APPELLATE CIVIL.

1921

Feb. 25

Before Mr. Justice Chevis and Mr. Justice Scott-Smith.

DWARKA DAS, AND OTHERS (PLAINTIFFS) *Appellants,*

versus

KRISHAN KISHORE AND JAI GOPAL (DEFENDANTS)—*Respondents.*

Civil Appeal No. 2006 of 1917.

Civil Procedure Code, Act V of 1908, section 2 (11) and Order XXII, rule 3—legal representatives of a deceased member of a joint Hindu family—Court fees—suit to enforce right to share in joint family property—Court-Fees Act, VII of 1870, section 7 (IV) (b)—Reference to arbitration by manager of joint Hindu family—whether binding on members—Status of after-born sons to challenge such reference and the award—Arbitrator—whether controlled in his decision by the parties' personal law.

R. K. died, and a dispute arose between his two sons K. K. and J. G. as to his property. They referred their dispute to arbitration by means of an agreement, dated the 8th of August 1909. At the time J. G. was sonless, but on the 26th of December 1909 a son J. N. was born to him. On the 9th of March 1910 the arbitrator gave his award and on the 25th of July 1910, upon an application made by K. K. to have the award filed in Court, the parties agreed to a compromise by which they accepted the award with certain modifications in favour of J. G. Upon this a decree was passed. D. D., the second son of J. G., was born on the 4th of August 1913. The present suit was instituted by J. N. and D. D., the minor sons of J. G., on the 16th of June 1914 for a declaration to the effect that the entire arbitration proceedings were null and void, and praying to be awarded joint possession of the property in dispute and they valued the relief sought at Rs. 2,500. The property was valued for purposes of jurisdiction at a sum exceeding 8 lakhs, and it was contended that the suit should be valued for purposes of Court-fees at the actual value of the plaintiffs' share. During the pendency of the appeal J. N. died. An application was then made under Order XXII, rule 3, Civil Procedure Code, praying that his brother D. D. and his mother *Mst.* P. D. should be brought on the record as his legal representatives. This application was accepted subject to all just exceptions.

Held, that there is no such thing as succession properly so-called in an undivided Hindu family and the order in chambers making D. D. and *Mst.* P. D. the legal representatives of J. N. deceased must consequently be set aside.

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Chunilal v. *Bai Mani* (1), followed, also Mayne's Hindu Law, 8th Edition, page 339.

Held also, that the present suit is not for partition and for possession of a definite share of joint property, but is one to enforce the right to share in joint family property. This being so the value of the suit is the amount stated in the plaint, *viz.*, Rs. 2,500, *vide* section 7 (IV) (*f*) of the Court Fees Act.

Dagdu v. *Totaram* (2), *Hari Chand* v. *Jiwan Mal* (3), and *Bidhata Roy* v. *Ram Charitra* (4), distinguished.

Held, that under Hindu Law a son conceived is the same as a son born for all purposes, and as J. N. deceased, who was conceived before the reference to arbitration, could therefore have maintained the present suit, the later born son D. D. was also competent to do so.

Sahapathi v. *Somasundaram* (5), and *Tulshi Ram* v. *Babu* (6), followed, also Mulla's Hindu Law, 3rd Edition, page 242, and Mayne's Hindu Law, 8th Edition, page 461.

Held further, that family arrangements or references to arbitration entered into in good faith by the manager of a joint Hindu family or by a father in such a family bind the other members or the minor sons in the absence of fraud or other good reasons to the contrary.

And if the reference cannot be objected to, the award cannot be objected to merely on the ground of inequality of benefit.

Balaji v. *Nana* (7), *Jagan Nath* v. *Mannu Lal* (8), *Jai Nath* v. *Kamala Nath* (9), *Ramdas* v. *Chabildas* (10), *Venkatagiri* v. *Subbarayalu* (11), *Ramdayal* v. *Motiram* (12), *Uppara Chingappa* v. *Gaddam* (13) and *Gandharp Singh* v. *Nirmal Singh* (14), followed, also Banerji's Law of Arbitration, 2nd Edition, pages 73 to 75. Mayne's Hindu Law, page 451, referred to.

