Relief Act ; and if (in the absence of data showing exactly how much principal has been received) the Court forms a reasonable estimate from the amount of consideration stated in the bond as to the probable amount of actual principal, I can see no legal objection to that estimate being accepted and acted on.

*Decree reversed.*

J. G. R.

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## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.*

RAJMAL GIRDHARLAL MARWADI (ORIGINAL PLAINTIFF), APPELLANT *v.* MARUTI SHIVRAM AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

1920 *July* 13.

*Civil Procedure Code (Act V of 1908), section 11, and Schedule II, Rule 20—Reference to arbitration out of Court—Award—Refusal by Court to file the award—Separate suit to enforce the award not barred by* res judicata *—Limitation Act (IX of 1908), Article 120—Limitation for a suit to enforce an award is six years.*

The parties to a mortgage referred their dispute to arbitration out of Court. An award was made in due course ; but when it was sought to be filed in Court under paragraph 20 of the Second Schedule to the Civil Procedure Code, the Court, without trying the validity of the award, refused to file it. The unsuccessful party then filed a regular suit to enforce the award ; but it was resisted on the ground that the refusal by the Court to file the award operated as *res judicata* to the present suit :—

*Held*, that the bar of *res judicata* did not apply and that the present suit was maintainable.

*Kunji Lal* v. *Durga Prasad*[1], referred to.

A suit to enforce an award is a suit not provided by any other Article by the Limitation Act, and the period of limitation for such suit is six years under Article 120.

SECOND appeal from the decision of C. V. Vernon, District Judge of Ahmednagar, confirming the decree

* Second Appeal No. 427 of 1919.

[1] (1910) 32 All. 484

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passed by K. M. Kumthekar, Subordinate Judge at Parner.

Suit to enforce an award.

In 1890 the defendants passed a simple mortgage to one Birdichand for Rs. 800. Birdichand assigned his rights in the mortgage to the plaintiff.

The plaintiff and defendants referred their disputes under the mortgage to arbitration out of Court. The arbitrator delivered his award on the 28th November 1910.

The plaintiff applied to the Subordinate Judge at Parner to file the award and for a decree in terms of the award. The application was numbered as a suit under Rule 20 of Schedule II of the Civil Procedure Code of 1908. But the Subordinate Judge ultimately refused to file the award, on the ground that the plaintiff's rights under the mortgage had been barred by limitation at the date of the award.

On the 25th November 1916, the plaintiff filed the present suit to enforce the award. The defendants resisted the suit on the grounds: (1) that it was barred as *res judicata*, and (2) that it was barred by limitation.

The Subordinate Judge held that the suit was not barred by *res judicata*, for the following reasons :—

In I. L. R. 32 All. 484 it has been held that the refusal of a Court to file an award on the ground of misconduct of the arbitrators will not operate as *res judicata* in respect of a subsequent suit brought to enforce the award. Their Lordships therein remark that "we, therefore, hold that the issue as to the misconduct of the arbitrators was decided in a proceeding which was not a suit within the meaning of section 13 of Act XIV of 1882 and that the decision on the said issue, accordingly, cannot operate as *res judicata*." The same principle applies to the case now before us.

It has also been held in I. L. R. 33 All. 490 that the refusal of a Court to file a private award will not operate as *res judicata* in respect of a subsequent suit brought to enforce the award.

In I. L. R. 30 Mad. 461 on page 463 their Lordships remark that "It has long been settled by authority in this Court and cannot, we think, now be

questioned that the erroneous decision by a competent tribunal of a question of law directly and substantially in issue between the parties to a suit does not prevent a Court from deciding the same question arising between the same parties in a subsequent suit according to law". Their Lordships further proceed: "The Court cannot of course allow the correctness of the decree given in the former suit to be questioned in the later suit on the ground that the former suit was decided under a mistake of law, nor can it pass a decree, the effect of which would be to set at naught in whole or in part the decree in the former suit." The defendants point this latter part of this judgment in their favour.

No doubt Mr. Atre first dismissed the suit No. 1453 of 1910 on a point of law. But it appears from the record that the matter directly and substantially in issue here on that point was not heard and finally decided by Mr. Atre. No issue was raised on this point in suit No. 1453 of 1910. Neither was it heard and finally decided. In view of the proceedings held from the date of the presentation of the application No. 1453 of 1910, till the order of dismissal made on 10th April 1911 on the plaint, I do not think that the present suit would be barred by *res judicata*, as the matter was not heard and then finally decided. I hold, therefore, that the suit was not barred by *res judicata*.

But the Judge was of opinion that the suit was barred by Article 113 of the Indian Limitation Act. He therefore dismissed the suit.

