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the decree as the term is used in its ordinary sense; it does not substitute anything for the decree which is set aside, but simply wipes it out and leaves the parties to the determination of their rights in a subsequent suit, and what is done with regard to the first Court's decree is merely ancillary to the rest of the order, which is not a decree. The rest of the order does not express any adjudication on the thing claimed, and the setting aside of the first Court's decree, or annulling it, whatever the term used may be, is also no adjudication upon any right claimed. It says, it is true, that the person who obtained that decree will not be at liberty to make use of it, but the right which is declared by that decree will still be open for the determination of the Court in the subsequent suit, and is not adjudicated upon in this particular suit. It has also been pointed out to us that the Appellate Court in setting aside the decree does not do so in any sense of adjudicating whether the decree was a right or a wrong decree. That being so, we think that no appeal lies against an order of this description, and this appeal must therefore be dismissed with costs.

Appeal dismissed.

C. D. P.

Before Mr. Justice Norris and Mr. Justice Beverley.

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BEPIN BEHARI CHOWDHRY (ONE OF THE DEFENDANTS) *v.* ANNODA PROSAD MULLICK AND ANOTHER (PLAINTIFFS).*

Arbitration—Civil Procedure Code (Act XIV of 1882), s. 510—Power of court to appoint new arbitrators.

The Court has power under section 510 of the Code of Civil Procedure to appoint a new arbitrator in the place of another only when the latter had consented to act as arbitrator.

Pugardin Ravutan v. *Moidinsa Ravutan* (1) approved of.

THIS appeal arose out of an application under section 521 of the Civil Procedure Code to set aside an award.

* Appeal from Order No. 184 of 1890, against the order of H. T. Mathews, Esq., Judge of Burdwan, dated the 27th of May 1890, reversing the order of Baboo Raj Narain Chakravarty, Munsiff of Cutwa, dated the 30th of March 1889.

(1) I. L. R., 6 Mad., 414.

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The plaintiffs brought a suit against the defendants. Five persons, who were nominated by the parties to the suit, were appointed arbitrators by the Munsiff to settle the matters in dispute between them. They were appointed arbitrators without any communication having been made to any one of them by either of the parties, and consequently without their assent to act having been first obtained. One of the five persons, originally nominated as arbitrators by both the parties, took no notice of his nomination and refrained from all action whatever in the matter. Thereupon the Munsiff, purporting to act under section 510 of the Code, with the consent of the defendants, but against the strenuous opposition of the plaintiffs, appointed a new arbitrator. The award was made: and the plaintiffs applied under section 521 of the Code to set aside the award on the ground, *inter alia*, that the award was illegal, inasmuch as the new arbitrator had been appointed against the wishes of the plaintiffs, and the Court had no power under section 510 to appoint a new arbitrator in the place of a person who not only had been appointed arbitrator without his consent to act as such having been previously obtained, but who had taken no notice of his nomination, nor any part whatever in the arbitration proceedings. The Munsiff overruled the objection and made a decree in terms of the award, dismissing the suit. The plaintiffs appealed to the Judge, who, in allowing the appeal, delivered the following judgment:—

"In this case the chief point for determination is whether any appeal lies. It is contended by the defendant that the latter part of section 522, Civil Procedure Code, is conclusive on the question. The plaintiffs, however, urge that before that section can be rightly held to apply it must be shown that there has been a valid and legal award, and that in the present instance this is not the case. It appears that one of the five persons originally nominated as arbitrators by both the parties abstained from taking any notice of the nomination, and refrained in fact from all action whatever in the matter. The Court, therefore, with the consent of the defendant, but against the strenuous opposition of the plaintiffs appointed another individual as arbitrator, purporting to act under the provisions of section 510 of the Civil Procedure Code. On reading that section along with section 522,