Held also, that in proceedings for filing an award the parties are competent to compromise by altering, amending or adding to the award.

Behari Lal v. *Dholan Das* (15), followed.

Held, that in the absence of any stipulation to that effect an arbitrator is not controlled in his decision by the rules of the personal law of the parties.

Muhammad Nawaz Khan v. *Alam Khan* (16), followed.

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(1) (1918) I. L. R. 42 Bom. 504
(2) (1909) I. L. R. 33 Bom. 658.
(3) 28 P. R. 1903.
(4) (1907) 6 Cal. L. J. 651.
(5) (1882) I. L. R. 16 Mad. 76.
(6) (1911) I. L. R. 33 All. 654.
(7) (1903) I. L. R. 27 Bom. 287.
(8) (1894) I. L. R. 16 All. 231.
(9) (1910) 7 Indian Cases 31.
(10) (1910) 7 Indian Cases 134.
(11) (1914) 24 Indian Cases 491, 496.
(12) (1913) 24 Indian Cases 86
(13) (1916) 50 Indian Cases 471.
(14) (1919) 54 Indian Cases 325.
(15) (1910) 5 Indian Cases 994.
(16) 70 P. R. 1891 (P. C.).

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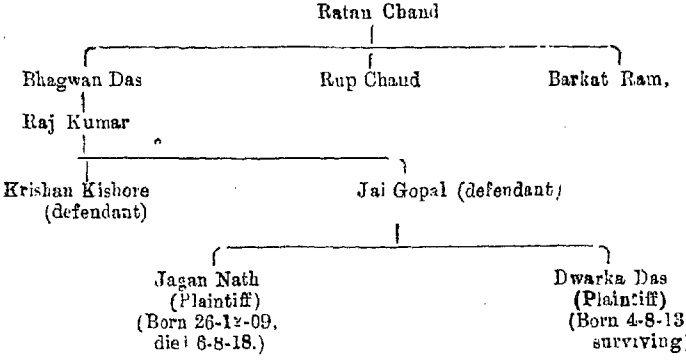
First appeal from the decree of D. Johnstone, Esquire, Senior Subordinate Judge, Lahore, dated the 15th May 1916, *dismissing the suit.*

TEK CHAND and FAKIR CHAND, for Appellants.

BEVAN-PETMAN and MOTI SAGAR, for Respondents.

The judgment of the Court was delivered by—

SCOTT-SMITH, J.—The following pedigree table will illustrate the present case :—



After the death of Raj Kumar there was a dispute between his sons Krishan Kishore, the chief defendant, and Jai Gopal as to his property. Krishan Kishore claimed that he was entitled to succeed to the whole property in accordance with the rule of primogeniture and that Jai Gopal was only entitled to maintenance. Jai Gopal, on the other hand, claimed that he was entitled to a share in the property in accordance with Hindu Law. They referred their dispute to arbitration by an agreement dated the 8th of August 1909, printed at page 25 of the paper-book, in which they appointed Mr. Atkins, Deputy Commissioner of Ferozepore, and formerly Deputy Commissioner of Lahore, as arbitrator, and agreed to abide by the settlement which he made regarding their rights. At the time of the reference to arbitration Jai Gopal was sonless, but on the 26th of December 1909 a son was born to him called Jagan Nath. On the 9th of March 1910 the arbitrator gave his award, and on the 25th of July 1910 upon an application made by Krishan Kishore to have the award filed in Court, the parties agreed to a compromise by which they accepted the award with certain modifications

