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I would, therefore, allow the appeal, discharge the decrees of the lower Courts, and remand the suit to the trial Court for disposal according to law. All costs up to date to be costs in the suit.

CRUMP, J.:—I concur.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

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SAKHARAM MARUTI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* RAJMAL GIRDHARILAL MARWADI (ORIGINAL PLAINTIFF), RESPONDENT*.

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 43, 44, 45—Conciliator appointed as arbitrator—Award by the conciliator—Award not filed by the Court—Suit to enforce the award.

The parties to a mortgage who appeared before a conciliator for a certificate appointed the conciliator as their sole arbitrator. The arbitrator made the award the same day. The plaintiff then applied to the Court to file the award; but the Court not being satisfied, rejected the application. The plaintiff ultimately sued to enforce the award:—

Held, dismissing the suit, that the award made by the conciliator could not be treated as a valid award having regard to the provisions of sections 43 to 45 of the Dekkhan Agriculturists' Relief Act, 1879.

SECOND appeal from the decision of C. V. Vernon, District Judge of Ahmednagar, reversing the decree passed by K. M. Kumthekar, Subordinate Judge at Parner.

Suit to enforce an award.

The plaintiff who held a mortgage from the defendants applied to a conciliator for a certificate under the

* Second Appeal No. 778 of 1921.

provisions of the Dekkhan Agriculturists' Relief Act, entitling him to sue on the mortgage. The plaintiff and the defendants appointed the conciliator as their sole arbitrator, and he made his award the same day.

An application was then made by the plaintiff to the Court to pass a decree in terms of the award. The Court, however, dismissed the application on the ground that the suit on the mortgage was barred by limitation.

Thereafter, Bombay Act XIII of 1912 having come into force, the plaintiff again applied for restoration of his application: but the application was rejected.

The plaintiff then filed the present suit to enforce the award. The trial Court dismissed the suit. On appeal, the District Judge was of opinion that the award was legal and binding: and passed a decree in favour of the plaintiff.

The defendants appealed to the High Court.

R. J. Thakor, for the appellants.

A. G. Desai, for the respondent.

SHAH, AG. C. J.:—The question of law in this second appeal relates to the validity of the award upon which the suit is based. The facts are these. The defendants represent the original owners of the property. The original owners effected a mortgage in favour of one Birdichand on the 3rd November 1890. He assigned his rights to the present plaintiff on the 27th July 1910. The plaintiff applied on the 30th July 1910 to the conciliator under the Dekkhan Agriculturists' Relief Act for a certificate. On the 28th November 1910, apparently the parties agreed before the conciliator that the matter should be settled through arbitration;

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and they appointed the conciliator as their arbitrator, who made an award on the same day. On the same date the plaintiff made an application to the Court of the Subordinate Judge at Parner for filing the award, and for a decree in terms of the award. The written statement of the defendants was filed on the same date, whereby they agreed that the plaintiff's application should be allowed, but the Subordinate Judge was not satisfied with that statement, and on notices being issued to the defendants, a fresh written statement was filed by them on the 21st December 1910 in which they repudiated the award. The Court rejected the plaintiff's application and refused to file the award on the 10th April 1911 on the ground that the claim on the original cause of action would be time-barred at the date of the award. It appears that the plaintiff again applied on the 28th January 1913 for the restoration of the suit in view of the Bombay Act XIII of 1912; but that application was rejected. Ultimately he filed the present suit on the 25th November 1916 claiming to enforce his rights under the award of the 28th November 1910.

The trial Court dismissed the suit in December 1917. In the appeal by the plaintiff to the District Court, it was held that the suit was barred by *res judicata*. The plaintiff appealed to this Court, and in Second Appeal No. 427 of 1919, it was held by this Court that the plaintiff was entitled to a decision on the merits, and that his claim was not barred by the plea of *res judicata*. (See *Rajmal Girdharlal* v. *Maruti Shivram*[1].)

After the remand by this Court, the appeal was decided by the learned District Judge on the merits. He held that the award in question was a legal and

[1] (1920) 45 Bom. 329.

valid award, and accordingly decreed the plaintiff's claim in terms of the award on the 8th August 1921.

