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bound to pay a deposit either on the day of the auction or on the next day. In the present case, the auction was held on the 16th and if the fee had been below Rs. 100 the defendant had to pay it on the 16th or 17th, but as the fee was above Rs. 100, the sanction of the Municipality was necessary, and until the sanction was given, the bid was not accepted. This does not advance the case further, for the sanction was admittedly given on the 20th, and the deposit should, therefore, have been paid on the 20th or 21st. The reference to eight days in the conditions of sale appears to refer to subsequent instalments and not to the deposit which is to be made at the time of the bid being accepted. This point, however, is of small importance in view of the finding on the first point as to the legality of the action of the Municipality in putting up to auction the right to levy fees.

I agree, therefore, that the decree of the lower appellate Court should be confirmed and the appeal dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL

Before Mr. Justice Fawcett and Mr. Justice Mirza.

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TATYA ROWJI, A FIRM (ORIGINAL PLAINTIFF), APPLICANT *v.* HATHIBHAI BULAKHIDAS (ORIGINAL DEFENDANT), OPPONENT.*

Indian Arbitration Act (IX of 1899), section 4 (a) and section 19—Civil Procedure Code (Act V of 1908), Schedule II, paragraph 18—Presidency Small Cause Court—Jurisdiction of the Court to stay suit pending reference to arbitration—Rules of Grain Merchants' Association†—Optional arbitration—Procedure.

*Civil Revision Application No. 348 of 1928.

† Rule 1 *(ja)* was as follows :—

"If and when any member or members refer their disputes to the Arbitration of this Association and if they agree to accept the award, then they should decide."

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The definition of "the Court" in section 4 (*a*) of the Indian Arbitration Act is subject to a proviso of repugnancy in the subject or context, and in view of the provisions of section 19 of the Act, and English decisions, it is clear that the Court contemplated in the latter section is the Court before which a suit is pending, provided that the suit is one to which the Act would apply under section 2, namely, that it is a suit which could, with leave or otherwise, be instituted in a Presidency town in respect of its subject matter. Accordingly the Small Cause Court at Bombay has, in a proper case, jurisdiction to stay a suit brought in that Court.

In re Babaldas Khemchand[1] and *Sita Ram Nath Mal* v. *Sushil Chandra Das and Co.*,[2] relied on.

Ralli v. *Noor Mahomed*,[3] disapproved.

Per FAWCETT, J. :—The provisions of paragraph 18 of the Second Schedule of the Civil Procedure Code are applicable in such a case.

Held, however, in a suit brought on contracts made subject to the Rules of the Grain Merchants' Association of Bombay, that there was in fact no submission to arbitration contained in the contracts, the rule relied on by the defendant merely giving an option to refer to arbitration, and not making a reference compulsory.

CIVIL Revision Application for setting aside the order of stay made by the Judge of the Court of Small Causes at Bombay.

Suit for money.

The petitioners-plaintiffs filed a suit against the opponents-defendants in the Small Causes Court at Bombay to recover Rs. 1,725, being the balance due at the foot of an account for difference of settlement contracts for the sale and purchase of groundnut seeds of January-February 1926 delivery.

The suit was fixed for hearing on September 22, 1926. On that date, the opponents put in their defences contending *inter alia* that the suit should be stayed and the matters in dispute be referred to arbitration of the Grain Merchants' Association as both the parties were members of the Association and contracts in dispute being made according to the rules of the Association.

[1] (1919) 45 Bom. 1. [2] (1921) 43 All. 553.
[3] (1906) 31 Bom. 236.

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Among the rules of the Association the material rules were :—

(Ch) "To attend to any custom or usage in dispute and to decide the same and to record such decisions for future use and having adopted such other measures convenience and facilities should be afforded for carrying on the trade."

(ja) "If and when any member or members refer their disputes to the Arbitration of this Association and if they agree to accept the award, then they should decide."

In 1924, the Managing Committee of the Association passed the following Resolution :—

"The paying and getting of difference (according) to the Vaida delivery Rules and the Bazar Rules should be made within eight days after the due date. If any one has an objection to the same a request should be made to the Association. And a fee of Rupees 2 should be charged for every such request. And the guilty party shall have to pay that fee."

The suit was heard on the 22nd, 23rd and 24th September, on which last date, the learned trial Judge made an order that the suit should be stayed to enable parties to comply with the rule about arbitration.

The petitioners therefore applied to the Full Court for a rule to set aside the said order but that Court refused the application on the ground that it had no jurisdiction to do so.

The petitioners applied to the High Court.

