

## APPELLATE CIVIL.

*Before Courtney Terrell, C.J., and Fazl Ali, J.*

1936.

BADRI CHAUDHURI

v.

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 February,  
6, 14, 26.

MUSAMMAT CHAMPA CHAUDHURAIN.\*

*Registration Act, 1908 (Act XVII of 1908), section 17, clause (b) and section 49—award on arbitration without intervention of court affecting immovable property, if compulsorily registerable.*

*Held*, that an award of arbitrators, on a reference without the intervention of the court, declaring the rights of the parties in immovable property worth more than a hundred rupees is compulsorily registerable under clause (b) of section 17 of the Registration Act.

*Bageshwari Charan Singh v. Jagannath Kuceri*(1), distinguished.

The mere fact that the defendant did not raise any objection to the admissibility of the award in the trial court did not affect the question because section 49 of the Registration Act is mandatory.

Appeal by the defendant.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

*Hasan Jan and Saileswar De*, for the appellant.

*R. K. Jha* (with him *Hareshwar Prasad Sinha* and *Ramnandan Prasad*), for the respondents.

FAZL ALI, J.—This appeal arises out of a suit which related to an award made by certain arbitrators without the intervention of court. The case which the plaintiff sought to make out at first was that the award was liable to be set aside in its entirety, but some time after the institution of the suit she made an application for the amendment of the plaint in which she asked the court to set aside the award not

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\* Appeal from Original Decree no. 119 of 1932, from a decision of Babu Devi Prasad, Subordinate Judge of Darbhanga, dated the 30th April, 1932.

(1) (1931) L. R. 59 Ind. App. 130.

1936.

BADRI  
CHAUDHURI  
v.  
MUSAMMAT  
CHAMPA  
CHAUDHURI.  
RAIN.

FAZL ALI, J.

in its entirety but only in part. The defendant Badri Chaudhri, who is the appellant in this Court contended in his written statement that the award was valid and binding on the parties. The learned Subordinate Judge having in the decree which he passed in the suit upheld certain portions of the award and declared the other portions as inoperative, defendant Badri Chaudhri now appeals against the decision of the Subordinate Judge and contends that the award should be either upheld or set aside in its entirety.

The plaintiff is admittedly the widow of one Murat Chaudhuri and the defendant Badri Chaudhuri is his nephew. After the death of Murat Chaudhuri a dispute arose between the plaintiff and Badri as to who should succeed to his estate, and both parties ultimately agreed to refer their dispute to certain persons who were appointed by them as arbitrators by a deed of reference, dated the 12th December, 1930. The arbitrators were under this deed empowered to give their award upon taking oral and documentary evidence regarding "the immoveable and moveable properties appertaining to the estate of Babu Murat Chaudhuri aforesaid". The arbitrators gave their award on the 25th of December, 1930. According to the award the plaintiff was to "continue as usual to be in possession and occupation as the malik of the house in place of Babu Murat Chaudhuri, deceased" and Badri Chaudhuri was to "continue to work according to the instructions of the said Musammat just in the same way as he used to do in his uncle's time". The arbitrators further, after referring to the principal items of property constituting the estate of Murat Chaudhuri, proceeded to lay down that the cloth shop, which was part of the assets of Murat Chaudhuri, was to be managed by Badri Chaudhuri and if the business resulted in loss the shop was to be closed and the money deposited "into the treasury of the Musammat". The

arbitrators also provided that in case the plaintiff wilfully wasted "the money and the bonds", the powers conferred upon her were to be exercised by Badri Chaudhuri and she was to have no right except that of receiving maintenance from Badri. The award then concludes with the following provision :—

"The arbitrators shall, in case of doubt and suspicion, be at liberty to examine the properties mentioned in paragraph 3."

There can be no doubt upon a careful reading of this award in the light of the allegations of the parties as to their respective rights in the property of Murat Chaudhuri that the arbitrators intended to give to the plaintiff the position of the owner of the properties left by Murat Chaudhuri and to defendant Badri Chaudhuri the position of a mere servant or manager. They did not, however, intend to give to the plaintiff any higher rights than that of a life owner and in their anxiety to prevent the property from being wasted by the plaintiff they provided by way of penalty that in case any waste was committed by her she would be divested of her rights in the property as owner and the rights would vest in Badri Chaudhuri. The award, however, though as far as it goes it aims at doing substantial justice between the parties, contains certain clauses which make it almost unworkable, with the result that neither party seems to be satisfied with it as a whole. Thus both the parties conceded before the learned Subordinate Judge that the particular provision in the award by which the arbitrators had empowered themselves to inspect and control the properties and the affairs of the parties was *ultra vires* and beyond the scope of the reference. The learned Subordinate Judge on hearing the parties came to the conclusion that this provision must be deleted from the award and he also set aside the award with respect to certain other matters. The material part of his judgment runs as follows :—

"Consequently while the award can remain intact for the first portion it must be set aside on the second. I therefore uphold the

1936.

