APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr Justice Hayward.

VYANKATESH MAHADEV (ORIGINAL DEFENDANT), APPLICANT, *v.* RAMCHANDRA KRISHNA (ORIGINAL PLAINTIFF), OPPONENT.* 1914. *June 25.*

Civil Procedure Code (Act V 1908), Order XXIII, Rule 3, Schedule II, clauses 1-16—Suit—Reference to arbitration without leave of Court—Application to stay further progress of the suit—Application not according to law.

After the institution of a suit, the plaintiff and one of the defendants entered into an agreement to submit the matter in difference between them to arbitration without the leave of the Court. Thereupon the defendant having applied to the Court to stay the further progress of the suit, the Court rejected the application on the ground *inter alia* that the reference did not amount to an adjustment of the matter in suit within the meaning of Order XXIII, Rule 3, of the Civil Procedure Code (Act V of 1908). On appeal by the defendant the District Judge confirmed the order.

The defendant having applied under the extraordinary jurisdiction,

Held, confirming the order, that where the Court was seized of a cause, its jurisdiction could not be ousted by the private and secret act of parties and if they, after having invoked the authority of the Court and placed themselves under its superintendence, desired to alter the tribunal and substitute a private arbitrator for the Court, they must proceed according to the law laid down in the first sixteen clauses of the Second Schedule of the Civil Procedure Code (Act V of 1908).

Held further, that parties litigating in Court had perfect liberty to compose their differences amongst themselves into any lawful agreement, compromise or satisfaction and that when this was done, they had only to apply to the Court under Order XXIII, Rule 3, of the Civil Procedure Code (Act V of 1908) ; but that a mere agreement to refer to arbitration, even though in other respects valid, could not be such an adjustment in whole or in part of the suit as the Court could give effect to under Order XXIII, Rule 3.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the order of C. Fawcett, District Judge of Poona, confirming the order passed by M. R. Chaubal, Second Class Subordinate Judge of Poona.

The plaintiff filed a suit for partition in the Court of the First Class Subordinate Judge of Poona and while

*Application No. 251 of 1913 under the extraordinary jurisdiction.

1914.

VYANKATESH MAHADEV v. RAMCHANDRA KRISHNA.

the suit was pending, he and defendant 1 agreed to refer their dispute to private arbitration without the leave of the Court. Defendant 1, thereupon, on the 16th February 1913 made an application to the Court to stay further proceedings in the suit. The application was as follows :—

On 8th December 1912 after appointing the Panchas it was agreed to refer the whole dispute to them with a view that the Panch should decide the subject-matter of the suit finally after taking the evidence of the parties. Now therefore the decision about the dispute between the parties in respect of the subject-matter of the suit must be arrived at by the Panchas appointed by the parties, and by them only. The matter now cannot be legally proceeded with in the Court. This is the objection of the defendant. The Court (it is prayed) should frame an issue about this objection and should make a preliminary decree on the decision of this issue.

A notice of the said application was given to the plaintiff and he stated in reply that the persons who were requested by him to act as arbitrators on his behalf were not willing, that the defendant's application did not correctly state the facts, that there had been no appointment of arbitrators at all, and that for the said reasons the suit should proceed.

The Subordinate Judge, after hearing the arguments of the parties, found that the agreement had been entered into by the plaintiff under a mistake of fact and that there had been no adjustment of the suit within the meaning of Order XXIII, Rule 3, of the Civil Procedure Code. He, therefore, rejected the application.

Defendant 1 having appealed, the District Judge dismissed the appeal without going into the question whether there was any mistake of fact on plaintiff's part in entering into the agreement.

Defendant 1 presented an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) urging *inter alia* that

the first Court had no jurisdiction to continue the proceedings after the agreement was entered into by the parties, that a decree should have been passed in terms of the agreement, that the proceedings in the suit should have been stayed and that the District Judge was wrong in not going into the question in respect of the agreement. A *rule nisi* was issued which required the plaintiff to show cause why the order of the lower Court should not be set aside.

Coyaji, with *B. V. Vidwans*, for the applicant (defendant 1) in support of the rule :—We submit that (1) the agreement to refer is an adjustment of the suit as contemplated in Order XXIII, Rule 3, of the Civil Procedure Code, corresponding to section 375 of the Code of 1882, and (2) on account of the agreement the further progress of the suit was barred under section 21 of the Specific Relief Act.

All the High Courts are in agreement that a submission plus the result of it, namely, the award, is an adjustment under Order XXIII, Rule 3. The question is whether submission alone is an adjustment. There is no distinct ruling of this High Court on the point. The Madras and the Calcutta High Courts are against our contention. They, however, proceeded on the ground that references to arbitration were specially dealt with by a chapter in the Civil Procedure Code relating thereto and, therefore, section 375 of the Code of 1882 should not be held to include a reference: *Tincowry Dey* v. *Fakir Chand Dey*[1], *Bhajahari Saha Banikya* v. *Behary Lal Basak*[2], *Venkatachala* v. *Rangiah*[3], *Pragdas* v. *Girdhardas*[4], *Rukhanbai* v. *Adamji*[5], *Harakhbai* v. *Jamnabai*[6].

