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S. S.  
SOMA-  
SUNDARAM  
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execution, and has erroneously refused to exercise a jurisdiction vested in it by law. The petitioner will in the circumstances be put to quite unjustifiable hardship if he is compelled to resort to a regular suit. He is, in fact, being denied his right to have the matter adjudicated on by the Executing Court.

I, therefore, set aside the orders passed by the trial Court and direct that the application for removal of attachment be dealt with on its merits.

The respondents will pay the costs of the petitioner in this Court.

### APPELLATE CIVIL.

*Before Mr. Justice Brown.*

GUNNU MEAH

v.

A. RAHMAN.\*

*Arbitration—Application to file an award and suit to enforce an award, distinction between—Second appeal to High Court—Signature by party to an award, when estops him from disputing the award—Suit not based on acceptance of award.*

There is a distinction between an application to file an award and a suit to enforce an award. In the latter case, but not in the former, a second appeal lies to the High Court.

*Nga Hla Gyaw v. Mi Ya Po, (1914-16) U.B.R. Vol. 2, 26—referred to.*

The mere signature by a party to an award does not necessarily in all cases estop him from afterwards disputing the correctness of the award, and this is especially so when the plaintiff's case is not based on any acceptance of the award by the defendant in virtue of his signature.

*U Gunawa v. U Pyinnyadiṭa, 1 Ran. 15—distinguished.*

*N. N. Sen* for the appellant.

*Bhattacharyya* for the respondent.

BROWN, J.—The appellant, Gunnu Meah, filed a suit in the Township Court of Insein for the enforcement

\* Civil Second Appeal No. 434 of 1928 from the judgment of the District Court of Insein in Civil Appeal No. 22 of 1928.

of the terms of an award directing the defendant to convey a certain house to the plaintiff.

The plaint set forth that the matter was referred to an arbitration consisting of Mahomedan elders of Insein and that an award was made by them on the 25th August 1927.

The defendant, while not denying that the matter had been referred to arbitration, pleaded that the award was invalid as it had not been signed by all the arbitrators and also that the award was bad on the ground of misconduct and corruption of the arbitrators.

The written statement did not specify what the misconduct and corruption complained of were. Evidence was called to show that the arbitrators refused to examine two of the witnesses named by the defendant.

The trial Court held that the arbitrators to whom the matter was referred consisted of some 30 persons and that only 12 of these persons signed the award. The Court, further, held that the arbitrators had refused to examine witnesses named by the defendant. The suit was therefore dismissed.

The findings of fact by the trial Court were accepted by the lower Appellate Court, which dismissed the appeal; and the present appeal has been filed under the provisions of section 100 of the Code of Civil Procedure.

A preliminary objection has been taken on the part of the respondent to the effect that no further appeal lies. It is contended that there was no suit to enforce an award but that in fact the matter before the Court was an application to file an award under the provisions of paragraph 20 of the Second Schedule to the Code of Civil Procedure. If that contention is correct, then no second appeal would lie;

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but I do not think that the contention can be upheld. The distinction between an application to file an award and a suit to enforce an award is pointed out in the case of *Nga Hla Gyaw and one v. Mi Ya Po and four others* (1). In the present case the plaint is headed "Suit valued at Rs. 86 for enforcing an award" and *ad valorem* court-fees have been paid accordingly. It is true that at the conclusion of the plaint there is a prayer that the award may be ordered to be filed; but the prayer goes on to ask that a decree be passed in accordance with its terms for the conveyance of the said house to the plaintiff. The plaint was accepted as a plaint in a suit and appears to have been treated as such throughout.

I am of opinion that there was a suit for the enforcement of the award before the trial Judge and that a second appeal does therefore lie. But in this second appeal questions of fact cannot be raised and it has not been contended before me that the findings that only some of the arbitrators signed the award and that the witnesses were not all examined can be challenged. The only point argued on behalf of the appellant is that the respondent signed the award himself and is therefore now estopped from challenging its validity.

I have been referred on behalf of the appellant to the case of *U Gunawa and two others v. U Pyinnyadipa* (2). In that case there had been a reference to arbitration and there had been an irregularity in the proceedings in that at one of the sittings of the arbitrators when witnesses were examined one of the arbitrators was absent. This was the second of the three sittings and no objection was taken at the time, nor was it raised in the pleadings of the case. It was held that by continuing

(1) (1914-16) U.B.R. Vol. 2, p. 26.

(2) (1923) 1 Ran. 15.

the proceedings without objection to this irregularity, the parties must be held to have condoned the irregularity and could not seek to set aside the award on the ground of that irregularity. I do not think that that decision is very relevant to the present case.

The whole arbitration in the present case was conducted at one sitting. There was no evidence to show that the respondent condoned any irregularity during the course of the arbitration proceedings. It was when proceedings were all concluded and the award had been delivered, that his signature was appended to the award. It was stated in *U Gunawa's* case "a party having knowledge of an irregularity cannot lie by without objection and take his chance of an award in his favour and then, when he finds that the award has gone against him, seek to set it aside on the ground of the irregularity to which he failed to object." The signature of the respondent in the present case was appended when the terms of the award were known to him and there was no question therefore of his taking a chance that the award would be in his favour. His case is that he was practically compelled to sign the award. I am not satisfied that his mere signature of the award necessarily removes all objection to the irregularity in the award. The chief difficulty in the way of the plaintiff seems to me to be this, that there is no mention in the pleadings of the defendant having signed the award at all. The suit is based on the award itself and not on any agreement by the parties whereby they mutually accepted the award. The question therefore of the acceptance of the award by the defendant was not in issue. If both parties to the award signed the award after it was delivered it may be that a suit could be filed to enforce the terms of the award on the ground that there was a definite contract

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by the parties by virtue of their signatures ; but this was not the case for the plaintiff here and I am not prepared to hold that the mere signature by a party to an award necessarily in all cases estops him from afterwards disputing the correctness of the award.

In all the circumstances of the case I am not satisfied that there is sufficient ground for interference. I therefore dismiss this appeal with costs.

## APPELLATE CIVIL.

*Before Mr. Justice Heald.*

MA THAING AND OTHERS

v.

MAUNG CHIT ON AND OTHERS.

1929  
 Feb. 4.

*Mortgage redemption suit—Basis of suit is the mortgage—Suit fails if provision of law prevents proof of mortgage—Admission of mortgage by one party, how far binding on others—Amendment of pleadings—Suit for redemption cannot be converted into suit for possession on strength of legal title.*

The basis of a suit for redemption of a mortgage is the mortgage alleged, and if by reason of some provision of law (for instance the requisite registered instrument the mortgage cannot be proved, the suit must fail.

*Ma Twe v. Maung Lun, 8 L.B.R. 334—referred to.*

In a suit for redemption of a possessory mortgage, the admission of the mortgage by one party who has no interest in the property and was never in possession as mortgagee, cannot bind other parties who resist the claim on the ground that the mortgage required a registered instrument. A person cannot be allowed to amend his plaint which was for redemption of a possessory mortgage into one for possession on the strength of his legal title. That would be substituting one distinct cause of action for another.

*Ma Shwe Mya v. Mo Hnaung, 4 U.B.R. 30 (P.C.)—referred to.*

*Kyaw Din* for the appellant.

HEALD, J.—Appellants, as mortgagors of a piece of land, sued to redeem that land on an allegation that they had mortgaged it to the 1st respondent for