the lower Court under s. 208 of Act VIII of 1859, is not open to appeal.

Appeal dismissed.

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SOBHA BIBEE v. MIRZA SAKHAMUT ALI.

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.

1877 *Jany.* 17.

BOONJAD MATHOOR AND OTHERS (PLAINTIFFS) *v.* NATHOO SHAHOO (DEFENDANT).*

Arbitration, matter referred to—Arbitrators doubting correctness of their decision—Award, validity and finality of—Appeal, right of—Act VIII of 1859, *ss.* 325, 327.

Matters in dispute were referred to the arbitration of five persons, of whom four made their award on 27th August 1875. On 3rd September, the same arbitrators granted an application for rehearing. Before the matter was reheard one of the four died, and an order striking off the application was made by two of the surviving arbitrators. On 21st February 1876, an application was made to the Court to have the award filed, which was opposed. The Court overruled the objection, and ordering the award to be filed gave a decree to the plaintiffs. *Held*, that the award was not a valid and final award, that the decree passed thereon was not final, and that an appeal would lie (1).

Sashti Charan Chatterjee v. *Taruck Chandra Chatterjee* (2) considered.

THE facts in this case are as follows:—

The parties appeared to have referred certain matters in dispute between them to arbitration by five persons named in the plaint. The course of proceedings before the arbitrators was not very clear, but it would seem that four of them made an award on the 27th August 1875. On the 3rd September, or five

* Special Appeal, No. 746 of 1877, against the decree of J. M. Lowis, Esq., Judge of Zilla Bhagalpore, dated the 19th March 1877, reversing the decree of Baboo Barhma Dutt, First Sudder Munsif of Monghyr, dated the 19th April 1876.

(1) See also *Gunga Narain Ghose* v. *Ram Chand Ghose*, 12 B. L. R., 48.

(2) 8 B. L. R., 315.

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days afterwards, the same arbitrators granted an application made by one of the parties for a rehearing of the matter. Before the rehearing had taken place, one of the four died, and finally an order appears to have been made by two of the survivors striking off the application. On the 21st of February, or within one day of the expiration of the six months allowed by law, certain of the parties interested made an application to the Court under s. 327 of the Code of Civil Procedure that the award migh tbe filed, and thereupon Nathoo Shahoo, the other party interested, showed cause against the award being filed. He submitted that the award not being unanimous, an application at the instance of the defendant had been made to the arbitrators for a review. That such application had been admitted, the usual notice issued to the parties interested, and a day fixed, the 15th November 1875, for the hearing of the further evidence. That in consequence of the laches of the arbitrators no final order had been made. He further contended that under such circumstances the agreement between the parties referring the suit to arbitration had become void by the death of one of the arbitrators at a time subsequent to the order admitting the award to review. On this state of facts the Munsif appears to have considered, not that the arbitrators were incompetent to rehear the matters in arbitration, but that a final and conclusive order rejecting the application for rehearing had been made by two of the arbitrators. He also remarked upon the insufficiency of the stamp on which the petition of review was filed before the arbitrators, and thought that, according to the provisions of s. 378 of Act VIII of 1859, the order rejecting the review was final. The Munsif further said:—"For rejecting the petition the concurrence of opinion of two arbitrators is sufficient. There is now no bar to the enforcement of the said award." He, therefore, ordered the award to be filed, and gave a decree for the plaintiff as to the said award being valid and correct.

On appeal, the District Judge held that the view taken by the Munsif was erroneous. He considered that the order striking off the case was not the act of the whole of the arbitrators, and that by the very fact of their having admitted the case to be re-

heard, they tacitly expressed a doubt as to the justice of their first award, and that until the question was again considered, their first award could not be looked upon as final. The Judge therefore thought it inadvisable to give such an award the force of a decree, and therefore reversed the decision of the Munsif.

The plaintiffs now appealed.

Baboo *Mohesh Chandra Chowdhry* (Mr. *Sandel* with him) for the appellants contended that there was no appeal from the decision of the Court of first instance, inasmuch as the decree passed, in accordance with the award, was final, and referred to *Sreenath Chatterjee* v. *Koylash Chunder Chatterjee* (1).

Mr. *Gregory* (Baboo *Amarendra Nath Chatterjee* with him) for the respondents, relied on *Soshti Charan Chatterjee* v. *Taruch Chandra Chatterjee* (2).

Baboo *Mohesh Chandra Chowdhry* replied.