On appeal, the District Judge disagreed with the trial Court on the point of limitation, for in his opinion, Article 113 had no application to the case. But on the other point, he was of opinion that the present suit was barred by reason of the adjudication on the application to file the award. The appeal was, therefore, dismissed.

The plaintiff appealed to the High Court.

*A. G. Desai*, for the appellant :—The District Judge was wrong in holding that this suit was barred by *res judicata*. The former application to file the award under paragraph 20 of the Second Schedule to the Civil Procedure Code though registered and numbered as a suit is not really a suit because the procedure followed is not that of a suit. The application was refused and the merits of the arbitration award were not gone into.

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Besides orders on such applications have been included among appealable orders in section 104 of the Civil Procedure Code. I rely on *Kunji Lal* v. *Durga Prasad*[1] where it was held that such an order refusing to file an award was not a decree.

The suit is not barred by limitation as it is within six years, for Article 120 of the Indian Limitation Act applies to suits to enforce an award.

*I. N. Mehta*, with *M. B. Dave*, for respondents Nos. 1 and 2:—The suit is *res judicata* because the general principles of *res judicata* apply. The application is numbered as a suit and the Court has got to see what it is that was decided and what it is that the Court is now asked to decide. The application to file an award was refused because the original mortgage on which the award was based was time-barred. I submit that in this suit to enforce an award the same question will have to be gone into. If that is so and if that question is once decided, to ask the Court to decide it again will be *res judicata*.

The general principles of *res judicata* have been applied to orders in execution proceedings. I rely on *Ram Kirpal* v. *Rup Kuari*.[2] My submission is that they will apply to orders made under paragraph 20 of the Second Schedule to the Civil Procedure Code.

As regards limitation, there is no Article which specifically provides for a suit to enforce an award; therefore to apply Article 120, the general Article, to such cases is wrong. My submission is that in applying a particular Article of the Indian Limitation Act to a suit to enforce an award, the Court ought to look to what it is that the award gives. If the award is for a money decree, the Article of limitation dealing with

[1] (1910) 32 All. 484.

[2] (1883) 6 All. 269.

recovery of money ought to be applied to a suit to enforce such an award. If the award gives possession of immoveable property, the Article dealing with immoveable property ought to be applied to a suit to enforce such an award. In this case the award directs payment of Rs. 800 by yearly instalments of Rs. 80. So, Article 57 (i.e., three years for a suit for recovery of money) will apply. If that is applied the suit will be time-barred. I rely on *Sornavalli Ammal* v. *Muthayya Sastrigal*[1] where in respect of a suit to enforce an award directing possession of immoveable property Article 144 was applied.

MACLEOD, C. J.:—The plaintiff sued to enforce an award against the defendants. Various issues were raised in the trial Court. The 4th issue was—Is the suit barred by limitation? The trial Court held that the suit was barred. It proceeded to find on the remaining issues. The result was that the suit was dismissed.

In appeal the learned appellate Judge held that the suit itself was not barred by limitation, but that it was barred by the rule of *res judicata*. It appears that the award was made on the 28th November 1910. The plaintiff then applied to file the award under para. 20 of the Second Schedule to the Civil Procedure Code. That application was rejected on the 12th January 1914. The plaintiff could appeal against that order under section 104 of the Civil Procedure Code. The plaintiff did appeal to the District Court, and also applied to the High Court in revision, but in both Courts the lower Court's decision was upheld.

It has now been argued that the question whether the plaintiff is entitled to get a decree on the award is *res judicata* and this suit was therefore barred. It can only be *res judicata* if the application to file the award can be considered as a suit. No doubt the application

[1] (1900) 23 Mad. 593.

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under para. 20 of the Second Schedule to the Civil Procedure Code is numbered and registered as a suit. But it does not follow that it thereby becomes a suit within the meaning of the word "suit" in the Code. The procedure followed is not that for a suit, but the procedure regulated by para. 21. The Court can only consider whether any ground such as is mentioned or referred to in paras 14 or 15 is proved, and the Court has power either to order the award to be filed or to refuse to file the award. If it orders the award to be filed, then it must pronounce judgment according to the award, and upon the judgment so pronounced the decree shall follow. Under section 11 of the Civil Procedure Code no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. It cannot be said that the proceedings under paras 20 and 21 of the Second Schedule were proceedings in a suit, though for the purposes of convenience they may be numbered and registered as a suit. Order IV refers to the institution of suits. Rule 1 says that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. Then the following Orders refer to the issue and service of summons and the proceedings that must follow when a regular suit has been instituted. This question was decided in *Kunji Lal* v. *Durga Prasad*[1] in which the Court felt itself bound to follow the series of decisions of its own Court, although the learned Judges seemed to think that there were some expressions in the case of *Ghulam Khan* v. *Muhammad Hassan*[2] from which it might be considered that their Lordships of the Privy Council were of opinion that an order made under old section 525 was a decree. No doubt a decree can be made when the Court pronounces judgment on the

[1] (1910) 32 All. 484.