which were in favour of Jai Gopal. Upon this a decree was passed upon the award as amended by consent. Dwarka Das, the second son of Jai Gopal, was born on the 4th of August 1913, and the present suit was instituted by Jagan Nath and Dwarka Das, minors, through their mother, on the 16th of June 1914, for a declaration to the effect that the entire arbitration proceedings referred to above are null and void and do not affect the plaintiffs' right in the joint family property of *Diwan* Rattan Chand. Upon defendants' objection that plaintiffs could not sue for a mere declaration an amended plaint was put in which is to be found at pages 65-66 of the paper-book. Therein the plaintiffs asked for a declaratory decree to the effect that the arbitration proceedings were null and void and did not affect their rights and also prayed to be awarded joint possession of the property in dispute and they valued the relief sought at Rs. 2,500. In the original plaint the property was valued for purposes of jurisdiction at a sum exceeding 8 lakhs of rupees and when the amended plaint was put in the defendants objected in regard to the reduction of the value of the suit for purposes of jurisdiction and said the plaintiffs had no power so to reduce it. The Subordinate Judge, however, held that as the plaintiffs had altered their claim, they could alter the value of the relief sued for. The Judge held that the suit as laid in the amended plaint fell within section 7 (4) (*b*) of the Court Fees Act. The Lower Court has dismissed the suit, holding that the sons are bound by the action of their father Jai Gopal in referring the matter in dispute to arbitration.

Plaintiffs filed an appeal to the District Court, which held by its order of 9th July 1917, printed at pages 24-25 of the paper-book, that the value of the suit was over 8 lakhs of rupees as originally fixed and returned the memorandum of appeal for presentation in the Chief Court, where it was then filed. During the pendency of the appeal Jagan Nath has died. Upon his death an application was made under Order XXII, rule 3, Civil Procedure Code, that his brother Dwarka Das and his mother *Mussammat* Puran Devi, should be brought on the record as his legal representatives. This application

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was accepted subject to all just exceptions. Mr. Petman on behalf of the respondent Krishan Kishore raises a preliminary objection to the effect that Dwarka Das and *Mussammat* Puran Devi cannot be considered to be legal representatives of Jagan Nath. In support of his objection he refers to the definition of 'legal representative" in section 2 (11), Civil Procedure Code, where it is defined as meaning a person who in law represents the estate of a deceased person. He refers to page 339, Mayne's Hindu Law, 8th Edition, where it is said that "there is no such thing as succession, properly so called, in an undivided Hindu family," and to *Chunilal* v. *Bai Mani* (1), where it was held that the surviving co-parceners were not bound by the decree, for on no construction of the term 'legal representative' could members of a joint Hindu family be brought within its definition as contained in section 2 (11), Civil Procedure Code. On this authority we admitted the force of Mr. Petman's objection and set aside the order making Dwarka Das and *Mussammat* Puran Devi the legal representatives of Jagan Nath deceased.

Another preliminary objection was that the plaint and the appeal were not properly stamped. The contention is that as the suit is for joint possession of property the value for purposes of Court-fee should be the actual value of the plaintiffs' share in the property. On behalf of the appellant it is contended that the suit is not for possession of any definite share but only one to enforce his rights to share in the joint property. *Bakhshi* Tek Chand contends that the suit is one to enforce the rights to share in the property on the ground that it is joint family property under section 7 (4) (*b*) of the Court Fees Act and that the value of such a suit is according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. In all such suits it is laid down that the plaintiff shall state the amount at which he values the relief sought and it was contended that the plaintiff was within his rights in valuing the relief sought by him at Rs. 2,500.

(1) (1918) I. L. R. 42 Bom. 574.

In support of the objection *Dagdu* v. *Totaram* (1) and *Hari Chand* v. *Jiwan Mal* (2), were referred to, but in each of these cases the suit was for partition and for possession of a definite share of joint property. Those authorities are therefore not on all fours with the present case. In *Bidhata Roy* v. *Ram Charitra* (3), at the bottom of page 654 there is an *obiter dictum* to the effect that section 7 (4) (*b*) of the Court-Fees Act is applicable to a suit to enforce the right to share in any property on the ground that it is joint family property. This clause, the Judge stated, seems to refer to a suit for joint possession and not to a suit for partition No other authority on all fours with the present case has been cited, and we have overruled the objection, holding that the present claim is certainly one to enforce the right to share in joint family property. This being so the appeal was properly filed in the District Court, which had jurisdiction to hear it, but as it was before us we heard it at the request of Counsel.

