1900 AUG. 29.

CRIMINAL REVISION.

28 C. 302.

declared to be in possession of some of the disputed lands, and an order was made awarding him costs. Mr. Cook left the district, and Mr. O'Malley, who succeeded him, on the application of Ram Prasad Pattak assessed costs on the 18th May 1900 at Rs. 201-13-6 against the [303] petitioner without notice to him. The petitioner then applied to the District Magistrate to set aside the order passed on the 18th May, but Mr. O'Malley, who was officiating as District Magistrate, rejected the application.

The petitioner thereupon applied for and obtained a rule from the High Court calling upon the District Magistrate to show cause why the order of assessment of costs should not be set aside as being made without notice to the petitioner.

Mr. *Swinhoe* (with him Babu *Atulya Charan Bose* and Babu *Hari Bhusan Mookerjee*) for the petitioner.

The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

PRINSEP, J.—The rule is made absolute as the Magistrate admits that he passed the order under s. 148, Code of Criminal Procedure, making the petitioner liable for a certain sum as costs without notice to him, so that he might have an opportunity of contesting the same. The Magistrate is now at liberty to proceed after due notice to the parties concerned.

Rule made absolute.

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28 C. 303.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Brett.

BENI MADHUB MITTER (*Defendant* No. 2) *v.* PREONATH MANDAL AND ANOTHER (*Plaintiffs*).* [13th December, 1900].

Arbitration—Award—Acquiescence—How far a defendant, not a party to an application for reference to arbitration, is bound by his conduct.

In a suit brought by the plaintiffs for recovery of possession of certain immoveable property on a declaration of title thereto a reference was made to arbitration.

One of the defendants (defendant No. 2) did not join in the reference and did not take any part in the proceedings before the arbitrators, although it appeared that he, in obedience to a summons which was issued at the instance of another defendant, sent his servant to produce a document [304] before the arbitrators. An objection was now taken by defendant No. 2 that he was not bound by the award :—

***Held*, that it was so, and that the conduct of defendant No. 2 was not such that it could be said that he was bound by the award by reason of acquiescence.**

THIS appeal arose out of an action brought by the plaintiffs for recovery of possession of certain immoveable property on a declaration of title thereto. The plaintiffs and the defendants Nos. 3, 4, 5, and 7 applied to the Subordinate Judge of 24-Pergunnahs, Babu Bulloram Mullick, for an order of reference, and all the matters and disputes were accordingly referred to arbitration on the 16th of November 1896. The award was made on the 14th of June 1897. It gave the plaintiffs

* **Appeal from Appellate Decree No. 2039 of 1898, against the decree of C. P. Caspersz, Esq., District Judge of 24-Pergunnahs, dated the 9th of July 1898, reversing the decree of Babu Bulloram Mullick, Subordinate Judge of that District, dated the 25th of July 1897.**

1900 DEC. 13.

APPELLATE CIVIL.

28 C. 303.

certain reliefs against defendants Nos. 2, 3, 4, 5 and 7. The learned Subordinate Judge confirmed the award as against defendants Nos. 3, 4, 5 and 7, but dismissed the suit as against the defendant No. 2 on the 25th June 1897. The plaintiffs preferred an appeal to the District Judge of 24-Pergunnahs. One of the questions raised in the appeal was, whether the award was binding on the defendant No. 2. The learned District Judge relying upon the cases of *Saturjit Pertap Bahadoor Sahi* v. *Dulhin Gulab Koer* (1) and *Unniraman* v. *Chathan* (2) held that it was so binding. The material portion of his judgment was as follows:—

"In the present case out of ten defendants only four applied along with the plaintiffs. The defendant No. 2 did not contest the suit; he merely filed a *vakalatnama*. That being so, does the doctrine of acquiescence constructively make him bound by the award. The arbitrators evidently were of this opinion. The conduct of defendant No. 2, when this advantage was being debated, warrants the conclusion that he consented, as did his sub-tenant, to the arbitration proceedings . . . . . But this defendant was fully aware of the proceedings as the notice was given to all the pleaders. He sent his servant to produce a document before the arbitrators and he declined to produce other papers. He awaited the result of the reference and then preferred an objection to the Court, which did not impugn the award on the merits. Such conduct clearly disentitles the defendant No. 2 to relief."

