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effects a change of language by the omission of words which occurred in a statute, and those words were necessary to convey a particular sense, the omission must be construed as intended to convey a different sense. As Sir Dinshah Mulla has pointed out in his treatise on the Transfer of Property Act, 2nd Edition, at page 285, that omission " makes the charge of the buyer for price prepaid effective not only against the seller but against all persons claiming under him irrespective of notice ". Therefore, if Hari had a statutory charge against the property purchased by Siraj, he could enforce it against that property, and the plea of want of notice would be of no avail. The lower Courts were in error in holding that the absence of notice of the charge was a complete answer to Hari's claim. I would, therefore, allow the appeal, reverse the orders of the lower Courts, and direct that the claim in the Darkhast shall be allowed with costs throughout.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Rangnekar.

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July 29

NARAYAN RAMCHANDRA AMBURE (ORIGINAL PLAINTIFF), APPELLANT *v.* DHONDIBA TUKARAM GAVALI (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sections 47, 141, Schedule II, paragraph 1—Decree—Execution—Dispute referred to arbitration—Applicability of Second Schedule to execution proceedings—Decision by Judge—Appeal.

In the course of execution proceedings the parties referred a certain dispute to arbitration through the Court. The reference provided that the arbitrators were to decide the dispute and in the event of disagreement between them, the Court was to decide it as provided by the terms of reference. The arbitrators did not agree and the executing Court decided the dispute in favour of the plaintiff, but this decision was reversed in appeal.

*Second Appeal No. 162 of 1934.

In second appeal it was contended for the plaintiff that by the terms of reference the Court had been constituted an umpire in the event of arbitrators failing to agree and that the decision of the Subordinate Judge being that of an umpire, no appeal from it was competent :—

Held, (1) that the Subordinate Judge had no jurisdiction to accept the reference to arbitration and to make an order on it and that the award, if any, made either by the arbitrators or by him was illegal and without jurisdiction ;

(2) that the decision of the Subordinate Judge would come under section 47 of the Civil Procedure Code and would be appealable.

T. Wang v. *Sona Wangdi*,[1] relied on.

The meaning of section 141 of the Civil Procedure Code, 1908, upon its clear terms, is that the procedure to be followed in regard to suits under the Code is, as far as possible, to be followed in other original proceedings of the nature of suits, such as proceedings in probate, guardianship, under the Indian Trusts Act for the appointment of a trustee, and under the Indian Lunacy Act.

SECOND APPEAL from the decision of G. H. Salvi, Assistant Judge, Sholapur, reversing an order made by V. R. Chaubal, Joint Subordinate Judge, Sholapur, in Darkhast No. 1739 of 1932.

Proceedings in execution.

The material facts appear from the judgment of the Court.

M. R. Jayakar, with *S. R. Parulekar*, for the appellant.

P. B. Gajendragadkar, for the respondent.

RANGNEKAR J. This appeal arises out of a dispute between two neighbours, and it is a pity that they could not come to some amicable arrangement between them, as the subject-matter of the dispute seems to me to be of a very trifling nature.

It appears that the appellant brought a suit, No. 304 of 1932, against the respondent for a declaration and injunction restraining him from damaging his wall which is between his house and that of the defendant and shown as QR in the map (exhibit 17). The parties took a consent decree and it is the last clause in the consent decree which

[1] (1924) 52 Cal. 559.

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has given rise to the present dispute. It is in these terms :—

"At present the defendant has got his door adjoining the wall of the aforesaid upper storey and adjoining the said door there is another door adjoining the house of Rajeshri Deoba Gavli. The defendant should get his privies constructed at his own costs adjoining the said door and have the door for egress close by and should not have it near the plaintiff's wall."

As the Judges of both the lower Courts have pointed out, the decree is extremely vague, and mentions no measurements as to the situation of the various doors referred to therein. It also seems to me that if the map is correct the clause in the decree to some extent is incorrect. The clause refers to the first door of the defendant adjoining the wall on which there is an upper storey and then it says that adjoining that door there is another door adjoining the house of Deoba Gavli. Now it seems to be common ground and is also evident from the map that the first door in the wall of the upper storey is some distance away from the second door which the defendant has and which adjoins the house of Deoba Gavli. To start with, therefore, the clause seems to me to be inaccurate in describing the two doors if the map is correct and if I am right in understanding the case made out by both parties and from the evidence on record. The point is not very important except perhaps for the purpose of showing how unsatisfactory the decree was in regard to the description of the relevant doors mentioned therein. This decree was made in 1932. Then there was a set back which necessitated the pushing of the wall on which the upper storey was standing a few feet away towards the north. The wall which now is in existence is described as PR in the map. The defendant commenced to erect a privy in this wall and it is undisputed that he was allowed to put up the privy where it now is without any objection being raised by the appellant. The work done by the defendant, as both the Judges point out, is that of solid stone masonry work, and it must have taken some time before it was completed. It was after

the work was completed that the plaintiff filed an application for execution (exhibit 20) asking that the defendant should be ordered to remove this solid stone masonry structure from the place where he had put it up and take it a few feet away towards the wall OP to the west. Both parties appeared before the learned Subordinate Judge, and as he points out, it was found that there was no reliable data on which the dispute could be decided, and therefore the parties referred the matter to arbitration through the Court. The reference, exhibit 26, is signed by both the parties. It says that they have appointed each two arbitrators and have authorised them to decide the dispute either unanimously or by majority, and in the event of the arbitrators disagreeing and of there being no unanimity of opinion the Court should then decide the dispute on a perusal of the report of the arbitrators and the evidence on the record. Then they stated that none of them wanted to tender any oral evidence. On this application the learned Subordinate Judge made the following order :—

"The persons named are appointed arbitrators to decide the dispute. Parties to produce necessary copies or documents before the arbitrators."

