APPELLATE CIVIL.

Before Mr. Justice Beverley and Mr. Justice Ameer Ali.

SATURJIT PERTAP BAHADOOR SAHI (DEFENDANT) *v.* DULHIN GULAB KOER (PLAINTIFF.)* 1897 *February* 9.

Arbitration—Award—Decree in accordance with award with slight modification—Appeal—Illegal award—Reference applied for by agent without authority—Knowledge and tacit ratification by principal—Civil Procedure Code (1882), section 522.

In a suit which was defended by an agent (*am-mukhtar*) on behalf of the defendant, the agent applied for a reference to arbitration although he had no power to do so under the *am-mukhtarnamah*. After the submission of the award, objection was made on behalf of the defendant that the agent had no authority to apply for or consent to the reference. The objection was overruled by the Court, and a decree made in accordance with the award with one slight modification in the defendant's favor.

Held, (1) in answer to an objection that no appeal lay under section 522 of the Civil Procedure Code, except in so far as the decree was in excess of or not in accordance with the award, that an appeal would lie if the award was shown to be illegal and void *ab initio*, *Nandram Daluram* v. *Nemchand Jadavchand* (1) followed.

(2) That although the agent was not authorized to apply for or consent to a reference, the defendant, having been aware of the proceedings and tacitly ratified the action of his agent, could not be allowed to question the legality of the award, and the award was not void *ab initio*. *Unniraman* v. *Chathan* (2) referred to.

THE facts of this case, so far as they are material to this report, sufficiently appear from the judgment of the High Court. The principal question discussed in appeal was whether the decree in this case, which was passed in accordance with the award of arbitrators with a slight modification, was subject to an appeal to the High Court.

The defendants appealed to the High Court.

Babu *Saligram Singh*, Babu *Raghunandan Prasad*, and Mr. *H. E. Mendies* for the appellant.

* Appeal from Original Decree No. 191 of 1894 against the decree of Jadoo Nath Dass, Subordinate Judge of Tirhoot, dated the 30th of March 1894.

(1) I. L. R., 17 Bom., 357. (2) I. L. R., 9 Mad., 451.

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Babu *Umakali Mukerjee* and Babu *Nalini Nath Sen* for the respondent.

Babu *Umakali Mukerjee* for the respondent took a preliminary objection under section 522 of the Civil Procedure Code, and urged that there was no appeal against this decree except so far as it was in excess of, or not in accordance with, the award.

Babu *Saligram Singh* for the appellant contended that the objections taken to the award if established would make the award illegal, and an appeal is allowed in a case like this. There was no valid reference in this case, as the defendant did not authorize it, and the whole proceeding was unauthorized and illegal. *Protap Chunder Roodro* v. *Huro Monee Dossia* (1), *Lala Iswari Prosad* v. *Bir Bhanjan Tewari* (2), *Junglee Ram* v. *Ram Heet Sahoy* (3), *Nussurwanjee Pestonjee* v. *Mynoodeen Khan* (4), and *Nandram Daluram* v. *Nemchand Jadavchand* (5). The other question is one of limitation. That is also an error of law, and the award should be remitted under section 520 of the Civil Procedure Code.

Babu *Umakali Mukerjee* for the respondent.—The objection as to the authority of the agent should not be allowed to be raised in this case. *Unniraman* v. *Chathan* (6). The objection was not taken in the petition before the Court below. There was ratification of the agent's acts. The decree being in accordance with the award, there is no appeal. As to limitation there is no error patent on the face of the award, and no objection was taken in the written statement on the ground of limitation.

Babu *Saligram Singh* referred to *Makund Ram Sukal* v. *Saliq Ram Sukal* (7).

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

This appeal is by the defendant in a suit which was brought against him in the Court of the Subordinate Judge of Mozufferpur. The defendant who resides in the district of Gorakhpur, defended the suit by his *am-mukhtar*, one Hurdeo Narain, who

(1) 24 W. R., 188.
(2) 8 B. L. R., 315 ; 15 W. R., F. B., 9
(3) 19 W. R., 47.
(4) 6 Moo. I. A., 134 (155.)
(5) I. L. R., 17 Bom., 357
(6) I. L. R., 9 Mad., 451.
(7) I. L. R., 21 Calc., 590 ; L. R., 21 I. A., 47.