The defendants have now appealed to this Court; and it is urged on their behalf, first, that the award is not legal, because there was no reference to the arbitrator in writing; and, secondly, that the agreement between the parties as represented by the award does not represent a just and legal agreement under the circumstances. On the other hand, it is urged by Mr. Desai for the respondent that section 43 of the Dekkhan Agriculturists' Relief Act does not require any reference in writing, and that the award is not open to the objection which is now urged that it does not represent a legal and equitable agreement finally disposing of the matter.

I have stated the respective arguments on both sides as they were advanced. But as a result of these arguments, the principal point that arises for our consideration is whether in view of the provisions as to conciliation in Chapter VI of the Dekkhan Agriculturists' Relief Act, and particularly in sections 43-45, the award in question can be held to be valid. After a careful consideration of the provisions of the Dekkhan Agriculturists' Relief Act, and of the arguments urged before us, I have come to the conclusion that this award cannot be treated as a valid award.

As regards the first point, it is true that under section 43 of the Act after the matter is once before the conciliator, if the parties come to any agreement finally disposing of the matter, such agreement shall be forthwith reduced to writing. In the present case what happened before the arbitrator must be considered, in my opinion, to be an agreement finally disposing of the matter between the parties within the meaning of section 43. It was open to the parties to arrive at

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an agreement between themselves or through arbitration so as to dispose of the matter finally. There is no reference to the arbitrator in writing: but it need not be in writing. It is sufficient if the agreement finally disposing of the matter is reduced to writing. The award, which is assented to by the parties, is in writing, and that is the agreement which purports to dispose of the matter finally. The argument as to the absence of any writing relating to the reference to the arbitrator was based upon the provision in the section about an agreement to refer to arbitration. I do not treat what happened in fact before the arbitrator on the 28th November 1910 as merely an agreement to refer to arbitration, but as a completed arbitration resulting in effect in an agreement between the parties disposing of the matter finally. The provisions of section 45 refer to the procedure to be followed when there is an agreement to refer the matter to arbitration, and have no application to the present case. The absence of any writing referring the matter to arbitration does not affect the validity of the agreement evidenced by the award.

The next question is whether the award which was made by the conciliator while the conciliation proceedings were pending before him, is a valid award which gives the parties a fresh cause of action in supersession of the original cause of action between the parties. If the provisions of section 44 are carefully examined it would appear that if there was an agreement between the parties finally disposing of the matter, the conciliator would have to adopt the procedure laid down in that section, namely, to forward th agreement in original to the Court of the Subordinate Judge, and to deliver to each of the parties a written notice to show cause before such Judge, why such agreement ought

not to be filed in such Court; and if the proper procedure had been followed, the Court would have scrutinized the agreement: and, if it thought that the agreement was legal and equitable finally disposing of the matter, and that it had not been made in fraud of stamp or registration laws, the Court might have ordered it to be filed, and then it would have taken effect as a decree of the said Court.

Even assuming for the sake of argument without admitting it that the application made by the plaintiff producing the award before the Court was practically a submission to the Court by the conciliator of this agreement between the parties finally disposing of the matter, and that the matter was substantially before the Court, though not in the manner provided in section 44, it was still obligatory upon the Court to consider whether it was a legal and equitable agreement between the parties; and unless the Court was satisfied on that point, it could not have given effect to it. For one reason or other the Court refused to give effect to the agreement evidenced by the award, and it seems to me that it is not open to the plaintiff now to treat this award as affording a distinct and separate cause of action to be dealt with according to the ordinary rules applicable to a suit based on an award. The fundamental difficulty of the plaintiff seems to me to be that it was obligatory upon the parties to adopt the procedure laid down in the Dekkhan Agriculturists' Relief Act if anything which was in the nature of an agreement finally disposing of the matter before the conciliator was to be given effect to by the Court after determining whether it was a legal and equitable agreement. By adopting any other procedure the plaintiff cannot get rid of the necessity to submit the agreement to the Court as required by section 44. In