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my first impression was that the Court was perfectly justified in taking this course, that the award was good, and that no appeal lay. The plaintiff's pleader, however, has drawn my attention to a ruling of the Madras High Court in the case of *Pugardin Ravutan* v. *Moidinsa Ravutan* (1) which certainly seems to bear out his contention. By this ruling it appears to have been decided that section 510 of the Civil Procedure Code presupposes that the arbitrators have first consented to act, and have declined after the reference to arbitration. In this instance, as in that, what actually occurred was that the consent of the person who failed to act had not been previously obtained. Section 510, therefore, did not apply: and the appointment by the Court of another individual as arbitrator in his place, against the wish of the plaintiffs, was accordingly *ultra vires*. The result is that the award was invalid. Section 522, therefore, is inapplicable. The Munsiff's decree is consequently appealable. There being no materials on the record on which this Court can come to a finding on the merits of the case, the appeal must be decreed and the suit remanded under section 562 of the Civil Procedure Code. Costs to abide the result."

From this decision Bepin Behari Chowdhry, the principal defendant, appealed to the High Court.

Dr. *Rash Behary Ghose* and Baboo *Jogesh Chunder Dey* for the appellant.

Baboo *Jogendra Chunder Ghose* for the respondents.

It was contended on behalf of the appellant that the Munsiff was justified under the circumstances of the case, and had full power under section 510 of the Code, to appoint a new arbitrator; and that therefore the award was valid. It was also contended that, under section 522 of the Code, no appeal lay from a judgment upon award, but this contention was over-ruled on the authority of the case of *Joy Prokash Lall* v. *Sheo Golam Singh* (2).

The judgment of the Court (NORRIS and BEVERLEY, JJ.) was as follows:—

We think that this appeal fails and must be dismissed.

As the point, so far at any rate as this Court is concerned, is a new one, I will state the facts and give the reason for the conclusion at which we have arrived.

(1) I. L. R., 6 Mad., 414. (2) I. L. R., 11 Calc., 37.

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It appears that the plaintiffs brought a suit against the defendant. Five persons were nominated as arbitrators to settle the matter in dispute between the parties. There is no evidence to show that any one of these five persons had been previously communicated with by either of the parties, and therefore nothing to show that any of them had given his consent to accept the position of an arbitrator. The so-called five arbitrators were appointed by the Munsiff at the suggestion of the respective parties in Court. It appears that one of these five persons abstained, as the Judge finds, from taking any notice of the nomination, and refrained from any action whatever in the matter. The Munsiff thereupon nominated, as he called it, a fifth arbitrator.

We think that that proceeding on the part of the Munsiff was illegal, and that section 510 of the Code of Civil Procedure, under which he purports to act, applies only in cases where a person has signified his assent to take upon himself the duty of an arbitrator, and after so signifying his assent dies, or refuses, or becomes incapable to act, or leaves British India under the circumstances therein referred to. That view was taken by the Madras High Court in the case of *Pugardin Ravutan* v. *Moidinsa Ravutan* (1) referred to by the District Judge, and in that view we concur.

We think therefore that the appeal fails, and must be dismissed with costs.

C. D. P. *Appeal dismissed.*

Before Mr. Justice Norris, Mr. Justice Beverley, and Mr. Justice Banerjee.

CHARU CHUNDER PAL, GUARDIAN FOR SATISH CHUNDER PAL, MINOR (DEFENDANT), *v.* NOBO SUNDERI DASI AND ANOTHER (PLAINTIFFS.)*

1891 *March* 3.

Hindu law—Inheritance—Stridhan—Bengal School of Law—Widowed daughter with dumb son—Daughter's son.

Under the Bengal School of the Hindu law a widowed daughter having a son who is dumb at the time the succession opens out (but is not shown to be incurably dumb) is entitled to succeed to her mother's *stridhan* in preference to a daughter's son.

(1) I. L. R., 6 Mad., 414.

* Appeal from appellate decree No. 400 of 1890, against the decree of Baboo Dwarka Nath Bhuttacharjee, Subordinate Judge of Midnapore, dated the 13th January 1890, affirming the decree of Baboo Krishna Dhun Mukerjee, Munsiff of Midnapore, dated the 22nd of April 1889.