S. E. Bamji, for the applicant.

P. B. Shingne, for the opponent.

FAWCETT, J. :—The applicants are plaintiffs in a suit that was filed against the opponents in the Small Causes Court of Bombay for a sum of Rs. 1,725, being the alleged balance due at the foot of an account in regard to certain contracts for the sale and purchase of ground-nut seeds. The opponents in their written statement, in addition to objecting to the plaintiffs' claim on its merits, took the point that the suit should be stayed, and the matters in dispute be referred to the

arbitration of the Grain Merchants' Association, as the parties were members of that Association, and the contracts in dispute contained a provision that they were executed according to the Rules of the Grain Merchants' Association, by which each party was bound. Evidence was given to support this last contention, and the learned Judge decided that arbitration was compulsory under a certain rule passed by the Managing Committee of the Association. He, therefore, stayed the suit to enable the parties to comply with that rule. The applicants contend that this decision is wrong in law and ask us to interfere in revision. The Full Court, it may be mentioned, decided that it had no jurisdiction to interfere.

The first question that has been discussed before us is whether, in any case, the Court of Small Causes had jurisdiction to stay the suit either under section 19 of the Indian Arbitration Act, or under paragraph 18 of the Second Schedule of the Civil Procedure Code. Mr. Bamji for the applicants has cited the decision of Davar J. in *Ralli* v. *Noor Mahomed*[1] where he held that the word "Court" in section 19 of the Indian Arbitration Act meant in Bombay this High Court in view of the definition of the words "the Court" in clause (*a*) of section 4 of the Act, and he relies upon this as establishing that a Judge of the Small Causes Court has no power to stay the suit that was before him. It is, however, to be noted that Pratt J. in *In re Babaldas Khemchand*[2] differed from Davar J.'s construction of the word "Court" in section 19. He pointed out that the definition of "the Court" in section 4 (*a*) is subject to a proviso of repugnancy in the subject or context, and he held that the provisions of section 19, and the decisions under the corresponding

[1] (1906) 31 Bom. 236.

[2] (1919) 45 Bom. 1.

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law in England, clearly showed that the Court contemplated in this section is the Court before which a suit is pending, provided that the suit is one to which the Act would apply under section 2, namely, that it is a suit which could, whether with leave or otherwise, be instituted in a Presidency town in respect of its subject-matter. In regard to the words in section 19 " a submission to which this Act applies " he held that those words are intended to provide for the case of a suit filed in an up-country Court in an area to which the Act has not been applied, though part of the cause of action has arisen in a Presidency town. The same point has been considered by the Allahabad High Court in *Sita Ram Nath Mal* v. *Sushil Chandra Das and Co.*[1] It was there held that " the Court " mentioned in section 19 of the Indian Arbitration Act is not necessarily the Court as defined in section 4 (*a*) of the Act, but means the Court before which the suit or other legal proceeding which it is sought to refer to arbitration is instituted. The learned Judges in the judgment say (p. 554) :—

" Section 19 is a mere repetition of section 4 of the English Arbitration Act, and it is in our view idle to contend, looking at the language of the section itself, *a fortiori* looking at the long course of decisions in the English Courts under the corresponding section, that the Court spoken of in that section is not the Court before whom the legal proceedings or other attempt to bring a suit are in fact instituted. The definition in section 4 (*a*) of the Act only applies where there is nothing repugnant to it in the context. The context of section 19 is repugnant to the interpretation of the word ' Court ' therein being confined to the District Court."

In that case the District Court was the one referred to because that was a case not arising in a Presidency town. We agree with the views of Pratt J. and of the Allahabad High Court as just mentioned. Therefore, if section 19 of the Indian Arbitration Act is applicable to a suit in the Small Causes Court at Bombay, in our opinion the Judge before whom that

(1) (1921) 43 All. 553.

suit is pending has jurisdiction to stay the suit under that section.

But a further point arises. This is whether paragraph 18 of the Second Schedule of the Civil Procedure Code should not be the law applicable to such a suit rather than section 19 of the Indian Arbitration Act. This paragraph 18 is one of the provisions in the Second Schedule, which apply by virtue of section 89 of the Code. Sub-section (1) of that section says :—

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule."

Both this section 89 and the Second Schedule of the Code, with certain omissions which do not touch paragraph 18, have been prescribed as part of the procedure to be followed by the Bombay Court of Small Causes under the Rules that were framed by this Court in 1895 under the Presidency Small Cause Courts Act, 1882, as subsequently amended. This is under the power conferred by section 9 of the Act just mentioned, as amended by Act I of 1895, and the second proviso to section 8 of the Civil Procedure Code of 1908 enacts that :—

"All rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act, 1882, shall be deemed to have been validly made."

