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As to the first of these questions, it seems to me, that the defendant has made no such case in the Court below. He did not ask either of the Courts to determine what the rights or shares of Maka and Bazu were, and to allow him to retain possession of the land to that extent; but he relied entirely on the *Den mohur* right of Baxu Bibi, and by that right, I think, he elected to stand or fall. I do not think, therefore, he is entitled now to ask us, in special appeal, to give him a decree to the extent of the rights of these two parties.

MARKBY, J.—I am of the same opinion. I think it is impossible for the defendants to set up, for the first time, in the argument on the special appeal, a case which involves an inquiry into facts not asertained in the Courts below. Throughout this case, until now, they have maintained their absolute right as purchasers from an absolute owner. They now admit that their vendor was not absolute owner, and say that by inheritance she was entitled to a share. But there has until now been no enquiry asked for, as suggested, into the state of the family, so as to ascertain whether any, and if any, what share came to this lady. And in my opinion we ought not to commence that inquiry at the preseut stage of this suit.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

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RAMBHANJAN BHAKAT (DEFENDANT) *v.* SRIKRISHNA BHAKAT (PLAINTIFF.)*

Arbitration—Award—Appeal—Act VIII. of 1859, *s.* 327.

In an arbitration case between a mahajan and his gomasta, an award was made to the effect that rupees 725 were outstanding and due to the *kuti*, of which rupees 483 were due to the mahajan, and rupees 241 to the gomasta; that the gomasta should point out the parties owing the rupees 483; or in default make good the amount. The mahajan applied to the Subordinate Judge of Bhagulpore, under Act VIII. of 1859, section 327, to file the award. The Subordidate Judge held that it was not proved that the gomasta had done as required by the award, and ordered

* Miscellaneous Regular Appeal, No. 416 of 1868, from an order of the Judge of Bhagulpore, dated the 24th June 1868, affirming an order of the Subordinate Judge of that district, dated the 17th September 1867.

him to pay the deficit. The gomasta appealed to the Judge who held that no appeal lay from the judgment of the Subordinate Judge enforcing the award.

Held, on special appeal, that the subordinate Judge's judgment decided a question of fact not determined by the award, and that an appeal would lie.

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Baboos *Ramesh Chandra Mitter* and *Taraknath Palit* for appellant.

Baboos *Chandra Madhab Ghose* and *Abinash Chandra Banerjee* for respondent.

THE facts are sufficiently clear from the following judgment delivered by

NORMAN, J.—The plaintiff, Srikrishna, is a mahajan ; and the defendant, Rambhanjan, is his gomasta. Srikrishna sued Rambhanjan for an account of the profits of certain *kutis*, one of which was at Bhagulpore. The dispute between them was referred to arbitration. The arbitrators found that there was a sum of rupees 725-11-9 appearing to be due by third parties to the Bhagulpore *kuti*, and that of this sum rupees 483-13 was the share of Srikrishna, the mahajan, and the residue, rupees 241-14-6, of Rambhanjan Sing, the gomasta. The award went on to state that, if the sum of rupees 483-13-6 could "not be recovered from the debtors, or if it be not proved that they have taken it," that sum must be paid by Rambhanjan to Srikrishna. It went on to state that Rambhanjan was to make *mukabala* of this sum of rupees 483-13-6 (meaning that he was to point out the debtors, and show, on comparison of their accounts, that this sum was really due) ; and if there should be no proof of the alleged arrears being due from the debtors to the firm, he should pay the amount to Srikrishna out of his own pocket. The award contained a declaration that the sum of rupees 553-13-6 found due in respect of the accounts of another *kuti*, was paid by Rambhanjan to Srikrishna immediately after the making of the award.

The plaintiffs applied to the Subordinate Judge of Bhagulpore under section 327, to file the award. The defendant objected that the award could not be filed, and alleged that he had been

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willing to make *mukabala* of the sum that was due from the debtors of the firm.