Against this decision the defendant No. 2 appealed to the High Court.

[305] Dr. *Rash Behari Ghosh* (with him Babu *Dwarka Nath Chuckerbutty*) for the appellant.

Dr. *Ashutosh Mookerjee* (with him Babu *Brij Mohun Mazumdar*) for the respondents.

The judgment of the High Court (BANERJEE and BRETT, JJ.) was as follows:—

In this appeal, which arises out of a suit for declaration of title to, and recovery of possession of, certain immoveable property, the question raised on behalf of the appellant, the defendant No. 2, is whether the Lower Appellate Court was right in holding that that defendant was bound by the award of the arbitrators to whom the case was referred, although he was not a party to the reference, by reason of acquiescence.

It is admitted that the defendant No. 2 did not join in the reference to the arbitration that was made in the cases. The ground upon which the learned Judge below has held him bound by the award is thus stated in his judgment: "The conduct of the defendant No. 2, when his advantage was being debated, warrants the conclusion that he consented, as did his sub-tenant, to the arbitration proceedings." Then after considering certain cases presently to be noticed, the learned Judge observes: "But this defendant was fully aware of the proceedings, as notice was given to all the pleaders; he sent his servant to produce a document before the arbitrators; and he declined to produce other papers. He awaited the result of the reference and then preferred an objection to the Court, which did not impugn the award on the merits. Such conduct clearly disentitles the defendant No. 2 to relief."

We are of opinion that the facts referred to in this judgment do not warrant the conclusion that the defendant No. 2 is bound by the award by reason of his acquiescence in the reference. It is not said that this defendant did anything beyond sending his servant to produce a document; and this was done not at the instance of the defendant himself, but in

(1) (1897) I. L. R. 24 Cal. 469. (2) (1886) I. L. R. 9 Mad. 451.

obedience to a summons requiring him to produce the document, the summons being issued at the instance of the defendant No. 7. It is not shown that the defendant No. 2 took any part in the proceedings before the arbitrators. [306] It is not even suggested that he did. Mere silence on his part, and his omission to inform the arbitrators that he was not a party to the reference, cannot be taken to be sufficient to make the award binding upon him.

Of the three cases relied upon by the learned Judge, that of *Saturjit Pertap Bahadoor Sahi* v. *Dulhin Gulab Koer* (1) was a case in which consent to a reference to arbitration was given by the agent of a party and it being found that the party had ratified the act of his agent, it was held that he could not question the validity of the award. That case, therefore, was different from the present one. As regards the case of *Unniraman* v. *Chathan* (2) it will be sufficient to say that the learned Judges there, whilst declining to interfere under s. 622 of the Civil Procedure Code in favour of the party who impugned the award on the ground of absence of consent on his part to the reference, observed: "It is not necessary to say and we expressly refrain from saying anything as to the validity of the award." And the case of *Shitanath Biswas* v. *Kishen Mohun Mookerjee* (3) is clearly distinguishable from the present, as there all that was held was that a party who was made a co-plaintiff at his own instance after the suit had been referred to arbitration could not object to the validity of the award, as he took the position of a co-plaintiff in the case as it then stood before the arbitrators, and, as he made no objection to the arbitration, but suffered the arbitrators to give in their award, it affected him equally with the other co-plaintiffs.