[2] (1901) 29 Cal. 167.

award, and there being no appeal against that, the question whether any suit could be filed to enforce the award would never arise. An order refusing to file an award is a different matter. It cannot be considered as a decree. In my opinion, therefore, this suit is not barred by *res judicata*. It is not barred by limitation, because it seems to be settled now that a suit to enforce an award is a suit not provided by any other Article of the Limitation Act. Then the time is six years under Article 120. The appeal therefore must be allowed and the case remanded to the lower appellate Court for decision on the remaining issues. The appellant must get his costs of the appeal.

FAWCETT, J.:—I agree that the word "suit" in section 11 of the Civil Procedure Code cannot properly be extended to cover an application under para. 20 of the Second Schedule of the Code, even though such application is to be registered as a suit. In *Gokul Mandar* v. *Pudmanund Singh*[3] their Lordships of the Privy Council with reference to section 13 of the then Civil Procedure Code, corresponding to the present section 11, made the well-known remark that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the law and the enactment according to its true construction. Also in *Ram Kirpal* v. *Rup Kuari*[4] their Lordships held that judgment in execution proceedings would have a binding force not under this particular section, but upon general principles of law. It is upon such general principles that the learned District Judge has apparently gone in holding that the present suit is barred. But the adjudication on an application to file an award under para. 20 is restricted under para. 21 to a particular class

[3] (1901) 29 Cal. 707 at p. 715.

[4] (1883) 6 All. 269.

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of questions, and I do not think in those circumstances that the general principles of *res judicata* should be held to be applicable so as to bar the right of suit to a person who has succeeded in obtaining the award. The only authority on the question that has been cited to us is also against any such doctrine.

As regards the question of limitation, it has already been held in this Court in *Fardunji Edalji* v. *Jamsedji Edalji*[1] that a suit on an award to recover a certain sum of money allowed by the arbitrator is not a suit for specific performance, and therefore this Court should agree with the decisions which hold that such a suit as the present does not fall under Article 113 of the Indian Limitation Act.

Since the oral delivery of the above judgment my attention has been drawn to the observations of the Judicial Committee in *Muhammad Newaz Khan* v. *Alam Khan*[2] which (according to the view taken in *Ponnusami Mudali* v. *Mandi Sundara Mudali*[3]) clearly imply that any matter which is directly and substantially in issue and is determined in a proceeding under section 525 (corresponding to para. 20 of Schedule II of the present Code) would be *res judicata* in any subsequent litigation between the same parties. With due respect it seems to me that their Lordships left entirely open the question whether an application under section 525 is a suit such as is contemplated in section 13 (see at page 419). But even assuming it was such a suit, they held that the mere refusal to file an award would not constitute a binding judgment against the validity of the award, unless the particular ground on which its validity is assailed was definitely raised and put in issue and made the subject of a trial. In the present

(1) (1903) 28 Bom. 1.

(2) (1891) 18 Cal. 414.

(3) (1903) 27 Mad. 255.

case the question of the validity of the award does not appear to have been so tried in the proceedings on the application to file the award ; for the application was summarily rejected on the ground that, treated as a suit, it was time-barred.

*Appeal allowed.*

R. R.

## APPELLATE CIVIL.

*Before Mr. Justice Shah and Mr. Justice Crump.*

GANGABAI WIDOW OF MAHADEO RAMCHANDRA BADVE (ORIGINAL PLAINTIFF), APPELLANT *v.* JANKIBAI, WIFE OF RAMCHANDRA BADVE (ORIGINAL DEFENDANT No. 2), RESPONDENT[*].

1920. *July* 13.

*Hindu law—Widow—Right of residence—Transferee for value not affected by the right.*

Under Hindu law, a widow cannot assert her right of residence in a house which has been sold by her husband during his life-time, unless a charge is created in her favour prior to the sale.

The right which a Hindu wife has during her husband's life-time is a matter of personal obligation arising from the very existence of the relation and quite independent of the possession by the husband of any property, ancestral or self-acquired.

*Manilal* v. *Bai Tara*[1], considered.

*Jayanti Subbiah* v. *Alamelu Mangamma*[2], followed.

SECOND appeal from the decision of V. R. Kulkarni, Additional First Class Subordinate Judge at Sholapur, varying the decree passed by V. V. Pataskar, Second Class Subordinate Judge at Pandharpur.

Suit to recover possession of a portion of a house.

In 1904, defendant No. 1 sold the house to plaintiff's mother for Rs. 1,500 ; but continued to live in the house

[*] Second Appeal No. 994 of 1917.

(1) (1892) 17 Bom. 398.

(2) (1902) 27 Mad. 45.