As Jagan Nath, who joined in the suit, has died and as Dwarka Das has been held not to be his legal representative, the next point which arises is whether Dwarka Das, who was neither conceived nor born at the time of the reference to arbitration or at the time of award can maintain the suit. *Sabapathi* v. *Somasundaram* (4) is authority for the proposition that under Hindu Law a son conceived is equal to a son born, and accordingly an alienation by a Hindu to a *bonâ fide* purchaser for value is liable to be set aside by a son who was in his mother's womb at the time of the alienation, to the extent of his share. It is admitted by Counsel for the defendant that Jagan Nath, who was conceived before the reference to arbitration could have maintained the suit. It is also admitted by him that if a son or sons are alive at the time of an alienation then an after-born son can challenge that alienation. The authorities for this proposition are Mulla's Hindu Law, 3rd Edition, page 242, where it is stated that an alienation, *invalid* when it was made, may be set aside not

(1) (1909) I. L. R. 33 Bom. 658.
(2) 28 P. R. 1903.
(3) (1907) 6 Cal. L. J. 651.
(4) (1882) I. L. R. 16 Mad. 76.

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only at the instance of the sons then living but at the instance of any son born after the date of alienation, unless it has been ratified by them before his birth. Also see Mayne's Hindu Law, 8th Edition, page 461 and *Tulshi Ram* v. *Babu* (1). I am of opinion that a son conceived is the same as a son born for all purposes, and that if he be born alive he has a right to challenge alienations or other acts affecting his rights in the joint family property, and that any other son born subsequently, unless the former has in the meanwhile consented to the act impugned, can also challenge it.

Mr. Tek Chand in arguing the case on the merits urges that the right of sons in a joint Hindu family is quite independent of their father and that the father could not represent his minor sons in a reference to arbitration. He has also referred to the arbitration proceedings and has urged that there was no sufficient evidence before the arbitrator to support his decision that the rule of primogeniture prevailed in the family of the parties. He says that Jai Gopal ought to have insisted on the dispute being decided in accordance with Hindu Law. He urges that Mr. Atkins tried to find out what the intention of the parties' father had been and that he did not go into the Hindu Law governing succession to property. He says that Jai Gopal did not act in the best interests of his sons who at the time were unborn in referring the matter in dispute to arbitration. He refers to Mayne's Hindu Law, pages 450 and 451, where the authority of the father in dealing with the joint family property is discussed. At page 451 it is said :—

> "It is an established rule that a father can make no disposition of the joint property which will prejudice his issue, unless he obtains their assent, if they are able to give it, or unless there is some established necessity or moral or religious obligation to justify the transaction. And it makes not the least difference whether the disposition is in favour of a stranger or one of the family themselves. The test is whether it is an infringement upon their vested rights."

(1) (1911) I. L. R. 33 All. 654.

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Mr. Tek Chand urges that the reference to arbitration in this case was an infringement of the vested rights of Jai Gopal's sons.

Mr. Petman on behalf of the defendant on the other hand argues that the reference to arbitration was made with the *bonâ fide* intention of settling a dispute about succession to family property and was in the nature of a family arrangement which cannot be questioned by Jai Gopal's sons. He urges that it is quite clear from the record that Jai Gopal never gave up his claim to succeed as a co-sharer but that he referred the dispute to an arbitrator in whom he had confidence and who knew the family, in perfect good faith and of his own free will. *Diwan* Narendra Nath, who was at the time Deputy Commissioner of Hoshiarpur, gave evidence to the effect that he wrote the agreement between Jai Gopal and Krishan Kishore to refer the dispute between them to the arbitration of Mr. Atkins. His evidence is printed at page 81 of the paper-book, and it is proved from it that no pressure or undue influence was brought to bear upon Jai Gopal in order to get him to execute the agreement. No misconduct has been alleged against the arbitrator. He considered the previous history of the family and the wishes of the parties' father and an admission made by Jai Gopal himself in a letter to his father, which is printed at page 40 of the paper-book, and came to the decision that the rule of primogeniture prevails in the family and that Jai Gopal was only entitled to maintenance.

Mr. Petman in support of his contention that the reference to arbitration was of the nature of a family arrangement and cannot be contested by Jai Gopal's son has referred *inter alia* to the following authorities, *Balaji* v *Nana* (1) where it was held that the manager of a joint Hindu family, even when he is not the father, has the power to bind the family by a reference of a dispute with any outsider regarding any family property to arbitration, provided such reference is for the benefit of the family. Minors in the family are bound by the reference and will act

(1) (1903) I. L. R. 27 Bom. 287.