The arbitrators did not agree. Those of the plaintiff reported that the privy should be shifted to eight feet towards the west while those on behalf of the defendant reported that the defendant had done the work in accordance with the decree. The matter therefore came before the Court, and apparently the Court acting under exhibit 26 held that the work was not done in accordance with the decree and ordered the defendant to shift the privy at his own costs and in default of his so doing the work was ordered to be done through the Court. The defendant appealed to the Assistant Judge of Sholapur. He held that the work was in accordance with the decree, that the Darkhast was untenable and dismissed it with costs. From that decision the present Second Appeal is made.

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Two points are taken by the learned counsel on behalf of the appellant. The first is that there being a reference to arbitration by the parties and accepted by the Court, upon the terms of that reference the Court was constituted as an umpire in the event of the arbitrators failing to agree. Therefore, the decision of the learned Subordinate Judge of Sholapur was a decision of an umpire and no appeal from it was competent to the District Court. The second point is with regard to the merits of the case, and the argument is that although the decree is not perhaps as definite as might have been, the intention of the parties was that the privy should be constructed as nearer the wall OP and farther away from the wall QR as possible, and, therefore, the defendant has contravened the terms of the consent decree.

Now it is clear from section 89 of the Civil Procedure Code that 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 to the Code. It is not argued that this reference is justified either by the Indian Arbitration Act or by any other law, but it is contended that the reference though made in execution proceedings is governed by the provisions of the Second Schedule to the Code, which deals with arbitration in general in pending suits and references made outside Courts. The question then is whether the present reference to arbitration will come under the Second Schedule. In support of his argument the learned counsel for the appellant relies on the provisions of section 141 of the Civil Procedure Code. That section provides :—

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction."

In my opinion the meaning of the section upon its clear terms is that the procedure to be followed in regard to

suits under the Code is as far as possible to be followed in other original proceedings of the nature of suits, such as proceedings in probate, guardianship, under the Indian Trusts Act for the appointment of a trustee, Lunacy Act, etc. The section does not apply to proceedings in execution of a decree which are proceedings in the suit. Section 141 corresponds to the old section 647 of the Code of 1882. There was a difference of opinion between the several High Courts in this country as to whether the old section 647 applied to execution proceedings. It was held by the Allahabad and Bombay High Courts that the section applied to applications for execution. A contrary view was taken by the Calcutta High Court. Having regard to this conflict of opinions the Legislature amended section 647 in 1892 by adding an explanation which was in these terms :— " This section does not apply to applications for the execution of decrees which are proceedings in suits." The result of this amendment was to supersede the view taken by this Court as regards the applicability of section 141. Before the amendment, however, the same question arose before the Privy Council in the case of *Thakur Prasad* v. *Fakir-ullah*[1] and it was held by their Lordships of the Privy Council that section 647 did not apply to applications for execution, but only to original matters in the nature of suits, such as proceedings in probate, guardianships and so forth. Apart from this, it seems to me that it is very difficult to hold that the provisions of the Second Schedule are applicable in applications for execution proceedings : for one thing it is impossible to apply some of the provisions in the Second Schedule, particularly those which provide for the acceptance of the award where no objection could be taken to it, or if taken has been overruled, and for the Court being bound thereupon to pass an award decree which would be capable of execution. I need not dilate upon the point, because the view which I am inclined to take

[1] (1894) 17 All. 106, P. C.

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has been taken by the Calcutta High Court in *T. Wang* v. *Sona Wangdi*.[1] It seems to me, therefore, that the Subordinate Judge had no jurisdiction to accept the reference to arbitration and to make an order on it, and that the award if any made either by the arbitrators or by him as an umpire is illegal and without jurisdiction. The decision of the Subordinate Judge would then come under section 47 of the Civil Procedure Code and would be appealable in the ordinary way. The learned Assistant Judge in appeal therefore was right in overruling the contention made on behalf of the plaintiff though upon a different ground.

[His Lordship then dealt with the second point regarding the merits of the case not material for this report and concluded :—]

The appeal is dismissed with costs.

Appeal dismissed.

Y. V. D.

[1] (1924) 52 Cal. 559.

APPELLATE CIVIL.

Before Mr. Justice Rangnekar.

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August 5

GURUNATH KHANDAPPAGOUDA PATIL (ORIGINAL PLAINTIFF JUDGMENT-DEBTOR), APPELLANT *v.* VENKTESH AND OTHERS, SONS AND HEIRS OF THE DECEASED LINGO RAMCHANDRA PATIL (HEIRS OF ORIGINAL DEFENDANT No. 3, APPLICANT), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 144—Decree—Execution—Restitution—Costs recovered from defendant who was not joined in appeal—Decision reversed in appeal—Defendant entitled to refund of costs—"Any party", meaning of.

The expression "any party" in section 144 of the Civil Procedure Code, 1908, is not confined to parties to the appeal in which the decree has been reversed or modified. It includes every person against whom the decree appealed from was passed, though he was not a party to the appeal, provided the appeal is in effect and substance in favour of such person.

*First Appeal No. 70 of 1934.