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has started with an idea that *kathiari* is illegal. In the plaint the plaintiff clearly stated that under the record-of-rights he was entitled to get Rs. 1-15-0 which included *kathiari* also. The learned Munsif apparently did not examine the record-of-rights, and had he done so and if the statement of the plaintiff was borne out by the record-of-rights, it would have been obvious to him that this was not an *abwab*.

The case is, therefore, remanded to the learned Munsif. He will call upon the plaintiff to produce the record-of-rights and if the rent there is Rs. 1-15-0, whether the *kathiari* be mentioned or not, the decree will be at that rate. If it appears that the homestead land was otherwise belagan and that the *kathiari* is payable in respect of it, the plaintiff will be entitled to a decree for it. If the tenancy was created after the record-of-rights was published and this *kathiari* was one of the terms on which the land was settled the plaintiff is obviously entitled to it. If these conditions do not exist the plaintiff will not be entitled to a decree, not on the ground that it is an *abwab* but on the ground that it is in excess of the settled rent.

The application is allowed, but as there has been no appearance on behalf of the opposite-party there will be no order for costs.

Rule made absolute.

J.K.

APPELLATE CIVIL.

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December, 22, 23.

Before Fazl Ali and Varma, JJ.

RADHEY LAL

v.

KANHAI LAL.*

Code of Civil Procedure, 1908 (Act V of 1908), Schedule II, paragraphs 14 and 16(2)—arbitration—award—decree based on award, when appealable—decree based on an invalid

*Appeal from Original Decree no. 134 of 1936, from a decision of Babu Nidheswar Chandra Chandra, Subordinate Judge of Patna, dated the 23rd December, 1935.

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award, whether appealable—commissioner and arbitrator, difference between the powers of.

No appeal lies from a decree based on an award unless the decree is in excess of or not in accordance with the award. No appeal is maintainable on the ground that the award is void or invalid or illegal.

There is ample provision in paragraphs 14 and 15 of Schedule II of the Code to enable the court to which the award is submitted to refuse to give effect to the award if in its opinion it is either void or invalid or illegal. If, however, the award is accepted it means that in the opinion of the court it is neither void nor invalid and the Legislature does not appear to have intended that the opinion of the court should be challenged in appeal.

Paragraph 16 merely gives effect to the principle of finality of awards and the intention of the Legislature evidently is that an award should be subjected to the scrutiny of one court only, namely, the court through whom the reference is made to arbitration and not that court and an appellate court.

Ghulam Khan v. *Muhammad Hassan*(1), relied on.

Durga Charan Deb Nath v. *Gangadhar Deb Nath*(2), dissented from.

The essential difference between a commissioner appointed to effect a partition and an arbitrator appears to be that the former is an officer selected and appointed by the court, in whose selection the parties have not, as of right, any choice, whereas the latter is a person selected by the parties in whose selection the court has no choice. In the former case the parties have expressed no consent to be bound by the decision of the commissioner who is appointed by the court and whose decision the parties may challenge before the court passing a final decree. In the latter case they have expressed such consent and cannot challenge the arbitrator's decision on questions of law and fact except on the limited grounds mentioned in the Second Schedule of the Code.

Bholanath Ray v. *Bata Kristo Ray*(3), followed.

(1) (1901) I. L. R. 29 Cal. 167, P. C.
(2) (1930) 34 Cal. W. N. 813.
(3) (1926) 7 Pat. L. T. 739.

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Appeal by the defendant.

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

Sir Manmatha Nath Mukherjee (with him *B. C. De, S. N. Mukherjee, Mehdi Imam* and *K. P. Verma*), for the appellant.

Khurshaid Husnain (with him *N. K. Prasad II* and *Ramanugrah Prasad*), for the respondent.

FAZL ALI, J.—This is an appeal from a final decree in a partition suit which purports to be based upon an award given by certain arbitrators appointed by the parties just before the final decree in the suit was passed. The parties are brothers, the plaintiff being the younger brother of the defendant and both being the sons of one Basant Lal.