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upon it. The High Court in that case cited with approval the case of *Jagan Nath* v. *Mannu Lal* (1) where it was held that it was competent to the father of a joint Hindu family in his capacity of managing member of the family to refer to arbitration the partition of the joint family property and the award made on such a reference, if in other respects valid, will be binding on the sons. *Bakhshi* Tek Chand distinguishes these cases on the ground that the present case is different as there the dispute was between the members of a joint Hindu family on one side and an outsider on the other, but in my opinion if a manager or a father can refer a dispute between the family and an outsider to arbitration or a dispute in the family relating to partition of the joint family property, there is no good reason why he should not have authority to refer a dispute as to the right to share in the property arising between the members of the family themselves. I do not see any valid reason for distinguishing between the two cases. Mr. Petman also referred to the case of *Jai Nath* v. *Kamala Nath* (2), where it was held that the *karta* in a joint Hindu family had full power to act as guardian of the joint property of himself and his minor nephew and to deal with it for the purpose of making the reference to arbitration ; and also *Ram Das* v. *Chabildas* (3) where it was held that in the case of a family arrangement where there is sufficient motive, the Court will not consider the *quantum* of consideration and disturb the transaction on the ground of the inequality of the benefit, unless there is fraud or some other ground which in law vitiates it. He also referred to *Venkatagiri* v. *Subbarayalu* (4) where it was held that the minor sons of a Hindu father, are bound by a *bonâ fide* compromise of a doubtful claim entered into by their father as manager of the joint family. He refers especially to the following passage on page 496 :—

> "That the father and the managing member of a Hindu family has a right to bind

(1) (1894) I. L. R. 16 All. 231.
(2) (1910) 7 Indian Cases 31.
(3) (1910) 7 Indian Cases 134.
(4) (1914) 24 Indian Cases 491, 496.

his minor sons by a *bonâ fide* compromise of disputed claims is undoubted law. In *Sarabjit Partab Bahadur Sahi* v. *Indarjit Partab Bahadur Sahi*, it was held that where a family dispute which might have led to 'disastrous litigation' was compromised by the father, the same was binding upon his minor sons unless it was proved that the father's consent to the compromise was obtained by undue influence or misrepresentation. As said in Mussammat *Hassan Bibee* v. *Fazal Kadir*, the law as to family arrangements is governed by a special equity and will be enforced if honestly made. When the responsible members of a family agree to an arrangement which has been arrived at without undue advantage being taken the minor sons cannot be allowed to disturb the arrangement after it had been acted upon for many years. In *Ramdas* v. *Chabildas* (1) Chandavarkar, C. J. and Macleod, J., held :—

> 'In the case of a family arrangement where there is a sufficient motive for it, the Court will not consider the *quantum* of consideration and disturb the transaction on the ground of inequality of the benefit, unless there was fraud or some other ground which in law vitiates it.' "

Again Mr. Petman refers to the case *Ramdayal* v. *Motiram* (2) where it was held that in the absence of fraud or collusion a reference to arbitration by a Hindu father was binding on the other members of the family. Another ruling relied on by him is *Uppara Chinngappa* v. *Gaddam* (3) where a Division Bench of the Madras High Court held that where the manager of a joint Hindu family refers a dispute to arbitration in good faith and the circumstances are such that there is no collusion, the result of the submission will be binding on the other members of the family. In *Gandharp Singh* v. *Nirmal Singh* (4) it was held that a compromise, which is entered into by a Hindu father

(1) (1910) 7 Indian Cases 134.
(2) (1913) 24 Indian Cases 863.
(3) (1918) 50 Indian Cases 471.
(4) (1919) 54 Indian Cases 825.

