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without the suit having been set down on the daily board for hearing or decree.

*Scott* (Acting Advocate General) and *Rivett-Carnac* for the appellant (defendant):—The award is not an adjustment of a suit within section 375 of the Civil Procedure Code (Act XIV of 1882). Chapter XXXVII of the Code which deals with awards provides a mode of obtaining a decree on an award, but clearly does not contemplate any proceeding under section 375. This suit did not appear in the cause list, and this has been held to be necessary—*Pell v. Valetta*.<sup>(1)</sup> Further, a decretal order is a decree, and section 375 does not apply to suits after decree.

*C. H. Setalvad* (with *Davar*) for respondents (plaintiffs):—They cited *Samibai v. Premji*<sup>(2)</sup>; *Appasami v. Varadachari*<sup>(3)</sup>; *Brojodurlabh Sinha v. Ramanath Ghose*<sup>(4)</sup>; Act VI of 1892.

JENKINS, C. J.:—Several objections have been taken to the decree under appeal. First it is said that Chapter XXXVII of the Civil Procedure Code, 1882, is an exhaustive exposition of the power to refer to arbitration pending a suit. I can find nothing, however, in Chapter XXXVII which invalidates a proceeding not in accordance with its provisions beyond the result that non-compliance deprives a party of a right to claim the consequences the chapter prescribes, and I therefore think the objection cannot succeed. It is then urged that the award on the reference cannot be made the basis of an adjustment under section 375 of the Code. But can it be said that by an award under a voluntary submission a suit is adjusted “by a lawful agreement or compromise”? It is conceded, and I must assume correctly, that under the special circumstances of the case the submission is valid. But every submission to arbitration implies an obligation to perform the award of the arbitrator: *Lievesley v. Gilmore*<sup>(5)</sup>; so that here there was an agreement to perform the award in adjustment of the suit, and that is an adjustment of the suit by agreement. This view finds support in the decision of

(1) (1880) 5 Cal. L. R. 464.

(3) (1896) 19 Mad. 419.

(2) (1895) 20 Bom. 304.

(4) (1897) 24 Cal. 908.

(5) (1866) L. R. I. C. P. 570.

my learned colleague in *Samibai v. Premji*,<sup>(1)</sup> and though that decision was doubted by O'Kinealy, J., in a dissenting judgment in a Full Bench case, *Brojoduriah v. Ramnath*,<sup>(2)</sup> it has met with the approval of Farran, C.J., in *Ghellsukhai v. Nandubai*<sup>(3)</sup>; and the view, if not affirmed, certainly was not rejected in the recent case of *Lakshmana Chetti v. Chinnathambi*.<sup>(4)</sup>

Then it is argued that no decree could be passed, as the suit was not put down on the trial board, and in support of this view *Pell v. Valatta*<sup>(5)</sup> was cited. It is enough to say that there is no fixed practice here, which prevents a decree being obtained on motion without the suit's appearance on the board.

Then it is said that no decree could be passed under section 375, because there already was a decree. This argument is based on section 375A, the history of which is common knowledge; but I think the answer is that this is not an adjustment of an application or other proceeding subsequent to the decree, but of the suit which was still pending.

STARLING, J. :—This is a suit which was filed to take partnership accounts in which on the 24th February, 1899, a decretal order was passed referring it to the Commissioner to take the accounts. Before any steps had been taken in the Commissioner's office the parties referred their disputes to arbitration, and an award was passed by the arbitrators on the 28th June, 1900. On the 13th December, 1900, a decree was passed on motion after notice in which the submission and award were recorded under section 375 of the Civil Procedure Code, and the terms of the award embodied in it.

Under section 375, a decree passed in conformity with its provisions is final, and no appeal will lie, except on the ground that the decree though apparently within its terms, yet is not so, by reason, *e.g.*, of the decree not being in accordance with the terms of the agreement, or there being no legal agreement in existence.

The first argument on behalf of the appellant was that, there having been a reference and award, proceedings ought to have

(1) (1895) 20 Bom. 304.

(2) (1896) 21 Bom. 335 at p. 341.

(3) (1897) 24 Cal. 938.

(4) (1900) 24 Mad. 326.

(5) (1880) 5 Cal. L. R. 464.

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Code which required correcting. Consequently, in my opinion, section 375A refers to applications in suits other than those under Chapter XXII, and enacts that the provisions of that chapter, and especially of sections 373 and 374, shall not apply to such applications, but that it does not prevent the provisions of section 375 being brought into operation after the Court has passed a decretal order referring a suit to the Commissioner.

It is worthy of note that the case of *Fakir Ullah v. Thakur Prasad*<sup>(1)</sup> was taken up to the Privy Council, and that Court held that, independently of Act VI of 1892, section 647 did not apply to applications for execution, but only to original matters in the nature of suits, thus overruling all the Allahabad cases. The report will be found under the name of *Thakur Pershad v. Sheikh Fakir Ullah* in 22 I. A. 44.<sup>(2)</sup> This decision, if it had been passed three years earlier, would have rendered section 2 of Act VI of 1892 unnecessary.

Under these circumstances I am of opinion that there was no objection to the present suit being treated under section 375 as adjusted by the submission and award proved herein, and a decree being passed in terms of the award. The appeal should therefore be dismissed with costs.

*Appeal dismissed.*

Attorneys for the appellant—*Messrs. Edgelow, Gulabchand and Wadia.*

Attorneys for respondents—*Messrs. Malvi, Hiralal and Modi.*

(1) (1890) 12 All. 179.

(2) (1894) 17 All. 106.

## ORIGINAL CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Starling.*

CHABILDAS LALLUBHOY, PLAINTIFF, v. MOWJI DAYAL, DEFENDANT.\*

*Small Cause Courts Act (XV of 1882), section 41—Mortgage—Mortgage sale—Ejectment—Suit brought by purchaser at mortgage sale to eject mortgagor—Right of purchaser to possession not derived from mortgagee.*

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\* Small Cause Court Reference No. 2887 of 1901.