On the 18th June, 1934, the plaintiff instituted the present suit for the partition of properties, both moveable and immoveable, and in the first schedule of the plaint he claimed that one of the items of the properties to be divided between him and the defendant was cash amounting to nine lakhs of rupees. The plaintiff also made an application to the court for the appointment of a commissioner to make an inventory of the joint properties on the allegation that the moveable properties were in danger of being removed by the defendant. The defendant did not file any written statement, but he filed an application in which he denied some of the allegations made by the plaintiff and tried to resist the appointment of the commissioner. Ultimately a commissioner was appointed and before him on the 23rd June, 1934, the parties presented a compromise petition. This petition recited that it had been settled between the parties (*1*) that the plaintiff would accept 7-annas share in all the moveable properties, articles, cash, ornaments, etc., and the defendant would take the

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remaining 9 annas and (2) that the properties should be partitioned by three persons who had been chosen by the parties, the names of these persons being Nanda Lal Bhagat, Lachman Sao and Hari Kishun. The petition further stated

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"that in whatever manner the aforesaid arbitrators shall partition and allot the properties, cash, articles and bond, ijara (deeds), hundis, decree, etc., shall be acceptable to both parties, and should, for any reasons, they fail to agree in the partition of any property the opinion of the majority shall prevail and the partition shall take effect accordingly."

The arbitrators subsequently gave their award setting out therein details of properties allotted to the plaintiff and the defendant respectively. They decided that the defendant had concealed a sum of three lakhs and not over nine lakhs of rupees as was alleged by the plaintiff, and to equalise the share of the plaintiff in the total asset, they directed the defendant to pay to him a sum of Rs. 98,773 odd. Certain objections were preferred by the defendant to the award, but they were disallowed by the Subordinate Judge who directed the preparation of the final decree in accordance with the award. The defendant then moved this Court against the order of the Subordinate Judge giving effect to the award, but his application was dismissed. He has now preferred this appeal from the final decree passed by the learned Subordinate Judge and the main question which has been argued in this Court is whether an appeal lies from the decree.

Paragraph 16 (2) of the Second Schedule of the Code of Civil Procedure provides—

"Upon the judgment pronounced according to the award 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."

Prima facie, therefore, no appeal can be entertained from the decree passed in the present suit. It is, however, contended by Sir Manmatha Nath Mukherjee who appears on behalf of the appellant that in the present case an appeal will lie, because in the first

place the Second Schedule of the Code of Civil Procedure has no application to the facts of the present case; and, secondly, because the so-called award of the arbitrators was without jurisdiction and was, therefore, in law no award at all.

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As to the first point it is contended that the parties having agreed among themselves as to their respective share in the properties to be divided, there was no longer any matter in difference between them so as to bring the case under paragraph 16 of the Second Schedule and the position of the so-called arbitrators was not unlike that of a commissioner who is usually appointed for the partition of properties in a suit for partition after the preliminary decree is passed. This contention is obviously untenable, because the compromise petition itself shows that all the differences between the parties had not been settled. Indeed, in the very preamble of the petition it is recited that the reference to the three persons named in the petition became necessary because " many kinds of harassment and monetary loss are involved in a dispute between the parties and it is not known how long the suit will be going on and what will be the result ". Evidently the parties were not agreed among themselves as to how the properties were to be divided, otherwise there would have been no necessity of referring the question to the arbitrators. The expression " the matter in difference between the parties " which has been used in paragraph 1 of the Second Schedule is quite general and I have no doubt that it fully covers the present case. As to the distinction between a commissioner and an arbitrator it has been clearly pointed out in *Bolanath Ray* v. *Bata Krishto Ray*(1) and I shall merely quote the following passage from the judgment delivered in that case:

" The essential difference between a commissioner appointed to effect a partition and an arbitrator appears to me to be that the former is an officer

(1) (1926) 7 Pat. L. T. 739.

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selected and appointed by the court, in whose selection the parties have not, as of right, any choice, whereas the latter is a person selected by the parties in whose selection the court has no choice. In the former case the parties have expressed no consent to be bound by the decision of the commissioner who is appointed by the court.....and whose decision the parties may challenge before the court passing a final decree. In the latter case they have expressed such consent and cannot challenge the arbitrator's decision on questions of law and fact except on the limited grounds mentioned in the Second Schedule of the Code." Thus the first contention put forward on behalf of the appellant must fail.