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fact what happened before the conciliator on the 28th November 1910 seems to have been misconceived by the plaintiff and he has treated the award as an ordinary private award through an arbitrator appointed by the parties without the intervention of the Court. Once the matter was before the conciliator, that procedure, it seems to me, was not open to them. They had either to come to an agreement finally disposing of the matter, in which case section 44 would apply, or to agree to refer the matter to arbitration in which case the provisions of section 45 would apply; and if neither of these things was done, the plaintiff was entitled to a certificate as provided in that Chapter which would enable him to prosecute the suit in a regular way on the original cause of action. The question is not so narrow as the learned District Judge seems to have thought, namely, whether it was open to the arbitrator to decide the point of dispute between the parties according to law or not. If this were treated as a private award, it does not matter whether the decision was according to law or not. If it is viewed in the light of an agreement between the parties, as I have indicated it should be viewed, then it seems to me that the non-compliance with the procedure laid down in section 44 is fatal to the suit based on the award.

I would, therefore, allow the appeal, reverse the decree of the lower appellate Court and restore that of the trial Court with costs here and in the lower appellate Court on the plaintiff. The cross-objections are dismissed with costs.

CRUMP, J.:—I agree, and in view of the possible importance of the point, I desire to add my reasons shortly. It appears to me that when, on the 30th July 1910, the plaintiff applied to the conciliator, it must be

taken, defendants being agriculturists, that the subsequent proceedings were to be governed by the provisions of the Dekkhan Agriculturists' Relief Act. The conciliator being thus seized of the matter, it was not, in my opinion, open to him to act otherwise than is provided by the special legislation. To hold that he could do so, would be to frustrate the object of the Legislature in enacting those provisions for the benefit of agriculturists-defendants. It follows, therefore, that, when the matter came before the conciliator, there were two courses open to him, and only two. If conciliation was to be effected, he could, under section 43, persuade the parties to come to an agreement disposing of the matter, or an agreement to refer the matter to arbitration. There was no third course, such as was suggested in the argument before us. Now if either of those results was achieved, then the further steps were subject to the sanction of the Court. Without the sanction of the Court, anything done by the conciliator could have no final effect. Whether the agreement in the present case is regarded as finally disposing of the matter or as an agreement to refer to arbitration, the result is in either case the same. The next step in the former case would be that the Court would deal with the matter under section 44. In the latter case, the Court would deal with the matter under section 45. But in either case the final word lay with the Court. Apart, therefore, from any minor defects in the procedure, such as the absence of a writing or the failure of the conciliator himself to forward the agreement to the Court, it appears to me there is a fatal defect in the plaintiff's present case, because the Court in dealing with this matter refused to give effect to that which had been done before the conciliator. The Court apparently regarded this agreement as one finally disposing of the matter, and that is, I think, the

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correct view. But taking that view, the Court said that it was not an equitable agreement and, therefore, refused to give effect to it. The only course then open to the plaintiff in accordance with the provisions of the Act was to obtain a certificate from the conciliator and to file a suit, if so advised. This he did not do. Nor, on the other hand, did he take any steps which might have been open to him to challenge the decision of the Court. Therefore, it seems to me impossible to argue, having regard to the provisions of the Dekkhan Agriculturists' Relief Act, that we have in this case anything which could be termed a valid award. If that is so, the basis of the present suit fails, and it must necessarily be dismissed.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

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NATHALAL RAMDAS VAGHJI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* THE NADIAD MUNICIPALITY (ORIGINAL DEFENDANT), RESPONDENT*.

Bombay District Municipal Act (Bom. Act III of 1901), section 50A—Survey introduced in Municipal area—Decision of Survey Officer declaring a plot as "street land"—Suit for a declaration of ownership—Government, whether a necessary party.

In the municipal limits of the town of Nadiad, a survey was undertaken as contemplated by section 50A of the District Municipal Act, 1901. The City Survey Enquiry Officer held that the land in dispute was a "street land" as defined in section 3, clause 12, under District Municipal Act, 1901. The plaintiffs filed a suit in the Subordinate Judge's Court at Nadiad for a declaration that the plaint land was of their ownership and for an injunction restraining

* Appeal from Order No. 10 of 1921.