(1) (1902) 30 Cal. 218.
(2) (1906) 33 Cal. 881.
(3) (1911) 36 Mad 353.
(4) (1901) 26 Bom. 76.
(5) (1908) 33 Bom. 69.
(6) (1912) 37 Bom. 639.

1914.

VYANKATESH MAHADEV v. RAMCHANDRA KRISHNA.

Our submission is that the chapter relating to arbitration was not restrictive ; and because it made no provision for the case where the parties to a pending suit refer their dispute to arbitration without the intervention of the Court, it did not follow that the agreement could not be recogized by the Court and properly as an adjustment of the suit.

In any case the suit could not be proceeded because of the agreement. Section 22 of the Specific Relief Act barred it : *Harivalabdas Kalliandas* v. *Utamchand Manekchand*[1] followed in *Sheo Dat* v. *Sheo Shankar Singh*[2].

D. A. Khare and *J. R. Gharpure* for the opponent (plaintiff) to show cause :—The facts show that there was no agreement in fact. Further as found by the first Court we were misled on a material point of fact.

A mere agreement is not an adjustment of a suit : *Ghulam Khan* v. *Muhammad Hassan*[3], *Tincowry Dey* v. *Fakir Chand Dey*[4], *Rukhanbai* v. *Adamji Shaik Rajbhai*[5] where *Samibai* v. *Premji Prajji*[6] is commented upon, *Budha* v. *Haku*[7].

Next, even supposing that there was a submission it was inadmissible in law and it was not made with the permission of the Court.

Rule 18 of Schedule II of the Civil Procedure Code contemplates proceedings before suit : *Peruri Suryanarayan & Co.* v. *Gullapudi Chinna*[8] and *Ramjidas Poddar* v. *Howse*[9] where section 19 of the Indian Arbitration Act has been interpreted, and that section and Rule 18 of Schedule II of the Code will be found, on comparison, to be similarly worded.

(1) (1879) 4 Bom. 1.
(2) (1904) 27 All. 53.
(3) (1901) 29 Cal. 167.
(4) (1902) 30 Cal. 218.
(5) (1908) 33 Bom. 69 at p. 74.
(6) (1895) 20 Bom. 304.
(7) (1882) P. R. No. 130 of 1882.
(8) (1909) 34 Bom. 372.
(9) (1907) 35 Cal. 199.

Lastly, we revoked our submission, if there was any, immediately after the mistake of fact was discovered and before the other arbitrators joined or any action was taken.

To bring a suit within Rule 18 there must be a subsisting agreement. As we revoked the agreement it cannot avail the defendant at all: *Randell* v. *Thompson*[1], *Deutsche Springstoff Actien Gesellschaft* v. *Briscoe*[2].

BEAMAN, J.:—A suit had been instituted and it is alleged that the plaintiff and one of the defendants after the institution of the suit entered into an agreement to submit the matters in difference between them to arbitration. Thereupon the defendant moved the Court to stay the further progress of the suit. The first Court refused, and on appeal the learned District Judge was of opinion that the defendant's application could not be sustained and that the suit must proceed.

We are asked to interfere in the exercise of our revisional jurisdiction and to set aside that order of the learned District Judge. It apears to me that the agreement alleged to have been made between the plaintiff and one of the defendants does not fall under any of the clauses of the Second Schedule of the Civil Procedure Code. The first 16 of those clauses exhaust the whole process of arbitration after the suit has been instituted, and the parties desire to submit their differences to arbitration under the control of the Court. The Court under those 16 clauses controls completely the whole course of the reference, indeed the reference is its own, and its jurisdiction is never at any time ousted until a good award has been made. In the event of an award having been made, but being set aside for any reason, the Court immediately resumes its jurisdiction and

(1) (1876) 1 Q. B. D. 748. (2) (1887) 20 Q. B. D. 177.

1914.