It is next contended that the present case does not fall within the Second Schedule of the Code of Civil Procedure at all because this Schedule is intended to apply to those cases only where a decree is based wholly upon the award of the arbitrators, whereas in the present case the final decree is based partly upon a preliminary decree and partly upon the award of the arbitrators. This contention must be negatived on the short ground that there is nothing in the Code to prevent the parties from referring the matter in difference between them to arbitration at any stage of the suit and that it is not quite correct to say that the final decree which has been passed in the suit is not wholly based upon the award of the arbitrators. It is true that the parties agreed among themselves as to their respective shares and this agreement was incorporated in the preliminary decree but the division of the properties which is the subject of the final decree was wholly based upon the award of the arbitrators.

Lastly it was contended that the award of the arbitrators is void because they had no authority to divide the cash which was not produced before them. It is contended that the arbitrators had been authorised merely to divide those properties the existence of which was admitted and they went beyond their

jurisdiction in deciding that the defendants had concealed a sum of three lakhs of rupees. It appears that this was precisely one of the points raised by the appellant before this Court in the Civil Revision to which reference has already been made, but it was overruled, it being pointed out that the arbitrators had been empowered not only to divide the properties but also to ascertain what was to be divided. It appears to us that the view which was expressed in that case is the only reasonable view which can be taken when the compromise petition is carefully read. As I have already stated, one of the properties which the plaintiff asked the court to divide was cash amounting to about nine lakhs of rupees. The compromise petition does not suggest anywhere that the allegations of the plaintiff in this respect were to be entirely ignored nor does it say that the arbitrators were to divide only such properties as were produced before them. On the other hand it recites that in whatever manner the arbitrators shall partition and allot the properties *including the cash* shall be acceptable to both parties. I do not think, therefore, that the compromise petition which is the basis of the arbitrators' authority imposed any such limitation upon the power of the arbitrators as to prevent them from trying to ascertain what was to be divided. This is quite sufficient to dispose of the contention put forward on behalf of the appellant; but the legal aspect of the matter must also be examined, inasmuch as the learned Advocate for the appellant argued upon it at some length and cited various authorities in support of his contention.

It appears that previous to the decision of the Judicial Committee in *Ghulam Khan* v. *Mohammad Hassan*(1) it was held in a number of cases that though a decree might be in accordance with an award, an appeal would lie from the decree if the award upon which the decree was passed was invalid. This view,

(1) (1901) I. L. R. 29 Cal. 167, P. C.

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however, has been abandoned by the majority of the High Courts in India since the pronouncement of the Judicial Committee in that case. The Judicial Committee dealing with section 522 which corresponded to paragraph 16 of the Second Schedule of the Code of Civil Procedure observe as follows with reference to the concluding words of this provision which are to the effect that no appeal shall lie from a decree passed upon a judgment pronounced according to an award except in so far as a decree is in excess of or not in accordance with the award :

"Those words appear to be perfectly clear. Their Lordships would be doing violence to the plain language and the obvious intention of the Code if they were to hold that an appeal lies from a decree pronounced under section 522 except in so far as the decree may be in excess of or not in accordance with the award. The principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decisions in this country. The time has long gone by since the courts of this country showed disposition to sit as a court of appeal on award in respect of matters of fact or in respect of matters of law."

It may be pointed out here that the Code of Civil Procedure does take into account those cases where an award determines any matter not referred to arbitration and paragraph 14 of the Second Schedule clearly provides that in such cases the Court may remit the award to the reconsideration of the arbitrator upon such terms as it thinks fit. In the present case the defendant did not ask the court specifically to remit the award or any part of it to the arbitrators under paragraph 14, but it is pointed out that one of his objections to the award was that the arbitrators had gone beyond the scope of the reference in awarding a decree for Rs. 98,773-2-3. This objection, however, even if we assume it for the purpose of this appeal to have been an objection under paragraph 14, was

considered and overruled and the application made by the appellant to the High Court to revise the order of the Subordinate Judge overruling his objection did not also succeed. Then comes paragraph 15 which provides, firstly, that the award remitted under paragraph 14 becomes void on the failure of the arbitrators to re-consider it; and, secondly, that an award may be set aside on certain grounds specified in that paragraph. The first part of the paragraph had no application to the case, as the award was never remitted to the arbitrators and the defendant did not succeed in persuading the Subordinate Judge to set it aside under the second part of the paragraph. Paragraph 16 says—

"Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in the manner provided in paragraph 14 and where the Court has refused an application made to it to set aside an award, the Court shall proceed to pronounce judgment according to the award."

