APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

MERALI VISRAM (ORIGINAL DEFENDANT 4), APPLICANT, *v.* SHERIFF DEWJI AND ANOTHER (ORIGINAL PLAINTIFFS), OPPONENTS.*

1911.
August 16.

Civil Procedure Code (Act V of 1908), section 115—Award—Decree framed upon award—Appeal—Application under revisional jurisdiction—Decree set aside—Grounds—Jurisdiction.

The plaintiff, as Mutawali of a Musjid at Zanzibar, brought a suit against the defendant for the recovery of certain pots and pans. Three other persons, who alleged themselves to be Mutawalis, were joined as parties apparently without any amendment of the plaint. After some progress of the suit, the presiding Judge was asked by all concerned in the Jamat (community) to arbitrate upon all matters in difference between them. The Judge framed an award on the 30th June 1904 and the award was read out in Court after notice to the parties. In the year 1909 a pleader for the plaintiff applied to have a decree framed in the terms of the award and the Judge accordingly passed a decree on the 7th April 1909.

One of the defendants having appealed against the decree which was not appealable, the appeal was allowed to be converted into an application under the revisional jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) and the decree was set aside as being passed by the Judge without any sort of jurisdiction whatever. The grounds being :—

(1) There was no written reference to arbitration as required by law.

(2) The reference was made by a great number of persons who were not parties to the suit.

(3) The matters in difference submitted to arbitration were matters not in suit at all.

(4) The result of the said irregular proceedings was to expand the claim for the possession of a few cooking utensils into a suit for framing a scheme for the administration of a large religious endowment and no suit of the kind could have been properly launched without the previous sanction of the Advocate General or such officer as is clothed with his functions.

(5) The award was made on the 30th June 1904 and the application to have it filed was not made till 1909. The application was, therefore, manifestly time-barred.

(6) The plaintiff died early in the year 1905 and no application was ever made to bring his heirs or legal representatives on record. The suit had, therefore, abated by July of that year.

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* Application No. 173 of 1911 under the extraordinary jurisdiction. Appeal No. 97 of 1910 converted into application.

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APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the decree of Lindsey Smith, Judge of His Britannic Majesty's Court at Zanzibar, in Suit No. 81 of 1903.

One Sheriff Dewji, son and constituted attorney of Dewji Jamal, sued the defendant Remtulla Allarakhia Tejani for the recovery of certain cooking utensils which the plaintiff alleged he was entitled to as Mutawali of the Shia Itnashari Mosque. The proceedings in the suit commenced in February 1902 before His Honour Judge Piggott and subsequently they grew and expanded, new parties being added and new issues raised; at length it was left to His Honour Judge Smith to decide as arbitrator with full powers practically one issue, namely, "Who are or ought to be Mutawalis of this Mosque." With respect to the said issue the Judge remarked :—

The only other point, *viz.*, as to who are entitled to the cooking utensils is a very unimportant one and was only raised, I think, to bring the question of Mutawaliship to an issue. It is agreed that the members of the Itnashari community are entitled to use these vessels and the evidence shows that they are always kept at the Mosque ; so whether they are under charge of Mutawalis of Mosque or Moonim of Jamat seems to me immaterial.

The Judge accordingly framed his award on the 30th June 1904 and pronounced judgment. Subsequently the Court was moved to pass a decree in the terms of the award and the Judge, on the 7th April 1909, passed the following decree :—

This case coming on for hearing before His Honour Judge Lindsey Smith and after examination of several witnesses it was subsequently referred with the consent of all the parties to the suit to the sole arbitration of His Honour Judge Lindsey Smith. Judgment having been pronounced according to the award of the sole arbitrator it is hereby declared that four persons, namely, Sheriff Dewji, Saleh Hassan, Suleman Versi and Dharamsi Khatao, are hereby appointed Mutawalis. It is further ordered that should any of these four die or retire or change their faith then the Jamat are to select another in his place, the name to be afterwards put before the Senior Judge for his sanction. If, however, there are any of the descendants of the four Mutawalis mentioned in the deed, dated 1st August 1881, who wish to be elected Mutawalis and are eligible for the post, they must be given preference over all other candidates. Should any Mutawali become ill or leave Zanzibar he may appoint an attorney in his place, but if he is away from his duties more than 12 months such attorney shall not act without the approval of the Jamat and Judge. If the attorney be not so approved and the Mutawali does not

return within 3 months the post is to be considered vacant. With regard to the cooking pots claimed in the plaint, it is declared that they are part of the Mosque property. Should, however, it be more convenient that they be under the charge of the Jamat the Mutawalis should give them over to the Jamat, the Jamat paying a small fee or rent for them. It is further ordered that 2nd, 3rd and 5th defendants do pay the sum of Rs. 300 costs. No costs against 1st defendant, nor against the 4th defendant as he was only a formal defendant.

7th April 1909. (Sd.) LINDSEY SMITH.

Defendant 4 preferred an appeal, No. 97 of 1910, but as the decree was not appealable, the Court, after hearing arguments on the point, allowed the appeal to be converted into an application under the revisional jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908).

Jinnah with *Mirza and Mirza* for the appellant-applicant (defendant 4).

G. K. Parekh for the respondent-opponents (plaintiffs).

BEAMAN, J. :—This was an appeal against a decree purporting to be made upon an award of the 30th of June 1904 in His Britannic Majesty's Court at Zanzibar, the decree itself, giving effect to the award, was not made until the 7th April 1909.

