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For the reasons given above, we accept these appeals and dismiss all the suits but leave the parties to bear their own costs throughout.

A. K. C.

Appeals accepted.

APPELLATE CIVIL.

Before Addison and Ram Lal JJ.

MUL RAJ AND OTHERS (PLAINTIFFS) Appellants,

versus

TULSI RAM (DEFENDANT) Respondent.

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March 31.

First Appeal from Order No. 11 of 1939.

Civil Procedure Code (Act V of 1908), S. 104 — Sch. II, Para. 17 — Private reference to arbitration — agreement to refer — filed in Court — Award made thereon — Court's order superseding the arbitration and stating that the proceedings had therefore become infructuous — such an order whether a decree and an appeal competent therefrom.

There was a private reference to arbitration. The appellants made an application to the Senior Subordinate Judge under paragraph 17 (1) of the Second Schedule of the Civil Procedure Code that the agreement to refer should be filed in Court. The Senior Subordinate Judge dismissed the application and on appeal under s. 104 (1) (*d*) of the Civil Procedure Code the High Court remanded the case directing the filing of the agreement in Court. An award having been made by the arbitrators the Senior Subordinate Judge refused to make it a decree of the Court, holding the award to be bad and stating that he dismissed the petition under paragraph 17 of the Second Schedule of the Civil Procedure Code. The question was whether an appeal lay in the circumstances where the award was made through proceedings taken in Court.

Held, that the part of the order of the Senior Subordinate Judge that he dismissed the application under paragraph 17 of the Second Schedule was obviously wrong as that had already been done by him at a previous stage.

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Held further, that as there was no regular suit, the order that the Court should have passed should have been an order superseding the arbitration and stating that the proceedings had, therefore, become infructuous, no right of appeal being given under s. 104 of the Code of Civil Procedure from such an order.

Ram Jowaya Mal v. *Devi Ditta Mal* (1), dissented from.

Seumal Nihalchand v. *Mulomal Rahumal* (2), referred to.

First appeal from the order of Sayed *Rafiq Ahmad, Senior Subordinate Judge, Ludhiana, dated 11th November, 1938, dismissing the application under paragraph 17, Schedule 2 of the Code of Civil Procedure and setting aside the award of the majority.*

VISHNU DATTA, for Appellants.

JHANDA SINGH, for Respondent.

THE JUDGMENT OF THE DIVISION BENCH.

ADDISON J.

ADDISON J.—There was a private reference to arbitration made by the parties on the 1st May, 1937. On 23rd October, 1937, the appellants made an application to the Senior Subordinate Judge under paragraph 17 (1) of the Second Schedule of the Code of Civil Procedure that the agreement to refer should be filed in Court. The application recited that the value of the subject matter in dispute was Rs.5,110. On 27th November, 1937, the Senior Subordinate Judge dismissed the application and there was an appeal to this Court under section 104 (1) (*d*), Code of Civil Procedure. The Single Judge, who heard the appeal, directed the filing of the agreement in Court and the case went back to the Senior Subordinate Judge.

There were three arbitrators. Two of them made one award and the third made another award. Objections were preferred and the Senior Subordinate Judge

(1) 117 P. R. 1916. (2) (1915) 28 I. C. 60.

found that the award of the majority was bad. He accordingly refused to make that award a decree of the Court and then went on to say that he dismissed the petition under paragraph 17 of the Second Schedule of the Code of Civil Procedure. Against this decision the appellants have preferred this appeal which has been referred to a Division Bench by a learned Judge of this Court.

The part of the order of the Senior Subordinate Judge to the effect that he dismissed the application under paragraph 17 of the Second Schedule is obviously wrong. That had already been done by him at a previous stage but, on appeal to this Court under section 104 (1) (*d*), the agreement had been filed in Court and the Senior Subordinate Judge thereafter had directed the arbitrators to make their award.

