

Before Mr. Justice Loch and Mr. Justice Mitter.

ROY PRIYANATH CHOWDHRY (PLAINTIFF) v. PRASANNA
CHANDRA ROY CHOWDHRY AND OTHERS (DEFENDANTS).*

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Award—Act VIII. of 1859, s 327—Appeal—Costs.

No appeal lies from an order rejecting an application to file an award.—(MITTER, J., *dubitante*)

Where the application was considered as a regular suit, the Judge was right in decreeing costs as in a regular suit.

This was an application on the part of Roy Priyanath Chowdhry, plaintiff, under section 327, Act VIII. of 1859. He prayed that an award made by Jatindra Mohan Tagore and Banshi Badan Mitter, appointed arbitrators under a deed of submission, dated Paush 21, 1273, or 4th January 1867, executed by himself and Ram Dhan Ghose, as executor to the estate of Roy Mathuranath Chowdhry, deceased, might be filed in Court under the provisions of section 327 of Act VIII. of 1859, and that it should be duly enforced. The award was dated 29th Paush 1273, or 12th January 1867, and was simply a formal ratification by the aforementioned arbitrators of the terms of a petition of the same date presented to the arbitrators by the parties themselves, whereby they agree that certain properties in dispute between them should be divided in the manner therein specified. The application bore date, 6th July 1867. Notice was directed to be given to Ram Dhan Ghose to show cause on the 24th August following, why the award should not be filed. On the 21st August a petition was presented by Jogmaya Chowdhraïn, elder widow of Roy Mathuranath Chowdhry, objecting to the award, and praying for delay. This was granted; and on the 14th September, she, as representing the interests of her two minor sons and Shashi Mukhi Chowdhraïn, second widow of Roy Mathuranath Chowdhry, was made a party to the suit; but subsequently, on the 7th December 1867, Prasanna Chowdhry, having obtained a certificate of administration from the Judge of the 24-Pergunas, was made defendant.

* Miscellaneous Regular Appeal, No. 483 of 1868, from a decree of the officiating Judge of Backergunge, dated the 30th June 1868.

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The Principal Sudder Ameen treated the application as a regular suit; and after going into evidence, dismissed the application, on the ground that the executor Ram Dhan Ghose, in submitting matters relating to the estate of Roy Priyanth Chowdhry to arbitration, and in consenting to a deed of compromise without consulting, as directed by the will, certain persons named therein as special advisers with him in all matters connected with the estate, had acted contrary to the will of the testator. The Principal Sudder Ameen, therefore, refused to file the award as a decree of the Court, and dismissed the application with costs as in a regular suit. The plaintiff appealed to the High Court.

Baboo *Ashutosh Chatterjee* for appellant.

Baboo *Anand Chandra Ghosal* for respondents.

LOCH, J.—It appears to me that this case comes under the ruling in *Chinta Man Sing v. Rupa Kooer* (1), and is similar to another case that of *Digamburce Dossee v. Poornanund Dey* (2), decided by NORMAN, SETON-KARR, and L. S. JACKSON, JJ., in which the Judges held, that, though the lower Court entered into the merits of the case, yet the order rejecting the application for filing the award was merely an order, from which no appeal lies to this Court.

In the present case the Judge, after following the course prescribed in section 327, Act VIII. of 1859, *viz.*, after having numbered and registered the application as a suit, called upon the opposite party to show cause why the award should not be filed in the Court; and after hearing what the opposite party had to say, ruled that the opposite party had shewn sufficient cause for rejecting the application, which he dismissed and gave costs as in a regular suit.

It is now contended that the costs should not have been awarded in this manner; that with regard to costs, the procedure

(1) Case No. 333 of 1866; 31st August 1866.

(2) 7 W. R., 401.

must be considered as a miscellaneous case, and not more than quarter costs should have been allowed.

I do not think that this objection can be admitted. The application is regarded as a suit; and costs if the Judge sees proper, can be awarded accordingly. I see, therefore, no valid ground to admit this appeal, which must be dismissed with costs.

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MITTER, J.—If I were at liberty to dispose of the preliminary objection taken by the respondent that no appeal lies from an order refusing to file an award, according to my own view of the law, I am bound to say that I would have decided it against him. In my opinion a regular appeal ought to lie to this Court against an order of the lower Court refusing an application for filing an award under section 327, Act VIII. of 1859. This section most clearly and distinctly states that such an application is to be numbered and registered as a regular suit, and I see no reason whatever why an order refusing such an application or granting it, should not be considered as a decree passed in a regular suit.

Section 23, Act XXIII. of 1861 which takes the place of section 332, Act VIII. of 1859, most distinctly says that, “except when otherwise expressly provided in this or any other Regulation or Act for the time being in force, an appeal shall lie from the decrees of the Courts of original jurisdiction to the Courts authorized to hear appeals from the decision of those Courts.” Now in this case there can be no doubt that a decision has been passed by the Judge, which is tantamount to a decree disallowing the claim of the applicant to the properties in suit; and in the absence of any express provision allowing an appeal from such a decision, I would have held that an appeal ought to lie to this Court exactly in the same way as in cases decided under sections 229 and 230 of the Code of Civil Procedure.

As the case stands, however, at present, I am bound to dispose of it according to the ruling in *Chinta Man Sing v. Rupa Kooer* (1), and I, therefore, dismiss this appeal with costs.

(1) Case No. 353 of 1866; 31st August 1866;
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