In the present case the court below followed the course clearly indicated in this paragraph and pronounced a judgment according to the award. It follows, therefore, that under clause (*2*) of this paragraph, in order to determine whether an appeal lies from a decree based upon a judgment so pronounced, all that is to be ascertained is whether the decree is in excess of or not in accordance with the award. Here it is not disputed that the decree is in accordance with the award but it is contended that the award itself is in excess of the powers conferred upon the arbitrators. It appears to me in these circumstances that no appeal lies from the decree and I am fortified in this view by several decisions of this High Court and other High Courts of this country. Sir Manmatha Nath Mukherjee referred us to the decision of a Division Bench of the Calcutta High Court in *Durga Charan Deb Nath* v. *Gangadhar Deb Nath*(1) in which it was held that there is a distinction between an award which is irregular and an award which is

(1) (1930) 34 Cal. W. N. 818.

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void, and that where the decree is based upon an award which is without jurisdiction, the decree is really based on something which is not an award. That case, however, has not been followed by the other High Courts and with great respect to the learned Judges who decided it I am unable to agree to the proposition enunciated therein. The expressions "void and without jurisdiction" are sometimes used in a loose sense as bearing the same meaning as the terms "invalid" and "illegal". But in whatever sense they may be used I think that there is ample provision in paragraphs 14 and 15 of Schedule II of the Code of Civil Procedure to enable the court to which the award is submitted to refuse to give effect to the award if in its opinion it is either void or invalid or illegal. If, however, the award is accepted, it means that in the opinion of the court it is neither void nor invalid and the legislature does not appear to have intended that the opinion of the court should be challenged in appeal. Paragraph 16 merely gives effect to the principle of finality of awards and the intention of the legislature evidently is that an award should be subjected to the scrutiny of one court only, namely, the court through whom reference is made to arbitration and not that court and an appellate court. I would thus prefer to follow the decisions of our own court which seem to be in consonance with the decision of the Judicial Committee as well as the plain language of paragraph 16 of the Second Schedule of the Code of Civil Procedure.

I would, therefore, dismiss this appeal with costs. Hearing fee ten gold mohurs.

VARMA, J.—I agree.

The contention on behalf of the appellant against the decree is not that the decree is in excess of or not in accordance with the award but that the award itself is defective in some of the ways pointed out by Sir Manmatha Nath Mukherjee. Firstly, he contends that the arbitrators had exceeded the powers that were

conferred upon them, because although the plaint referred to the property ascertained and unascertained, the petition of compromise did not refer to the unascertained portion of the property. Now, reading the various documents in connection therewith, namely, the petition of compromise and the preliminary decree passed thereon, it is clear to me that even the unascertained cash was included because when the arbitrators were to divide the property between the brothers all the properties could not be known to the arbitrators from the very beginning and they had to ascertain as to what the properties were which they were to divide. Moreover, the defendant raised this point before the court below. The petition of objection shows that they wanted to question (though not very clearly but in a round-about way) the authority of the arbitrators to give an award with regard to the property not ascertained by them. But that objection was disallowed. That is to say, even if we assume that there was a petition under paragraph 14 of the Second Schedule of the Code of Civil Procedure, that petition was rejected and then comes the mischief of paragraph 16 of the Second Schedule—that after a petition under paragraph 14 is rejected, a judgment must follow and a decree passed thereon and when that decree is passed, then, unless the party questioning the decree can show that the decree is in excess of the award or not in accordance with the award, he has no right of appeal. About the other point that this is not a decree passed entirely upon the award, it is clear from the materials before us that although a large number of documents had to be referred to, it is really a decree based on the award.

I agree that no appeal lies in this case.

Appeal dismissed.

J. K.