Now, if, after the agreement to refer to arbitration had been entered into, the arbitrators had made an award without the intervention of the Court and one of the parties had applied under paragraph 20 of the Second Schedule that the award should be filed in Court and the Senior Subordinate Judge had refused to do so, then undoubtedly an appeal would have lain under section 104 (1) (*f*), which is to the effect that an order filing or refusing to file an award in an arbitration without the intervention of the Court is subject to appeal. Thus if an agreement to refer is ordered to be filed or the Court refuses to file such an agreement put in under paragraph 17 of the Second Schedule, an appeal lies under section 104 (*d*) while, if an award is put into Court under paragraph 20 and the Court either files it or refuses to file it, an appeal lies under section 104 (*f*) as it was made without the intervention of the Court. The question, however, is

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whether an appeal lies in the present case where the award was made through proceedings taken in Court.

To answer this question, it is necessary to go to the provisions of Schedule II. Where an agreement to refer to arbitration is put into Court under paragraph 17 and the Court is asked to have it filed in Court, an appeal lies under section 104 (1) (*d*), Code of Civil Procedure, if the award is filed or if the Court refuses to file it. That stage has passed in the present case. The next appropriate paragraph of the Second Schedule is paragraph 19, which enacts that the foregoing provisions (of Schedule II), so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon. This paragraph, therefore, makes all the provisions prior to paragraph 19 of the Second Schedule applicable to proceedings in Court when an agreement is filed under paragraph 17. There is, of course, this difference; where there is a regular suit, it must either be decreed or dismissed; where there is a reference filed under paragraph 17 there can only be a decree if the award is held to be a good one. This did not happen in the present case as it was held that the award was bad. This takes us to paragraph 16 of the Second Schedule, which enacts that where a Court holds the award to be a good one it shall proceed to pronounce judgment according to the award and upon the judgment so pronounced 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. It follows from this that, if the trial Court had in the present case accepted the

award as given and had pronounced judgment according thereto, no appeal would have lain on the merits. The only appeal that could have been made would have been that the decree was in excess of, or not in accordance with, the award. It would thus be anamolous that, where the award is held to be bad, an appeal should lie on the merits.

The only other paragraph which need be referred to is paragraph 15 of the Second Schedule which provides for the grounds on which an award shall be set aside or become void and further enacts that where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such cases shall proceed with the suit. This is all right for an ordinary suit and it is perfectly clear that in it no appeal would lie from the order superseding the arbitration. In the present case, as there is no regular suit, the order that the Court should have passed should have been an order superseding the arbitration and stating that the proceedings had, therefore, become infructuous. No right of appeal is given under section 104 of the Code of Civil Procedure from such an order, and it is clear that no right of appeal was intended because it would be most improper not to allow an appeal except to the limited extent set out in paragraph 16 (2) of the Second Schedule when an award is held to be good and to allow an appeal when the award is held to be bad or void. In these circumstances it would seem to follow that no appeal lies.

The only difficulty is the decision given in *Ram Jawaya Mal* v. *Devi Ditta Mal* (1). There it was held that no appeal lay either under section 104 (*d*) or (*f*)

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of the Code of Civil Procedure but that an appeal lay from the order as that order amounted in law to a decree and was as such appealable. It seems to me with all respect that it is impossible to hold that the order superseding the arbitration under paragraph 15 (2) of the Second Schedule, which is the only order the Court could have passed, is a decree. It makes no difference that the Court has not used these words as under paragraph 19 these are the words which the Court should have used in its order. Having superseded the arbitration, there was no suit to proceed with, so that the matter came to an end by the order superseding the arbitration, no appeal being allowed from that order. It is unnecessary to refer to other decisions on this matter except *Seumal Nihalchand* v. *Mulomal Rahumal* (1) where the matter is discussed at length.

For the reasons given I would dismiss this appeal as incompetent, making no order as to the costs of this Court.

RAM LALL J.

RAM LALL J.—I agree.

A. N. K.

Appeal dismissed.

(1) (1915) 28 I. C. 66.