

Miscellaneous Special Appeal No. 19 of 1870.

1871.
Jan. 19.

LAKSHMAN SHIVAJI*Appellant.*
RAMA Esu *et al.**Respondent.*

Award—Arbitration—Filing of Award made without intercession of Court—Appeal—Civ. Proc. Code, Sec. 327—Stamp—Court Fees' Act (VII. of 1870).

An application to the High Court to set aside an order of a District Court, reversing an order of a court of first instance directing an award made without the intervention of a court to be filed, should be treated as an application for a miscellaneous special appeal. Such an application may be made, on a stamp of the value of two rupees, under Sec. II., No. 11, of the Court Fees' Act (VII. of 1870).

An appeal lies from an order directing an award made without the intervention of a Court of Justice to be filed in court.

THIS was a special appeal from the order of R. W. Hunter, District Judge of Ratnágiri, reversing the order of the Subordinate Judge of Khárepátan.

The facts of the case were as follows:—The appellant and respondents, by a written agreement, submitted certain matters in difference between them to the arbitration of six arbitrators, and it was agreed that if any of the arbitrators should be prevented from attending the meetings the other might take the evidence in their absence, and decide the matters before a certain time. The evidence was taken before all the arbitrators, but, as they did not agree on a decision within the appointed time, the time was extended. Before the expiration of the extended time, an award was made, signed by four only out of the six arbitrators, the other two having declined to sign it. An application was made to the court of Khárepátan to file the award, and a day was appointed for the parties to appear and make any objections they might have to make, and it was then ordered that the award should be filed. An appeal was preferred against this order, which the District Judge entertained. He reversed the order of the lower court, and referred the parties to a regular suit.

1871.
Lakshman
Srivāji
v.
Rānā Esā
et al.

The special appeal was heard before LLOYD and KEMBALL, JJ.

Pandurang Balibhadra appeared for the appellant.

Shivshankar Govindram appeared for the respondents.

ELOYD, J.:—This is an application brought under Sec. 35 of Act XXIII of 1861, it being urged that there was no appeal to the Judge of Ratnāgiri in this case. A preliminary objection was raised by the special respondent's Vakil that the petition to this court should have been on a stamp of the value of seven and a half rupees, under Sch. I, No. 1 of the Court Fees' Act; but we are of opinion that the practice which prevails in this court, of receiving such petitions on a stamp of two rupees' value, under Sch. II, No. 11, of the said Act, is correct; the objection, therefore, is overruled.

The circumstances of the case are fully set forth in the Judge's minute, and the chief point to which we have to direct our attention is, whether it was competent to the Judge to reverse an order for filing an award passed under Sec. 327 of the Civil Procedure Code.

Many decisions have been quoted in support of the argument on both sides, but few of them have any applicability to the point at issue.

Great stress has been laid on a observation which fell from the late Chief Justice, Sir Richard Couch, in the course of his judgment in the case of *Vyankatesh Ramchandra v. Balajirav (a)*, from which it would seem that he held the opinion that no appeal would lie in a case of this kind; the point, however, was not the one then under discussion, and it was a mere passing remark, which, though reserving of the highest consideration, is not binding on us. It was, however, determined in that case, and in others that have been cited, that a refusal, under Sec. 327, to file an award is not appealable, because it is not a decree.

Of the correctness of this view we see no reason to doubt; and, on the other hand, it appears to us that an order to file

an award is tantamount to a decree, because, on that order being passed, "the award may be enforced as an award made under the provisions of this chapter," &c., "as other decrees of the Court" (Sec. 325).

1871.
Lakshman
Shivaji
v.
Rama Rau
et al.

Taking the order, then, to have the force of a decree it is appealable, under Sec. 23 of Act XXIII. of 1861, and this view seems to be in consonance with that expressed in the case of *Wolee Alum v. Bibee Misrun (b)*.

We see, therefore, no grounds for holding that the Judge "exercised a jurisdiction not vested in him by law;" and as it has not been shown to our satisfaction that he misconstrued the submission-paper, and we have nothing to do with his appreciation of the evidence before him, we dismiss this application and saddle Lakshman Shivaji with the costs.

Special Appeal No. 20 of 1870.

Jan. 30.

ARLAPÁ NÁYAKAppellant.

NARSI KESHAVJI AND CO.Respondents.

Contract—Variation in Time for Delivery—Custom.

Where a principal instructed his agent to enter into a contract for the delivery of cotton at the end of Kártik, but the agent entered into a contract for the delivery thereof by the middle of that month:

It was held that the agent exceeded his authority in such a manner as to exempt the principal from liability upon the contract.

Though the objection assigned by a principal for repudiating a contract at the time of such repudiation be unfounded, he is not precluded from subsequently availing himself of other valid objections.

A custom which allows a broker to deviate from his instructions is unreasonable, and the courts of law will not enforce it.

THIS was a special appeal from the decision of A. L. Spens, Judge of the District of North Cánará, in Appeal No. 110 of 1868, reversing the decree of the Principal Sadr Amin of Honore.

The special appeal was argued, on the 30th of November 1870, before GIBBS and MELVILL, JJ.

(b) 12 Cal. W. R., Civ. R. 59.