The Subordinate Judge tried that question, and found that it was not proved that the defendant had made the *mukabala*. He gave judgment that the plaintiff's "suit be decreed, and that the defendant do pay to the plaintiff rupees 483-13, with interst from date of suit to that of realization, and costs and interest." From that decision the defendant appealed to the Judge. The Judge held, firstly, that no appeal lay from the judgment enforcing award under section 327 ; and, secondly, he thought that the Principal Sudder Ameen had jurisdiction, because "the "matter to which the award relates, must determine the jurisdiction "in this case: the matter exceeded 1,000 rupees, and hence "the Principal Sudder Ameen had jurisdiction." From that "decision defendant has appealed to this Court specially. We are of opinion that the decision of the Judge is erroneous. The 325th section of Act VIII. of 1859 enacts that, "in every case in which judgment shall be given according to the award, the judgment shall be final." If, then, this judgment is a judgment given "according to the award," within the meaning of the words of that section, no appeal lies. We think the expression "judgment according to the award," refers only to the case of a judgment simply following an award where the Court enforcing the award exercises no judgment on the matters referred, but simply enforces the decision of the arbitrators, not to a case where the Court pronounces a new and distinct decision, founded partly upon the award, and partly upon matters which were in issue before itself, and which were never in issue before and never adjudicated upon by the arbitrators.

We may observe that the 325th section does not take away the appeal, when the award is submitted in the form of a special case, and the Court passes judgment according to its own opinion on the special case. This shows that it is not intended to take away the appeal when the judgment proceeds, though in part only, upon matters independent of, and decided by, the award.

Here the judgment of the Principal Sudder Ameen was not a judgment according to the award, but proceeds on the determination of a question of fact not decided by the award. The appeal

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was not against any decision or determination of the arbitrators, but against a finding of the Subordinate Judge on a question of fact. We are not prepared to say that the plaintiff has not a right to ask to have the award filed under the 327th section; and, therefore, we do not at once dismiss the suit.

We think that there is nothing in the award, as it stands at present, which is capable of being enforced without a fresh suit.

We think that the application is one which might have been brought in the Moonsiff's Court. It is clear that the Moonsiff has jurisdiction in respect of the demand of the account of the Bhagulpure *kuti*, *viz.*, rupees 725, which is all which remained in dispute when the award was finally made. But we are not prepared to say that the plaintiff is not entitled to a decree setting out the entire award, which would operate as a declaratory decree as regards the accounts of the other *kuti*. This would bring the case within the jurisdication of the Subordinate Judge.

We, therefore, think that the Judge's decision on the question of jurisdiction must stand.

The respondent will pay the cost of this appeal and of the hearing before the Judge.

E. JACKSON, J.—I also think that the case must be remanded, in order that the Judge may decide the appeal before him, as to whether the defendant is liable for the sum of rupees 483 annas 13. The Judge was right, in my opinion, in the view he took as to this suit being improperly instituted as a suit merely to enforce on award. The award, as it stands, cannot be enforced. It must first be ascertained whether the defendant made *mukabala*. or not; or whether even now the defendant can make *mukabala*. The meaning of making *mukabala* is simply that the defendant must prove that the money was paid to the other parties, and is due from them, so that the plaintiff can recover it directly from them. If the defendant cannot do this, he is to be liable for the money himself. No time is specified in the award, and, therefore, it seems to me that even now, if the defendant can do what the award requires of him, he should be allowed to do it. If the

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judgment of the first Court had been only an order to enforce the award, it might have been final, but it is more than this. The suit should not, I think, have been brought under the 327th section, but having been so brought and allowed, perhaps the Judge is right to let it stand. Still he must decide the appeal on the question which the award left undecided.

Before Mr. Justice Loch.

FAKIRUDDIN MOHAMMED ASAN CHOWDHRY (APPELLANT) *v.* NAJUMUNNISSA CHOWDHRAIN AND OTHERS (RESPONDENTS).*

Privy Council Appeal—Review.

Where an application for review was rejected, and no appeal to the Privy Council was filed against the order of rejection, papers filed with the application for review, will not be forwarded with the record to the Privy Council on the appeal of the case.

Mr. *R. T. Allan* for applicant, petitioner.

Baboo *Kali Mohan Doss* for respondents.

LOCH, J.—THIS is an application that certain papers filed with an application for review, should be transmitted with the record to the Privy Council; and in support of the application, Mr. Allan has produced an order of the Privy Council of the 9th December 1868, in the case of *Khujoorunnissa* petitioner and appellant to the Privy Council, by which order the Privy Council directed that the papers presented with the petition of review, should be transmitted with the record to England. But, in that case, their Lordships do not lay down a general rule that, where an application for review has been made and rejected, such application, with any papers accompanying the petition of review, is to be sent with the record to the Privy Council.

There is a ruling of the Full Bench of this Court, *Raja Syud Enaet Hoossein* v. *Rani Roushun Jehan* (1) which rules that, where an application for review has been rejected, the papers relating to the review are not to be sent to Eng-

* Privy Council Appeal, No. 718 of 1864.

(1) 1 B. L. R. (F. B.), 1.