

other on the question of any custom and the decision of the case depends on the proper application of the Judicial authorities cited before the learned District Judge and before us. It is, therefore, a question of law and not a question of custom that is the subject of dispute before us.

We accept this appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Sir Shādi Lal, Chief Justice and Mr. Justice Skemp.

BALKISHAN (DEFENDANT) Appellant

versus

SOHAN SINGH (PLAINTIFF), LADHA RAM
(DEFENDANT) Respondents.

Civil Appeal No. 2339 of 1924.

Civil Procedure Code, Act V of 1908, Schedule II, paragraph 15, clause (1), sub-clause (c), and paragraph 16, subparagraph (2)—reference to arbitration without the concurrence of all parties to the suit—objection to validity of award on that ground overruled and decree passed in accordance with award—Appeal against decree—whether competent.

Where the plaintiff and L. R., one of the two defendants, referred their dispute to two arbitrators who made their award, and against this award L. R. alone filed objections, one of which was to the effect that the reference was invalid because it had been made without the concurrence of B. L., the other defendant, and the District Judge rejected the objection and passed a decree in accordance with the award, the question was whether an appeal was competent against

1929

PIR MAL

v.

TEJA SINGH.

1929

Feb. 8.

1929

BALKISHAN
v.
SOHAN SINGH.

that decree on the ground that the other defendant had not joined in making the reference.

Held, that no appeal was competent, *vide* paragraph 16, sub-para. (2) of the second Schedule to the Civil Procedure Code of 1908.

The words "or being otherwise invalid" in paragraph 15, clause (1), sub-clause (c), Schedule II of the present Civil Procedure Code indicate that the Legislature intended that objections to the validity of the award should be decided by the Court which made the reference, and that, if the objections have not been made or have been overruled and a decree has been given in accordance with the award, that decree should not be open to appeal.

Guranditta v. Pokhar Ram (1), *Lutawan v. Lachya* (2), *Hari Shankar v. Ram Piari* (3), *Nidamurthi Krishnamurthy v. Gargiparthi Ganapathilingam* (4), and *Mahomed Valli Asmal v. Valli Asmal* (5), followed.

Kankia Lal v. Narain Singh (6), distinguished.

Dwarka Nath Roy v. Fanindra Nath Roy (7), and *Fanindra Nath Roy v. Dwarka Nath Roy* (8), dissented from.

Second appeal from the decree of Lt.-Col. J. Frizelle, District Judge, Rawalpindi, dated the 20th May 1924, modifying that of Lala Dewan Chand, Junior Subordinate Judge, Rawalpindi, dated the 10th December 1923, and decreeing plaintiff's suit.

SHAMAIR CHAND, for Appellant.

MOOL CHAND, for Respondents.

JUDGMENT.

SHADI LAL C.J.

SIR SHADI LAL C.J.—This appeal arises out of an action brought by the plaintiff Sohan Singh for the rendition of accounts against the defendants, Ladha Ram and Balkishan. It appears that the defendants did not appear in the Court, though duly

(1) (1927) I. L. R. 8 Lah. 693.

(2) (1914) I. L. R. 36 All. 69 (F.B.).

(3) (1923) I. L. R. 45 All. 441.

(4) (1914) 25 I. C. 583.

(5) (1924) 26 Bom. L. R. 171.

(6) 28 P. R. 1916.

(7) (1919) 49 I. C. 262.

(8) (1919) 25 Cal. W. N. 832.

served, with the result that the trial Judge took *ex parte* proceedings, and passed in March, 1921, a preliminary decree against both the defendants. Thereafter, Ladha Ram appeared in answer to the summons issued by the Court ; and both he and the plaintiff made several infructuous attempts to have the dispute decided by arbitration.

On the 27th April, 1923, the plaintiff and Ladha Ram again referred their dispute to two arbitrators, who made their award on the 17th August, 1923. Against this award Ladha Ram alone filed various objections, one of which was to the effect that the reference was invalid because it had been made without the concurrence of Balkishan. The learned District Judge has rejected the application to set aside the award and has pronounced judgment in accordance with the award.