The judgment of the Court was delivered by

JACKSON, J. (After stating the facts of the case as mentioned above, proceeded as follows):—The Munsif cursorily remarked upon the insufficiency of the stamp on which the petition of review was filed before the arbitrator. I should have thought that no stamp was required. He also thought that according to the provision of s. 378 of Act VIII of 1859 the order in rejection of the review was final. It seems to me clear *that* could not possibly be a ground of judgment in this case. [The learned Judge then alluded to the judgment of the lower Appellate Court and continued—]

It has been contended before us in special appeal that the lower Appellate Court had no jurisdiction to make this order, inasmuch as the Munsif having made a decree in accordance with an award of arbitrators, that decree was by law final. And Baboo Mohesh Chunder Chowdhry referred us to *Sreenath*

(1) 21 W. R., 248. (2) 8 B. L. R., 315.

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Chatterjee v. *Koylash Chunder Chatterjee* (1), in which judgment was given by the late Chief Justice Sir Richard Couch, of which the head-note is to the effect that s. 327 of the old Code of Civil Procedure "incorporates the provision in s. 325 as to the finality of the judgment given according to the award, and puts the award filed under s. 327 in the same position as the award filed under s. 325; where a Court files an arbitration award and passes a decree, that decree is final." The question to be considered here was very fully considered by the Full Bench in *Sashti Charan Chatterjee* v. *Taruck Chandra Chatterjee* (2). It is not very easy to ascertain what was the decision of the Full Bench in that case; because separate judgments were given, which did not all agree, but the opinion of the late Mr. Justice Norman, who was then acting as the Chief Justice, in which opinion I concurred, was this, that where there has been an award, and the decree passed by the Court below is in accordance with that award, that judgment is final; but where it can be shown that there was not in fact any award on which a judgment could be based, there is no final decree, and an appeal would lie. In this case the defendant had to show cause against the finality of the award, and he did show what appears to me to be a very satisfactory cause. He showed that the arbitrators, after making the award and after an interval of only a very few days, had expressed a doubt as to the correctness of the award by intimating their readiness to reconsider their decision. It may be observed that the award was not one of the whole number of arbitrators, but of four out of five; and even if we assume that in the reference to arbitration provision was made that in case of difference of opinion the decision should rest with the majority, still the fact that one of the number had dissented ought to be taken into account when it is seen that the remaining arbitrators expressed a readiness to reconsider their decision. It may very well be that but for the death of one of these four, and what took place consequently, there might have been a further award by the same arbitrators in which the conclusion would have been different from that arrived at on the 27th August. It was never,

(1) 21 W. R., 248. (2) 8 B. L. R., 315.

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I think, the intention of the Act that the Court should bind parties by the result of a private arbitration when the arbitrators themselves plainly showed that they doubted the correctness of their decision. That, it appears to me, was an extremely strong and valid objection to the finality of the award, one which tended to show that the award was no valid award and therefore it was a matter which the lower Appellate Court could consider on appeal. I think, therefore, the Judge of the Court below was not in error in the decision which he arrived at in this case, and that this appeal ought to be dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice McDonell.

1878
January 24.

THE EMPRESS ON THE PROSECUTION OF MICHELL *v.* JOGGESSUR MOCHI.*

Government Currency Note, Theft of — Title of Original Owner—Appealable Order—Criminal Procedure Code (Act X of 1872*), ss.* 418 *&* 419*—Cashing a Currency Note—Sale — Contract Act, ss.* 74, 76, *and* 108.

A Government currency note was stolen from *A*, and cashed by *B* in good faith for *C*. On the conviction of *C* for theft, the Magistrate ordered the note to be given to *B*. *A* appealed to the Sessions Judge, who was of opinion that he was not competent to interfere as a Court of appeal under s. 419 of the Criminal Procedure Code; but submitted the case for the orders of the High Court.

Held, that the case could be disposed of by the Judge under s. 419 of the Criminal Procedure Code, and that the words "Court of appeal" in that section are not necessarily limited to a Court before which an appeal is pending.

Held further, that the provisions of s. 76 of the Contract Act did not apply, as the change of a currency note for money is not a contract of sale, and that as the note came honestly into the hands of *B*, the order of the Magistrate was right.

THE facts of this case appear sufficiently from the memoran-

* Criminal Reference, No. 223 of 1877, by H. T. Prinsep, Esq., Sessions Judge of the 24-Pergunnahs, dated the 13th of December 1877.