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that it is possible for him on his knowledge at the time to bring forward. Now at the time of Roshan's suit Nigahia on his present pleas was in possession and the owner of one-half of Jani's share. He did not plead that in respect of that half share his mortgage charge had merged in a sale. On the contrary, he accepted the contest on the footing of the mortgage and claimed merely that before ouster he was entitled to Rs. 516, which included a sum representing the improvements which he alleged he had effected in the land.

For the foregoing reasons we accept the appeal and dismiss the suit with costs throughout.

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice Zafar Ali and Mr. Justice Addison.

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Dec. 2.

RUGH NATH DASS-RAM SARUP (DEFENDANTS) Appellants

versus

MESSRS. SULZER BRUDERER AND CO. (PLAINTIFFS) Respondents.

Civil Appeal No. 2586 of 1922.

Arbitration—Suit on Award under an indent—where the completion of the contract is denied—Trial Court deciding case on some issues only, not dealing with defendants' objection—Practice of trying cases piecemeal, deprecated.

In a suit based on the award of an umpire or in the alternative on an alleged contract for the sale of goods, the Court ordered the parties to produce evidence on the first three issues which dealt solely with the validity of, and the amount payable under, the award, and notwithstanding the defendants' objection thereupon proceeded to decree the whole suit. No evidence was admitted on issues 4 and 5, namely,

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whether there was a completed contract between the parties and whether the defendants were estopped from impugning it. The arbitration clause was contained in an indent, the acceptance of which (and hence the completeness of the contract) was denied by the defendants.

Held, that the defendants could contest the suit on the award on the ground that there was no completed contract, and that therefore the arbitrator had no jurisdiction to make the award (the arbitrator himself being not competent to decide the question of the factum or the validity of the contract), and that consequently the trial Court should have received evidence on and tried issues 4 and 5.

Sassoon & Co. v. *Ramdutt-Ramkissen Das* (1), and *Jai Narain-Babu Lal* v. *Narain Das-Jaini Mal* (2), followed.

Tayabally Abdul Hussain v. *James Finlay & Co.* (3), and *Radha Kissen Khetry* v. *Lukhmi Chand Jhawar* (4), referred to.

The practice of trying an important case piecemeal should be deprecated as tending to lead to protracted litigation and serious inconvenience and to involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal.

Yatindra Nath Chaudhary v. *Hari Charan Chaudhary* (5), referred to.

First appeal from the decree of Diwan *Som Nath, Senior Subordinate Judge, Delhi, dated the 18th July 1922, decreeing the claim.*

TEK CHAND AND KHAN CHAND, for Appellants.

PREM LAL AND RAM KISHEN, for Respondents.

The judgment of the Court was delivered by—

ADDISON J.—The plaintiff sued the defendant on the allegations that the defendant on the 8th January 1920 placed an indent with him for five cases

(1) (1922) I.L.R. 50. Cal. 1 (P.C.). (3) (1923) 80 I. C. 969.
(2) (1922) I.L.R. 3 Lah. 296, 305, 306. (4) (1920) 56 I. C. 541.
(5) (1914) 26 I.C. 954.

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of grey Merino on certain terms; that the indent was duly accepted by the plaintiff within the prescribed period of 60 days; that the goods were shipped by the plaintiff; but that the defendant raised frivolous objections which were referred by the two parties to arbitrators who disagreed and that thereupon they were duly referred to an umpire who gave an *ex-parte* award in the plaintiff's favour. This award was to the effect that the defendant should take up and pay for the goods. It was alleged that the sum payable on this award, though it was not actually fixed, was Rs. 36,925-15-9, and this with future interest was claimed on its basis. In the alternative it was claimed that this sum was due for the price of the goods apart from the award.

The defendant admitted the indent, but denied that it had been accepted within the period prescribed. There was thus no completed contract. The submission to the two arbitrators was admitted, but the appointment and proceedings of the umpire were alleged to be illegal, so that the award was invalid. The other pleas do not require mention at present except that plaintiff's counsel replied that the indent had been accepted within the prescribed period, and that in any case the defendant had accepted his client's acceptance as due acceptance. These allegations were denied by defendant's counsel and the Court proceeded to frame the following issues :—

1. Was an umpire validly appointed, and did he give an award?

2. If so, is it invalid and not binding on the defendants?

3. To what amount is plaintiff entitled under the award?

4. Was there a completed contract between the parties?

5. Is defendant estopped from impugning the contract?

6. Was plaintiff ready and willing to perform his part of the contract? Did defendant break it? If so, how and when?

7. Was defendant excused from accepting the goods, under the circumstances of the case?

8. Had the property in the goods passed to the defendant?

9. If so, does not a suit lie for the price of the goods as framed?

Later it added the following two issues:—

10. What goods, and under what circumstances, have been parted with? What is the effect thereof on plaintiffs' claim?

11. To what amount for price, charges and interest are plaintiffs entitled, and at what rate of exchange?

When the first 9 issues were struck the Court ordered the parties to produce their evidence on the first three issues only, though later evidence was also allowed on issues (10) and (11) as being supplementary to the first three issues. It would seem that this order was verbally objected to when it was made, while before evidence was commenced, defendant's counsel again tried to get the order changed to allow of evidence being given on all the issues. He was overruled and he then put in a written application to the same effect. This also was refused. The Court then proceeded to judgment on the issues mentioned and holding that the award was valid, found that Rs. 32,683-2-6 were due on it. A decree for

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that sum with future interest at 9 per cent. per annum was given to the plaintiff with a lien on the goods. Against this decision the defendant has filed this appeal.