The appellant is met at the outset with the objection that no appeal is allowed against the decree passed upon an award, except in so far as that decree can be said to be in excess or contravention of the terms of the award; and it became very clear that this objection must prove fatal to the appeal, as brought.

Mr. Jinnah for the appellant then asked the leave of the Court to convert the appeal into an application under section 115 of the Code of Civil Procedure. It has, I think, been the practice of this Court always to allow, in proper cases, appeals to be so converted into applications for the exercise of this Court's power of superintendence and revision. We, therefore, acceded to Mr. Jinnah's request, and we have dealt with what was originally brought before us as an appeal on the footing of its being an application under section 115.

It was contended for the respondents that this Court had no power under section 115 to superintend or revise the proceed-

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ings of His Britannic Majesty's Courts in Zanzibar, and we were referred to the decision of a full Bench of this Court in *Khoja Shivji* v. *Hasham Gulam*(1). That case, however, is no longer good authority; for clause 29 of the Council Order relating to Zanzibar of the year 1897, is differently worded, and we think advisedly differently worded, so as to confer upon this Court powers of revision over all the Civil Courts of Zanzibar. We think that the application is well founded and that there are more than usually numerous as well as cogent reasons for allowing it.

The facts of the case, so far as they are material, are briefly these. A suit was brought in 1903 by a plaintiff, resident in Bombay, through his son, his constituted attorney, against a single defendant, resident within the jurisdiction of the Court of Zanzibar, for the recovery of certain pots and pans, to which the plaintiff alleged himself to be entitled, as Mutawali of a Musjid. This being the extent of the plaintiff's prayer the litigation began to grow in the first instance, apparently by the addition to the record of three other persons, who were alleged to be Mutawalis. But we are unable to discover that either then or at any subsequent period, any amendment was made of the plaint so as to enlarge the original prayer. The case passed through the hands apparently of Judge Piggott, and from him into the hands of Judge Smith, who, it appears from these proceedings, was asked by all concerned in the Jamat to arbitrate upon all matters in difference between them. His award is dated the 30th of June 1904; and it appears that this award was read out in Court, after notice was given to the parties.

Nothing more was done until 1909, when Mr. Framji, describing himself as pleader for the plaintiff, applied to have a decree made in terms of the award, and we are told that after only three hours' notice given to the defendants, the decree which is now made the subject of this revisional application, was passed on the 7th April 1909.

(1) (1895) 20 Bom. 480.

Now there appear to us at least six sufficient reasons, to which it would not be difficult to add others, for the conclusion that not only has the learned Judge below exceeded his jurisdiction, but that in the exercise of such jurisdiction, as he had, he has acted both illegally and with material irregularity.

(1) There was no written reference as required by law; and although that in itself might not have been a sufficient reason, it at least undermines the foundation of the jurisdiction.

(2) The reference to arbitration, so far as we are able to gather from the materials before us, was made by a great number of persons who were not parties to the suit.

(3) The matters in difference which were submitted to the arbitration of Judge Smith were matters not in suit at all.

(4) The result of these highly irregular, and we cannot help feeling, in the technical sense, illegal proceedings, has been to expand the claim for the possession of a few cooking utensils into a suit for framing a scheme for the administration of a large religious endowment. There is this further objection that no suit of that kind could properly have been launched without the previous sanction of the Advocate General, or such officer, as in Zanzibar, is clothed with his functions.

(5) The award having been made on the 30th of June 1904 and no application to have it filed having been made till 1909, such application is manifestly time-barred.

(6) The plaintiff died early in the year 1905, and as no application was ever made to bring his heirs or legal representatives on the record, the suit had abated by July of that year.

The proceedings then of April 1909, purporting to be made in the suit and bringing it to its completion, were made some four years after that suit had abated and no longer existed. It is therefore clear that acting as he did in April 1909, the learned Judge far exceeded his jurisdiction, or perhaps it would be more correct to say was acting entirely without any sort of jurisdiction whatever.

It was contended on behalf of the respondents that there is the highest authority for holding that this Court will not

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interfere in the exercise of its revisional powers with decrees passed upon awards, appeals against which have been expressly forbidden by the Legislature. In this connection we have been referred to the well-known case of *Ghulam Jilani* v. *Muhammad Hussan*[1]. But while fully recognizing the principle laid down by their Lordships of the Privy Council in that case, we do not think it has any applicability to such a state of facts as we have here to deal with. If the applicant were debarred from right of appeal and were also debarred from obtaining redress by recourse to this Court under section 115, it is difficult to say in what way he could be protected against the consequences of a procedure, so entirely unauthorized from first to last by any law; and we cannot bring ourselves to believe that there can be so patent a wrong, without its proper remedy, in allowing this application. Therefore, we do not feel that we are in any way contravening, as we certainly do not intend to contravene, the principle insisted upon by their Lordships of the Privy Council in the case cited.

We think that this application must be allowed and that the decree of the Court of His Britannic Majesty at Zanzibar must be set aside as having been arrived at wholly without jurisdiction and in its present form, in law, a mere nullity. The respondents must pay all costs of this proceeding and costs of the lower Court of the 7th April 1909.

Decree set aside.

G. B. R.

(1) (1901) L. R. 29 I. A. 51.