Against the decree, which followed upon the judgment, Balkishan has preferred this appeal, and a preliminary objection has been taken on behalf of the respondent that no appeal lies. Now, paragraph 16, sub-paragraph (2), of the second schedule to the Civil Procedure Code, provides that no appeal shall lie from a decree based on an award, except in so far as the decree is in excess of, or not in accordance with the award. It is clear that the decree of the District Judge is entirely in conformity with the award, and the preliminary objection is *prima facie* valid. It is, however, contended on behalf of the appellant that, where there is no valid agreement, to form the basis of a reference, there can be no valid award, upon which a decree can be based in accordance with paragraph 16 ; and that an appeal lies from a decree based upon an invalid award. A perusal of paragraph 15 of the schedule, however, shows that an

1929

BALKISHAN

v.

SOHAN SINGH.

SHADI LAL C.J

1929
 BALKRISHAN
 v.
 SOHAN SINGH.
 HADI LAL C.J.

award can be impeached, not only on the ground of the impropriety of the proceedings of the arbitrators, but also on the ground that it was otherwise invalid. This change has been introduced by the insertion of the words "or being otherwise invalid" in clause (1), sub-clause (c), of that paragraph, and in this respect the Civil Procedure Code of 1908 makes a departure from the corresponding section (section 521) of the Code of 1882. The award can now be impeached, not only on account of irregularities in the procedure of the arbitrators, but also because it was made by persons who had not been properly appointed to act as arbitrators. This amendment of the Code indicates that the Legislature intended that objections to the validity of the award should be decided by the Court which made the reference, and that, if the objections have not been made or have been overruled and a decree has been given in accordance with the award, that decree should not be open to appeal.

The question whether an appeal lies from a decree in accordance with the award on the ground that all the parties to the suit had not joined in making the reference has been answered in the negative by a Division Bench of this Court in *Guranditta and others versus Pokhar Ram and another* (1). The same view has been adopted by the Allahabad High Court in *Lutawan and others v. Lachya and others* (2), and *Hari Shankar v. Ram Piar and others* (3), by the Madras High Court in *Nidamurthi Krishnamurthy v. Gargiparthi Ganapathilingam* (4), and by the Bombay High Court in *Mohamed Valli*

(1) (1927) I. L. R. 8 Lah. 693.

(3) (1923) I. L. R. 45 All. 441.

(2) (1914) I. L. R. 33 All. 69 (F.B.).

(4) (1914) 25 I. C. 533.

Asmal versus Valli Asmal (1). Mr. Shamair Chand on behalf of the appellant invites our attention to a casual observation in *Kanhia Lal, defendant Petitioner v. Narain Singh and others (plaintiffs), Madan Lal and others (defendants), respondents* (2), but that observation was obviously an *obiter dictum* because, as admitted by the learned counsel, no appeal was filed in that case and the matter came up before the Chief Court on an application for revision. It is true that the Calcutta High Court has taken the opposite view in *Dwarka Nath Roy v. Fanindra Nath Roy* (3), which was affirmed on appeal in *Fanindra Nath Roy v. Dwarka Nath Roy* (4); but neither of the judgments contains any discussion on the subject.

1929

BALKISHAN

v.

SOHAN SINGH

SHADI LAL C.

The consensus of judicial opinion is clearly in favour of the rule that no appeal lies from a decree in accordance with the award even on the ground that the submission was invalid owing to want of concurrence of all the parties. I would accordingly uphold the preliminary objection and dismiss the appeal with costs.

SKEMP J.—I agree.

SKEMP J.

A. N. C.

Appeal dismissed.

(1) (1924) 26 Bom. L. R. 171.

(3) (1919) 49 I. C. 262.

(2) 28 P. R. 1916.

(4) (1919) 25 Cal. W. N. 832.