Two English cases were relied upon by the learned Vakil for the respondents, namely, *Govett* v. *Richmond* (4) and *Taylor* v. *Parry* (5). Those cases in the first place are not quite in point. Reference to arbitration in a pending suit is governed by certain express provisions in our Civil Procedure Code, one of which requires that all the parties shall give their consent to the reference and that an application for reference to arbitration shall be in writing. In the second place we feel bound to observe with reference to the former of the two cases just referred to that the correctness of the rule therein laid down is open to [307] question, and has been doubted by well-known writers of text-books on the subject. See Russel on Arbitration, 8th Edition, page 317, and Pollock on Contract, 6th Edition, page 191. And, as for the second case, the facts there were very different from those of the case before us. On the other hand there is a case in Marshall's Reports, p. 517, namely the case of *Deegumbur Chatterjee* v. *Musst. Ram Prea Debea* (6), which supports to a certain extent the view we take. There the Judge in the Court below referred the case to arbitration after having suggested to the parties that they should do so, and the reference was sought to be supported on the ground that the parties objecting did not oppose it when it was made. The learned Judges thereupon observed: "We think that the Judge took an erroneous view of the matter. A reference to arbitration should proceed on the recorded and expressed consent of both parties and not in the absence of it."

The judgment of the learned District Judge cannot, therefore, be

(1) (1897) I. L. R. 24 Cal. 469.
(2) (1886) I. L. R. 9 Mad. 451.
(3) (1866) 5 W. R. 180.
(4) (1834) 7 Sim. 1.
(5) (1840) 1 Man and Gran. 604.
(6) (1863) Marsh. Rep. 517.

1900 DEC. 13.

APPELLATE CIVIL.

28 C. 303.

supported, and it must be set aside so fa as it holds that the defendant No. 2 is bound by the award.

We are then asked to remand the case for an enquiry into the question whether, although the acts and conduct referred to in the judgment of the learned District Judge may not be sufficient to amount to such an acquiescence as would make the arbitrator's award binding upon the defendant No. 2, there were any other acts and conduct which would support the inference that there was acquiescence on the part of the defendant No. 2, and to allow the respondents to adduce further evidence on the point. We are unable to accede to this prayer, because no foundation is laid for an application of this sort in the proceedings in the Courts below. When the defendant No. 2 submitted his petition of objections to the award in the first Court, he distinctly stated that there was no notice served upon him, that he never appeared before arbitrators, and that he was not bound by the award. If the respondents thought it necessary to adduce evidence to show that the defendant No. 2 was bound by the award by reason of acquiescence, they ought to have asked the First Court to allow them to adduce such evidence ; and even **[308]** if it could be said that they had no sufficient opportunity of offering evidence before that Court by reason of the extreme view which it took on the question of law, they ought to have asked the Lower Appellate Court (before which they were appellants) to take evidence on the point. Even this they omitted to do. That being so, we think they are not entitled to ask us to remand the case for a further enquiry into the question.

The result then is that this appeal must be allowed and the case as against the defendant No. 2 will be remanded to the First Court for trial.

The costs of this appeal will abide the result.

Appeal allowed ; *case remanded.*

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28 C. 308.

Before Mr. Justice Ghose and Mr. Justice Pratt.

DWARKA NATH SANTRA AND ANOTHER (*Defendants*) *v.* RANI DASSI AND OTHERS (*Plaintiffs*).* [19th and 20th December 1900.]

Bengal Tenancy Act (VIII of 1885), s. 49, cl. (b)—Under-raiyat—Ejectment—Notice to quit—Period of notice—Transfer of Property Act (IV of 1882), s. 106.

It is not necessary that a notice under s. 49, cl. (*b*), of the Bengal Tenancy Act should mention any particular period within which the under-raiyat is to quit the land.

***Naharullah Patwari* v. *Madan Gazi* (1) followed.**

THE plaintiffs, who are the landlords, served a notice to quit on the father of the defendants, an under-raiyat, in Bhadra 1302 B. E. A second notice was then served on the defendants in Joistha 1305 B. E. The earlier notice required the tenant to quit the land from the 1st Baisak 1303 B. E. The present suit for ejectment against the defendants was instituted on the 26th June 1897, almost immediately after the date of the second notice.

[309] The Munsif held that the first notice was not in accordance with the provisions of the Bengal Tenancy Act, that even if it was a good

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*** Appeal from Appellate Decree No. 1367 of 1899, against the decree of E. G. Drake-Brockman, Esq., District Judge of Midnapur, dated the 1st of June 1899, reversing the decree of Babu Charu Chunder Mitter, Munsiff of Garbetta, dated the 10th of September 1898.**

(1) (1896) 1 C. W. N. 133.