VYANKATESH MAHADEV v. RAMCHANDRA KRISHNA.

completes the trial of the action. The next class of cases provided for in the Second Schedule are those in which persons who have not instituted any legal proceedings desire to submit any difference between them to arbitration. Having agreed to do so either party may then bring the agreement into Court, and if resisted by the other party, his application to have the agreement filed and further action taken upon it will be treated as a suit. Thereafter, again the Court immediately assumes and retains control of the subsequent arbitration proceedings. The third and the last case provided for in the Second Schedule is where the parties who have not come into Court have, not only agreed to refer matters in difference between them to arbitration, but have obtained an award. Here again the party desiring to enforce the award may bring it into Court and upon proper proceedings obtain a decree in conformity with it. There remains only one single clause 18, which is of an exceptional character, and virtually re-enacts a portion of section 21 of the Specific Relief Act, which is declared to have no applicability to any arbitration proceeding provided for in the Second Schedule. That clause, which is also to be found almost *in totidem verbis* in section 19 of the Arbitration Act, provides for a special class of cases in which after parties have agreed to submit matters in difference between them to arbitration, one of them in violation of such agreement institutes a suit in respect of any or all of those matters. Then the other party may set up in bar of the suit the agreement to submit to arbitration. If this analysis be correct, and I think there is no doubt but that it is, it is clear that what the defendant here relies upon is an agreement nowhere provided for in the Second Schedule of the Civil Procedure Code, nor does it fall within the language or the spirit of section 18, for that section, as I say, is designedly restricted to cases in which the suit

complained of has been instituted after the agreement to refer to arbitration. It might be objected that no solid ground in reason can be found for refusing to extend the principle of that section to cases where after a suit had been instituted parties had privately agreed to submit the matters in difference between them to arbitration, and in spite of such agreement and in violation of it one of them insists on going on with the suit. The answer to that appears to me to be short and simple, and to cover other objections which might arise upon other points I have very generally indicated, for, in my opinion, where the Court is seized of a cause its jurisdiction cannot be ousted by the private and secret act of parties, and if they, after having invoked the authority of the Court, and placed themselves under its superintendence, desire to alter the tribunal and substitute a private arbitrator for the Court, they must proceed according to the law laid down in the first 16 clauses of the Second Schedule. Therefore it appears to me that there is no force whatever in the applicant's contention that a private agreement of this kind is on the same footing as the private agreement contemplated in clause 17 reproducing old section 523, nor, as I have just explained, will it give him any right to invoke the assistance of clause 18. How then could it serve him? Only as a lawful agreement by which the suit had been adjusted wholly or in part. Doubtless any parties litigating in Court have perfect liberty to compose their differences amongst themselves by entering into any lawful agreement, compromise or satisfaction. And when this is done they have only to apply to the Court to act under Order XXIII, Rule 3. But it is equally clear that a mere agreement to refer to arbitration, even though it be in other respects valid, could not be such an adjustment in whole or in part of the suit as the Court could give effect to under Order XXIII, Rule 3.

1914.

VYANKATESH MAHADEV v. RAMCHANDRA KRISHNA.

In my opinion, therefore, the learned Judge below was right and no case whatever has been made out for the exercise of our revisional jurisdiction. I would, therefore, dismiss this application with all costs.

HAYWARD, J. :—The plaintiff brought a suit against the defendant No. 1 with regard to a certain matter which was subsequently referred by them to private arbitration without leave of the Court. The defendant No. 1 thereupon applied for stay of the suit in consequence of a reference to private arbitration outside the Court.

The orginal Court refused to stay the suit, holding that the reference had been made under a mistake of fact, and that in any case it did not amount to an adjustment of the matter in suit within the meaning of Order XXIII, Rule 3, of the Civil Procedure Code.

The first appeal Court did not decide the question as to mistake of fact, but held that there was no adjustment inasmuch as there had been no award within the meaning of Order XXIII, Rule 3, and that further the suit could not be held to be barred by the contract to refer as that contract was entered into subsequent to suit and was not prior to suit as contemplated by section 21 of the Specific Relief Act. Moreover, it pointed out that that provision had been repealed by Rule 22 of the Second Schedule of the Civil Procedure Code.

On this application for revision it has been contended, though the contention has not been very seriously pressed, that the submission to arbitration did as a matter of fact amount to a lawful adjustment, but there does not seem to me to be any substance in that contention as there was no resulting award as explained in the cases of *Rukhanbai* v. *Adamji*[1] and *Venkatachala* v. *Rangiah*[2]. It is to be observed that there was a

(1) (1908) 33 Bom. 69. (2) (1911) 36 Mad. 353.

resulting award in *Harakhbai* v. *Jamnabai*[1] in which case it was held by the present learned Acting Chief Justice that there was a good adjustment within the meaning of Order XXIII, Rule 3, to which effect could be given under the saving provisions of section 89 of the Civil Procedure Code.