It was argued by the learned counsel for the appellant that issues (4) and (5) went to the very root of the matter as they involved the question of the jurisdiction of the arbitrators, and that it was therefore illegal to shut out all evidence on these two issues and to decide the suit only on issues (1) to (3). The trial Court itself seems to have felt this difficulty; for, though it confined the case to issues (1) to (3), it entered into a discussion of issues (4) and (5) in its judgment at pages 73 and 74 of the paper book. It said there that the indent, which contained an agreement to refer disputes to arbitration, was admitted. It did not add that the acceptance of that indent by the plaintiff-respondent which was necessary to make it a completed contract was denied. It then went on to say that in the correspondence not a word was said as to the contract not having been completed, although both sides appointed arbitrators. This was a discussion of issues (4) and (5), evidence as to which had been excluded.

In *Sassoon & Co.* v. *Ramdutt Ramkissen Das* (1) their Lordships of the Privy Council held that a suit was maintainable to contest an award when the objection was the want of jurisdiction in the arbitrator. In *Jai Narain-Babu Lal* v. *Narain Das-Jaini Mal* (2), it was held at pages 305, 306 of the report that the question of the factum or the validity of the contract was not within the cognizance of the arbitrators, and that the arbitration clause assumed that there was a valid and binding contract between the

(1) (1922) I.L.R. 50 Cal. 1 (P.C.). (2) (1922) I.L.R. 3 Lah. 296, 305, 306.

parties, that is, that the arbitration clause, which is part of the contract, falls if the contract falls. It was sought to distinguish these authorities on the ground that in them the arbitration had been *ex parte* throughout. But in the present case the effect of there having been a submission to arbitration is clearly included in issue (5), which should therefore have been decided after recording evidence, and after issue (4) had been decided.

In *Tayabally Abdul Hussain* v. *James Finlay & Co.* (1), the Sind Judicial Commissioners also held that a party dissatisfied with a private award could contest it, when it was sought to enforce it under the Indian Arbitration Act, by taking such objections as that Act allowed but that that remedy was not his sole remedy. He could also bring a suit, thereafter, to set aside the award on the ground that no contract, providing for a reference to arbitration, was made or that it, if made, was not enforceable by reason of fraud or misrepresentation. *Radha Kissen Khetry* v. *Lukhmi Chand Jhawar* (2) is also in point.

In the case of the above authorities the suit was brought by the party objecting to the award; but that clearly makes no difference. In the present case, the umpire's *ex-parte* award was simply to the effect that the buyers should take up and pay for the goods. It was useless to file such an award in Court under the Indian Arbitration Act as no sum was fixed in it as due, and certain calculations had therefore to be made and rates of exchange ascertained. The plaintiff, therefore, came into the regular Courts on the umpire's award. In these circumstances it was within the defendant's rights to attack the award on all possible grounds.

(1) (1923) 80 I.C. 969. (2) (1920) 56 I.C. 541, 548.

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It was urged however by the learned counsel for the plaintiff-respondent that his plaint proceeded on two causes of action, paragraphs (4) to (7) disclosing the cause of action on the award, and the other paragraphs dealing with the claim independently of the award; that defendant's plea as to there being no completed contract referred to the second part of the claim which arose only if the award was set aside; and that the initial submission to arbitration was admitted, and that all that was pleaded as regards the claim on the award was that the arbitration proceedings were invalid on various grounds. This argument, though ingenious, cannot be accepted. It was in paragraph (2) of the plaint that it was stated that the indent had been accepted by the plaintiff within the prescribed period of 60 days. This was prior to any mention of an award. Similarly in paragraph (2) of the pleas the defendant at once denied that there was a completed contract as the indent had not been accepted within 60 days. The order of the pleas had to follow the plaint. Later, in replying to the paragraphs of the plaint dealing with the award it was admitted that two arbitrators, who disagreed, were appointed while it was added that the appointment of the umpire was invalid. Then in the further pleas, it was again denied that there was a completed contract. It is true that it might have been added for the sake of clearness that there could be no valid submission to arbitration as there was no completed contract, but the meaning was clear enough, namely, that, as there was no completed contract, the whole suit went.

This becomes even clearer when the statements of counsel before issues are examined. Plaintiff's counsel stated that the indent was accepted two days before the prescribed period ended, and that in any case the defendant accepted plaintiff's acceptance as

due acceptance. Both these allegations were denied by the opposing counsel. Issues (4) and (5) embody this part of the case and the whole suit depends on the findings on these issues and the legal effect thereof. The fact that there was a submission to arbitration may be evidence on this part of the case, but in the absence of other evidence it is impossible to decide these issues.

No question arises as to the defendant having accepted the order of the trial Court confining the trial to the three first issues. It is clear from the Court's order, dated the 20th April 1922, that this objection was probably taken at the very time the order was passed, and that defendant certainly objected before any evidence was recorded, and finally put in a regular petition when his objections were not heeded.

It follows that the trial Court has erroneously decided the first three issues as being preliminary issues, the decision of which was sufficient for the disposal of the case, whereas issues (4) and (5) may go to the root of the case. We, therefore, accept the appeal, and setting aside the decree of the trial Court, remand the suit under Order XLI, rule 23, Code of Civil Procedure, for decision according to law. The court-fee on appeal will be refunded. Other costs will be costs in the cause.

In conclusion, we would refer to *Yatindra Nath Chaudhary* v. *Hari Charan Chaudhary* (1) where the practice of trying an important case piecemeal was deprecated as tending to lead to protracted litigation and serious inconvenience and to involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal.

N. F. E.

Appeal accepted and case remanded.

(1) (1914) 26 I. C. 954