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appears to have verified and filed the written statement. After pending for over a year in the Subordinate Judge's Court, the case was, at the request of both parties, referred to arbitration, and on the 12th March 1894 the arbitrators submitted their award, holding that the plaintiff was entitled to recover the sum of Rs. 3,247 odd with proportionate costs from the defendant. On the 19th March the defendant, through the same *am-mukhtar*, filed an objection, in which he prayed that the award might be set aside on the ground (amongst others) that the arbitrators had allowed certain items which were barred by limitation, and when the matter came on to be argued a further objection was raised orally to the effect that Hurdeo Narain's *am-mukhtarnamah* did not authorize him to consent to the arbitration. The Subordinate Judge disallowed these objections, and made a decree in accordance with the award with one slight modification in the defendant's favour. A preliminary objection has been taken that under the provisions of section 522 of the Code no appeal lies against this decree, "except so far as it is in excess of or not in accordance with the award;" but upon the authorities, the latest cited to us being the case of *Nandram Daluram* v. *Nemchand Jadavchand* (1), it is clear that an appeal will lie if the award is shown to be illegal and void *ab initio*. Now, the defendant himself, that is to say, in his own person, appeals to this Court, and the main ground of his appeal that is pressed upon us is that his *am-mukhtar*, so far from being authorized to consent to a reference to arbitration, was expressly prohibited by the terms of his *mukhtarnamah* from so doing. The *mukhtarnamah* in truth does in our opinion contain such a prohibition. The attorney is authorized to do all acts in Court for his principal and to file petitions of all sorts "save and except petitions for relinquishment or admission of claims and *punchnamahs*," by which last term we understand petitions for reference to arbitration.

Now, there is no question that the application for the reference to arbitration was presented to the Court on behalf of the defendant by a pleader, whose *vakalutnamah* was signed by Hurdeo Narain. Hurdeo Narain, having no authority to make such an application himself, had of course no authority to authorise any

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one else to do so. The application therefore was not in accordance with the requirements of section 506 of the Code. But a further question which we have to consider in this case is, whether the defendant was aware of the reference to arbitration and acquiesced in the proceedings before the arbitrators, and, if so, whether he can now be allowed to raise this objection when the award has been given against him. The proceedings in the case appear to us to show conclusively that the defendant was personally aware of what was being done on his behalf. It was a suit between members of the same family. The plaintiff agreed to be bound by the defendant's sworn testimony in the case, and summons was served upon him to appear personally and give his evidence. An application to allow him to give his evidence on Commission was refused. Thereupon several successive medical certificates were filed on his behalf to the effect that he was too ill to attend in person to give evidence. At this stage of the case the matter was referred to arbitration. The first order of reference was made on 29th November 1893. That reference proved infructuous, and a second order was made on 23rd December 1893. The award was not submitted till 12th March 1894. Before the arbitrators, again, the plaintiff applied to have the defendant examined personally. The defendant, apparently from fear of having to give his evidence, left his home for Lucknow, and the arbitrators were unable to secure his attendance. Upon these facts it is impossible to come to any other conclusion than that he was aware of the reference to arbitration and tacitly ratified the action of his *am-mukhtar* in applying for such reference. It was only when the award was given against him that it occurred to him to raise the present objection. The case of *Unniraman* v. *Chathan* (1) is an authority for holding that in a case like this a person who has stood by and assented to the proceedings before the arbitrators cannot afterwards be allowed to turn round and question the legality of the order of reference. We think, therefore, that this ground fails, and that the defendant, having acquiesced in the proceedings, the award was not void *ab initio* in consequence of the defect in the order of reference.

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The second point urged is that the award is illegal, inasmuch as the arbitrators have allowed certain claims which, it is said, are barred by limitation. This objection refers to three sums of money which were borrowed by the defendant more than three years before suit, but which he agreed in writing to repay at a date which was within three years of suit. The arbitrators were of opinion that these writings were not properly stamped, and were therefore inadmissible in evidence. But they found that "apart from the so-called receipts, there is ample evidence on the record on behalf of the plaintiff, documentary and oral, to prove that the defendant did actually borrow money from the plaintiff *in the way stated*." And they go on to say: "In our opinion no portion of the claim is barred by limitation." It is clear, therefore, that no illegality in this respect is apparent upon the face of the award, such as might have been a ground for remitting the award under the provisions of section 520 of the Code. And it appears to us to be still more clear that the award was not in this respect so illegal or void *ab initio*, that an appeal against the decree made upon it will lie.

For these reasons we are of opinion that the appeal fails, and must be dismissed with costs.

S. C. C. *Appeal dismissed.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis William Maclean, Knight, Chief Justice, Mr. Justice Macpherson and Mr. Justice Trevelyan.

1896

JOGEMAYA DASSI (PLAINTIFF) *v.* THACKOMONI DASSI (DEFENDANT).* *Nov.* 23, 24 *Dec.* 10.

Limitation—Mortgage decree—Transfer to High Court for execution—Application for execution by sale—Civil Procedure Code (Act XIV of 1882), sections 227, 230, 244—Transfer of Property Act (IV of 1882), sections 67, 99—Limitation Act (Act XV of 1877), Schedule II, Articles 122, 179.

On the 29th September 1882 a decree was obtained against the defendant's husband in a suit on a mortgage by the latter, dated the 6th April 1880. On the 27th July 1883 an order was made for transfer of the decree to the High Court for execution. On the 8th April 1886 the mortgagee applied to the High Court for execution by attachment of the mortgaged properties, and in the same year an order for attachment was made. The mortgagee died in April 1892; and on the 20th August 1894 the plaintiff (his widow

* Appeal from Original Decree No. 43 of 1896, against the decision of Mr. Justice Sale, dated the 16th September 1895, in suit No. 145 of 1895.