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BADRI  
CHAUDHURI  
v.  
MUSAMMAT  
CHAMPA  
CHAUDHURI.  
RAIN.

FAZL ALI, J.

1936.

BADRI  
CHAUDHURI  
v.

MUSAMMAT  
CHAMPA  
CHAUDHURI  
RAIN.

FAZL ALI, J.

award so far as it is covered by the terms of the reference, i.e., paragraphs nos. 1, 2, 3 and a portion of paragraph no. 4 and set it aside with respect to the rest barring paragraph no. 6 which lays down that in case the cloth business proves a losing concern it should be closed."

Paragraphs 1, 2 and 3 are practically devoted to a narration of the facts which led to arbitration and the description of the properties left by Murat Chaudhuri. Paragraph 4 is the most important paragraph in the award because it defines the status of the parties and describes the plaintiff as the malik of the house and provides that defendant Badri Chaudhuri shall continue to work according to the instructions of the plaintiff. The remaining paragraphs provide how the properties should be managed by the parties.

The question which is to be considered in this appeal is whether that part of the award which has been declared to be inoperative is severable from the parts which have been upheld. It seems to me to be clear that the arbitrators in their award propounded an entire scheme as to the management of the property and it is difficult to uphold a part of the scheme and delete the remaining part of it. What the arbitrators seem to have intended was that although the defendant should be given a subordinate position in the management of the properties, yet the management should be carried on with his co-operation. The provisions of the award, therefore, which restrict the powers of the plaintiff being part of the scheme of management devised by the arbitrators cannot be easily severed from the other provisions where the status of the parties has been defined. In my opinion, therefore, the defendant's contention that the award should be set aside in its entirety must be upheld. Indeed this was the original prayer made by the plaintiff herself in her plaint at the date of the institution of the suit, though subsequently she modified the prayer.

There is also a legal difficulty in upholding the award, because it has not been registered. It is now

beyond dispute that an award made by arbitrators without the intervention of court is compulsorily registerable if it falls within clause (b) of section 17 of the Registration Act. This clause refers to

“ non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property.”

The contention put forward on behalf of the appellant is that the award in question required registration, because it had at least declared the rights of the parties in the immoveable properties left by Murat Chaudhuri. The learned Advocate for the respondents, however, contends that the word “ declare ” as used in section 17, clause (b), has been used in a special and restricted sense, because it is used in juxtaposition with the expression “ assign, limit or extinguish ” and he relies in support of this argument upon the decision of the Judicial Committee in *Bageshwari Charan Singh v. Jagannath Kuari*(1). In that case the Judicial Committee after referring to certain decisions of the Indian Courts upon the true construction of section 17 of the Registration Act observed : “ Their Lordships have no doubt that this track of decision is right. Though the word ‘ declare ’ might be given a wider meaning, they are satisfied that the view originally taken by West, J. is right. The distinction is between a mere recital of a fact and something which in itself creates a title. The distinction has been acted on in cases connected with mortgages by deposit of documents of title.” In the case which was actually before their Lordships the question was whether a certain petition presented to the commissioner was admissible in evidence without registration. Their Lordships held that the particular clauses of that petition which were relied upon as constituting a declaration of certain rights in immoveable property were mere recitals of existing facts. In the present case, however, the declaration

1936.

BADRI  
CHAUDHURI  
v.  
MUSAMMAT  
CHAMPA  
CHAUDHU-  
RAIN.

FAZL ALI, J.

1936.  
 BADRI  
 CHAUDHURI  
 v.  
 MUSAMMAT  
 CHAMPA  
 CHAUDHU-  
 BAIN  
 FAZL ALI, J.

as to the rights of the parties being made in an award cannot be held to amount to mere recital of facts but becomes the basis of the title of the parties in the sense that whatever the previous rights of the parties may have been, if the award is valid and can be enforced in a court of law, the rights of the parties as declared by the award can also be enforced. This being so, I think that the award should have been registered and as section 49 of the Registration Act lays down in clear terms that no document which is required to be registered shall be received as evidence of any transaction affecting such property, or affecting any immoveable property comprised therein, the award in question was not admissible in evidence. The mere fact that the defendant did not raise any objection to the admissibility of the award in the trial court will not affect the question, because section 49 is mandatory.

In this view the appeal will be allowed and the award will be set aside in its entirety. In the circumstances of the case, however, the parties will bear their own costs throughout.

COURTNEY TERRELL, C.J.—I agree.

*Appeal allowed.*

### APPELLATE CIVIL.

*Before Wort and Fazl Ali, JJ.*

KALI SINGH

v.

MATRU SINGH.\*

*Revenue Sales Act, 1859 (Act XI of 1859), section 37—purchaser at revenue sale, if can avoid the raiyati interest of a mukarraridar which he held before the grant of the mukarrari lease—grant of mukarrari right to a raiyat, effect of.*

\* Appeal from Original Decree no. 151 of 1933, from a decision of Babu Anjani K. Sahay, Subordinate Judge of Monghyr, dated the 31st of July, 1933,