Then the whole matter is at large. The point is that in all the cases cited above there was a suit pending at the time when the award was made, and the question was how the award was to be dealt with in the suit; and the better opinion seems to be that it can only be dealt with by being pleaded as a bar to the further continuance for the suit. But where there is no suit pending when an application is made to the Court under paragraph 20, I can see nothing to bar the procedure under paragraph 20 in the fact that the original agreement to arbitrate was made while a suit was pending. Paragraphs 20 and 21 provide for an adequate check of the proceedings before the award becomes a rule of the Court. This is all that is

(1) (1912) 16 Ind. Cas. 478. (2) (1916) I. L. R. 40 Bom. 386.
(3) (1921) I. L. R. 45 Bom. 245.

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necessary. The present proceedings fall directly within the terms of paragraph 20 because the matter was referred to arbitration without the intervention of the Court. The Court made no order in the matter of arbitration in the original suit which was simply dismissed.

But here there is another fact. The original agreement to refer to arbitration provided by its fourth clause that the arbitrator should pass his award by 30th *Baisakh*, 1329. As the arbitration was not completed by that date a fresh agreement was entered into between the parties extending the time till the 29th of *Sawan*, 1329. This enlargement of time is equivalent to a fresh submission to arbitration [see Halsbury's *Laws of England*, Vol. I, page 463, and *Stephens* v *Lowe* (1) and *Watkins* v. *Phillpotts* (2)]. This agreement was not made during the pendency of any suit and was free from the objection that has been urged against the first submission.

Finally, as to the error of law said to have been committed by the arbitrator in making an award when all the cosharers were not plaintiffs, it is sufficient to say that the suit was at an end and that the submission to arbitration was a submission of the dispute between the present plaintiffs and the defendant. There was, therefore no question of law for the arbitrator to consider; and, even if there was, then, as was pointed out by the Judicial Committee in *Ghulam Khan* v. *Muhammad Hassan* (3), arbitrators are judges of law as well as judges of fact and an error of law certainly does not vitiate their award.

My opinion, therefore, is that on all grounds this appeal fails and it must be dismissed with costs.

DAS, J.—I agree.

Appeal dismissed.

(1) (1832) 9 Bing. 32; 131 E. R. 526. (2) (1825) M'Cl. & Y. 393.
(3) (1902) I. L. R. 29 Cal. 167; L. R. 29 I. A. 51.