In view of that enactment the objection that has been taken by Mr. Bamji that this extension of paragraph 18 to the Small Causes Court is opposed to the saving of special or local laws in section 4 of the Code, falls, in my opinion, to the ground.

The question, however, remains, whether the words "save in so far as is otherwise provided by the Indian Arbitration Act, 1899," in section 89 of the Code, operate to prevent paragraph 18 of the Second

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Schedule applying to the Presidency Small Cause Court in preference to the provisions of section 19 of the Indian Arbitration Act. In my opinion the answer is in the negative. There is, in the first place, nothing contained in section 19 which is in substantial opposition to the provisions in paragraph 18 of the Second Schedule. There is a minor difference as to the stage when an application to stay the suit may be made, namely, that under section 19 it may be made "at any time after appearance and before filing a written statement or taking any other steps in the proceedings," whereas under paragraph 18 it may be made "at the earliest possible opportunity and in all cases where issues are settled at or before such settlement." The principle underlying both these phrases is practically the same, and, in my opinion, this difference is not important enough to make the provisions of section 19 inconsistent with paragraph 18 of the Second Schedule. This paragraph has been directly extended to the Small Causes Court under powers conferred upon this High Court, and, in my opinion, its provisions should, therefore, be considered applicable in preference to the provisions of section 19 of the Indian Arbitration Act.

Furthermore, it is to be noted that the first paragraph of section 3 of the Indian Arbitration Act, which says that sections 523 to 526 of the former Code of Civil Procedure "shall not apply to any submission or arbitration to which the provisions of this Act for the time being apply," does not cover this particular paragraph 18 of the Second Schedule, because there was no corresponding provision in the Code of 1882, and the paragraph was newly enacted in the Code of 1908. Therefore, in my opinion, paragraph 18 of the Second Schedule of the Code authorized the Judge to stay the suit, provided the conditions conferring upon him the power to stay are satisfied in the present case.

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On this question there have been three points raised before us by Mr. Bamji. He first of all said that the application to stay the suit was made too late, and cited rulings that refer to cases under section 19 of the Indian Arbitration Act. Paragraph 18, however, merely says " at the earliest possible opportunity and in all cases where issues are settled at or before such settlement." In the present case, the objection to the suit being proceeded with was raised in the opponent's written statement, which was put in on the first date on which the suit was fixed for hearing, namely, September 22, 1926. In these circumstances I do not think that the provisions in paragraph 18 that I have mentioned have been contravened. It was the earliest opportunity possible, unless the opponents were to go to the Judge on a date upon which the suit was not on the Board, and I do not think that paragraph 18 contemplates that this should be done.

The next point is that the suit was in relation to cross-contracts, and the decision in *Pokerdas Kishindas* v. *Vishinji Gordhandas*[1] was cited that, where cross-contracts have been made for the purpose of fixing the liability of the earlier contract, the rights and liabilities of the parties were determined, and there is no matter in dispute in regard to those contracts which could be referred to arbitration. The opponents in their written statement said that there were two additional contracts which were not cross-contracts, and the plaintiffs said that those were not included in the suit, because no loss had been incurred in regard to those contracts. The point has not been specifically gone into the judgment of the lower Court, and, as we can decide this application upon another ground, I think that it is one on which we had better abstain from expressing any opinion.

[1] (1919) 14 Sind L. R. 18.

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The third point is that in fact there is no submission to arbitration by the contracts in suit. It is pointed out by Mr. Bamji that the objects of the Association are stated in the Rules of the Grain Merchants' Association. Rule 1 (ja) only specifies optional arbitration and not compulsory arbitration. The actual words used (as translated) are "If and when any member or members refer their disputes to the arbitration of this Association, and if they agree to accept the award, then they should decide." That this merely gives an option to refer to arbitration is not disputed before us, and that has also been held in the judgment of the Court below. This is supported by a Resolution of the Managing Committee dated October 15, 1911, which has been put in evidence. This says:—"The Association does not take in hand matters relating to difference, but if the parties wish to appoint arbitrators, that can be done." Reliance, however, is placed by Mr. Shingne for the opponent on a Resolution of the Managing Committee dated July 5, 1924, which was communicated to members of the Association by a circular. As translated, this Resolution runs as follows:—

"The paying and getting of difference (according) to the Vaida delivery Rules and the Bazar Rules should be made within 8 days after the due date. If any one has an objection to the same a request should be made to the Association. And a fee of Rs. 2 should be charged for every such request. And the guilty party shall have to pay that fee."

The learned Judge says:—

"The powers of the Managing Committee to pass such a rule as the one relied upon by Mr. Davar are not shown to me but I am sure of this that the rule passed by them does not touch in any way on the powers of the Association. Because the Association has got the powers to arbitrate and the Rule says to members that the powers being there you have now to go to the Association and it will exercise the powers it possesses."