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with regard to ancestral property for the purpose of avoiding an existing or even possible litigation and which is in the nature of a family settlement, is, in the absence of fraud, collusion, undue influence or other like reason, binding on his sons. All these authorities seem to me to show that family arrangements or references to arbitration entered into in good faith by the manager of a joint Hindu family or by a father in such a family bind the other members or the minor sons in the absence of fraud or other good reasons to the contrary. The same view of the law is stated in the Law of Arbitration in India by Banerji, 2nd Edition, pages 73-75. No fraud or misrepresentation or any other similar reason which would invalidate the reference to arbitration has been pleaded in the present case and in my opinion there can be no reason for holding that the reference was not valid. It appears to me that the arbitration was agreed to for the settlement of a *bonâ fide* dispute, and having regard to the authorities I do not think that the sons of Jai Gopal can object to it. Once it is admitted that the reference cannot be objected to, it appears to me that the award cannot be objected to merely on the ground of inequality of benefit. Mr. Atkins, as his award shows, estimated the income of the property and based his award of maintenance to Jai Gopal thereon. Mr. Tek Chand contended that the parties had no power to modify the award and that the Court could not have passed a decree otherwise than upon the award as given by the arbitrator. It appears to me, however, that if the original award was valid, so far as Jai Gopal was concerned, it certainly cannot be considered to be invalid merely because it was somewhat modified in his favour. In the case of *Behari Lal* v. *Dholan Das* (1) it was held by Rattigan, J., the late Chief Justice of this Court, that it is competent to the parties to compromise the proceedings under section 525, Civil Procedure Code, by altering, amending or adding to the award. I therefore hold that there is no force in this contention.

Another argument urged by *Bakhshi* Tek Chand was that it was not open to the arbitrator to forsake

(1) (1919) 5 Indian Cases 994.

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the rules of Hindu Law and to hold that the parties were governed by the rule of primogeniture. In answer to this Mr. Petman has referred to *Muhammad Nawaz Khan* v. *Alam Khan* (1). In that case it was held that where a dispute relating to land and the right of succession thereto was referred by the members of a Muhammadan family to a private arbitrator, selected by reason of his knowledge of the circumstances of the family, without any stipulation that he was to be controlled in his decision by any custom or Muhammadan Law, and the arbitrator decided on the broad view of giving effect to what he conceived to be the intention of the deceased father of the parties, this could not be relied on as misconduct, and that such decision was within the right of the arbitrator. In accordance with this decision of the Privy Council I am of opinion that the arbitrator was not controlled in his decision by the rules of Hindu Law. At the same time I have no doubt that Mr. Atkins, who was an officer of experience and who for about a year from November 1906 worked as a Divisional and Sessions Judge, was fully acquainted with the personal law of the parties. He recorded any evidence which the parties wished and having regard to this and to his own personal knowledge of the parties' family he decided that succession therein was governed by the rule of primogeniture. It is not necessary for me to express any opinion as to whether he was justified in coming to this decision. I am not at all impressed by Mr. Tek Chand's arguments that Jai Gopal had no good reason to suppose that he would not succeed in a suit, if he had brought one, to enforce his right to a share in his father's property. He had during his father's life-time admitted in writing (Exhibit D. 2, at page 40 of the paper-book) that he was not entitled to a share, and he could have no reason to suppose that the arbitrator selected by him would not decide the dispute between himself and his brother in an equitable manner. We are told that the property is now a very valuable one, but it is not contended that the valuation made by the arbitrator was not at the time it was made a proper one.

(1) 70 P. R. 1891 (P. C.).

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After giving full consideration to all the relevant authorities, which have been cited on both sides, I am of opinion that Dwarka Das is bound by the reference to arbitration and by the award as subsequently modified by the compromise of the 25th July 1910. I would, therefore, dismiss the appeal with costs.

CHEVIS, J.—I concur. Even assuming that the decision would have been otherwise had the dispute been fought out in Court, still Jai Gopal could not be certain what would be the result of a suit. He took the advice of an experienced friend of the family, and the matter was referred to an arbitrator who had some knowledge of law and whose integrity of purpose could be thoroughly relied upon. I consider the action of the father in agreeing to refer to arbitration is binding on the son. No misconduct is proved, and we cannot go into the merits of the award. As to the modification of the award, this was, as my learned brother has pointed out, a modification in favour of Jai Gopal and I cannot see that this gives his son any right to set aside the decree.

The appeal is dismissed with costs.

Appeal dismissed.