But it has been contended, and strenuously contended, that a stay ought to have been granted of the suit. It has been argued that notwithstanding the pendency of the suit it was open to the parties to enter into an agreement to arbitrate privately, without leave of the Court, and to proceed to have that private reference to arbitration or the resulting award converted into an independent decree of the Court. It appears to me, however, that the matter is concluded by the wording of Rule 3 and Rule 15 occurring among the first 16 Rules referring to arbitration during pendency of a suit with the consent of the Court. Rule 3 lays down the conditions upon which jurisdiction in the suit shall be withdrawn from the Court and that condition is that there has been an order of reference under that Rule by the Court. As no other condition is stated, it must be presumed that that is the only condition under which the suit could be removed from the jurisdiction of the Court. Then again Rule 15 expressly provides the conditions under which jurisdiction in the suit can be resumed by the Court. It states that that can occur when the award either becomes void or has been set aside by order of the Court. Again as these are the only circumstances under which jurisdiction can again be resumed by the Court, it must be presumed that there are no other circumstances under which such jurisdiction could be resumed by the Court. A ruling to the contrary has been quoted to us in the case of *Harivalabdas Kalliandas* v. *Utamchand Manekchand*[2] and

[1] (1912) 37 Bom. 639.

[2] (1879) 4 Bom. 1.

1914.

VYANKATESH MAHADEV v. RAMCHANDRA KRISHNA.

it has been pointed out that that ruling was apparently approved of by one of the Judges in the case of *Praydas* v. *Girdhardas*[1] but it seems to me that caution must be observed in giving weight to that distant authority in view of the observations of the Privy Council in the case of *Ghulam Khan* v. *Muhammad Hassan*[2]. The Privy Council there appear to have taken the view that the Rules corresponding to the present Rules of the Code were exclusive, and the only Rules permitting arbitration during the pendency of a suit before a Court, and that the succeeding Rules corresponding to Rules 17 to 21 of the Second Schedule of the Code applied solely to arbitration in matters which had not come as suits before the Court. The Privy Council's decision has been so interpreted both by the Calcutta and Madras High Courts in the cases of *Tincowry Dey* v. *Fakir Chand Dey*[3] and *Venkatachala* v. *Rangiah*[4].

It has also to be observed that stay of a suit instituted after the reference to arbitration would alone appear to be contemplated by the wording of Rule 18 of the Second Schedule which is almost identical with the concluding 37 words of section 21 of the Specific Relief Act, and that interpretation is borne out by the cases of *Peruri Suryanarayan & Co.* v. *Gullapudi Chinna*[5] and *Ramjidas Poddar* v. *Howse*[6] dealing with the corresponding section 19 of the Indian Arbitration Act. So that this application would have been bound to fail whether it had been possible to have recourse to Rule 18 of the Second Schedule of the Civil Procedure Code or the concluding words of section 21 of the Specific Relief Act or section 19 of the Indian Arbitration Act. It appears to me, therefore, that this application must be dismissed, and the order of the

(1) (1901) 26 Bom. 76 at p. 80.
(2) (1901) 29 Cal. 167.
(3) (1902) 30 Cal. 218.
(4) (1911) 36 Mad. 353.
(5) (1909) 34 Bom. 372.
(6) (1907) 35 Cal. 199.

1914.

VYANKATESH MAHADEV v. RAMCHANDRA KRISHNA.

first appeal Court confirmed, and it is, therefore, unnecessary to discuss the further question raised whether the decision of the learned Judge would or would not have amounted to irregularity in the exercise of the jurisdiction within the meaning of section 115 of the Civil Procedure Code. Rule discharged with costs.

Rule discharged.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1914.
June 29.

NARANDAS VRIJBHUKHANDAS AND OTHERS (ORIGINAL DEFENDANTS 1, 2 AND 3), APPELLANTS, *v.* BAI SARASWATIBAI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Will—Construction—Life estate to daughter—Bequest to daughter's sons—On failure of the bequest the estate to go to the testator's cousins absolutely—No son born to the daughter at the death of the testator—Failure of the bequest to daughter's son—Not a case of intestacy—Operation of the bequest in favour of the testator's cousins—The intention of the testator to retain his estate in his own family, that is, in the hands of his cousins.

A testator in his will provided *inter alia* that his daughter should have a life estate of Rs. 150 and the rent of a house and in the event of her having a male child or male children, he or they should take the whole estate of the testator on attaining the age of 18 and then bearing a good character. Should the daughter have no male issue, then on her death, the whole of the testator's estate was to go to his cousins absolutely. The daughter having borne no male issue during the life-time of the testator, the intended bequest to her male issue failed : *Tagore case, Ganendra Mohan Tagore* v. *Jatindra Mohan Tagore*[1]. A question having arisen as to whether the condition of the daughter having a son (at the death of the testator) not being fulfilled, there was a case of intestacy,

Held that there was no intestacy. The intention of the testator was to give the whole of his property to his grandson (daughter's son). That intention having failed, the dominant intention of the testator was, subject to his daughter's life estate, to retain the estate in his own family, that is to say, in the hands of his cousins.

* Second Appeal No. 527 of 1913.

[1] (1872) 9 Ben. L. R. 377.