Against this view is the fact that the objects of the Association, as I have already mentioned, do not contemplate compulsory arbitration but optional

arbitration. And in those circumstances, there clearly is a legitimate doubt whether even the Association itself could make a rule imposing compulsory arbitration upon all its members in regard to contracts to be made under the rules of the Association. Far more is there the gravest doubt as to the powers of the Managing Committee of the Association to make arbitration compulsory, as it is said it did, in 1924. The learned Judge says that the powers of the Managing Committee to pass such a rule had not been shown to him, and the onus clearly lies upon the opponent to satisfy the Court that it is a valid rule. In our opinion that has not been done. Furthermore, the Resolution in itself is very vague, and it is certainly open to question whether it really has the meaning that is put upon it by the opponent. If it was intended that in all cases a dispute about differences should be referred to arbitration by the Association, then that should have been clearly stated in a way that would leave no doubt about that being the meaning of the rule or resolution. Furthermore, there should in such a case obviously be some provision made as to the manner in which arbitrators should be appointed and so on, because as stated in paragraph 2 of the Second Schedule of the Code, the manner of appointment of arbitrators is a matter to be settled by agreement between the parties, and it is only when difficulties arise about appointment according to the agreement that a Court exercises its power of appointment. The view of the lower Court that there was in fact a submission by the applicants to arbitration is, in our opinion, on the existing materials, entirely unjustified; and the case is one in which we think we should interfere under section 115, Civil Procedure Code, as in this view the Court had no jurisdiction to pass the order it did.

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Accordingly, we set aside the order staying the suit and direct the Court concerned to dispose of the suit according to law. The applicants to have the costs of this application from the opponent.

MIRZA, J. :—I agree. The context in which the words "the Court" are used in section 19 of the Indian Arbitration Act makes it clear that by those words the Court before which the suit is pending is intended. The Court of Small Causes would, therefore, have jurisdiction to stay the suit.

With regard to the point of delay, it may be noted that this was a Small Causes Court suit to which the rules and practice relating to suits on the Original Side of the High Court would not necessarily apply. It was not necessary in this suit to have filed a written statement or to have raised issues. The suit reached a hearing for the first time on September 22, 1926, when, it is stated, in the notes of the learned Judge, that defences were filed. These defences were nine in number. The very first defence related to the question of arbitration. Up to this point, in my opinion, the objection with regard to delay would not hold good. The case was argued on September 22 and adjourned to the 23rd without taking any evidence. On September 23 the only evidence taken before the learned Judge related to the question of arbitration. The case was again adjourned to September 24. On that day, the Court took some further evidence, upheld the defendant's preliminary objection and stayed the suit. Under these circumstances, it must be held that the defendant applied for stay of the suit "at the earliest possible opportunity."

On the interpretation, however, of the Rules of the Grain Merchants' Association, in my judgment, the

plaintiffs could not be compelled to go to any arbitration. The Resolution passed by the Managing Committee of the Association purporting to enact a rule making a reference to arbitration in such matters compulsory cannot, in my opinion, bind the plaintiffs in this case.

I am, therefore, of opinion that the order of stay should be set aside and the Court should be directed to proceed with the hearing of the suit.

Order set aside.

J. G. R.

APPELLATE CIVIL

Before Mr. Justice Fawcett and Mr. Justice Mirza.

GULABBHAI KANTHADJI (ORIGINAL PLAINTIFF), APPLICANT *v.* SOHANGDASJI GURU MOHANDASJI (ORIGINAL DEFENDANT), OPPONENT.*

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Temple property—Debt incurred by Shebait—Death of Shebait—Creditor's suit for recovery of debt out of idol's property—Administration suit not appropriate.

Inasmuch as succeeding Shebaits of a temple in fact form a continuing representation of the idol's property, there is no proper scope for the theory that, where a Shebait dies, a creditor, who claims to be paid out of the idol's property in respect of a debt incurred by the Shebait, can bring an administration suit on behalf of himself and all other creditors of the deceased Shebait.

Bai Meherbai v. *Maganchand*[1]; *Gangaram* v. *Nagindas*,[2] discussed.

Pramatha Nath Mullick v. *Pradyumna Kumar Mullick*,[3] referred to.

CIVIL Revision application against the order of the Joint Subordinate Judge at Surat.

Suit to recover money.

Gulabbhai (petitioner) was a creditor of one Mohandasji who was the Mahant of a temple of

*Civil Revision Application No. 249 of 1927.

[1] (1904) 29 Bom. 96.
[2] (1908) 32 Bom. 381.
[3] (1925) L. R. 52 I. A. 245.