

of quarry-men who claimed compensation on the ground of their earnings being affected, though they had no interest in the land. Here the claimant claimed an interest in the land which had been acquired, and the very objection to his claim admitted that he had that interest.

S. C. G.

Appeal allowed, case remanded.

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 NARAIN
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 v.
 THE
 SECRETARY
 OF STATE FOR
 INDIA IN
 COUNCIL.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, Kt., K. C. J. E., Chief Justice, Mr. Justice Prinsep, and Mr. Justice Hill.

CHOONEY MONEY DASSEE (DEFENDANT) v. RAM KINKUR DUTT
 AND OTHERS (REPRESENTATIVES OF THE PLAINTIFF).*

1900
 Nov. 23 &
 Dec. 21.

Right of suit—Survival of right—Survival of such right after a Hindu widow's death where her sons have sold their interest—Arbitration and Award—Reference for valuation of property in suit—'Valuator' as distinguished from an 'Arbitrator'—Judgment in terms of award—Civil Procedure Code (Act XIV of 1882), ss. 506, 522.

Where the suit was for injunction and damages for encroachment upon the property of which the plaintiff (a Hindu widow) was a life tenant, and an order was made by consent that the defendant was to purchase the plaintiff's interest in the said property and pay her the price to be settled by certain referees nominated by the parties; and where the plaintiff died after the valuation of her said property had been made, and its price ascertained and reported upon by the referees to the Court, and the suit was revived by the Lower Court at the instance of the representatives of the deceased plaintiff, and judgment given in their favour according to the said valuation treating it as an award: *Held*, that the suit had been properly revived in the name of her representatives the right to sue surviving to them.

Held, further, that the referees were, in effect, rather valuers than arbitrators, and no judgment therefore could properly be given, under s. 522 of the Code of Civil Procedure, in terms of their award. *Carus-Wilson v. Greene* (1) referred to.

THIS was an appeal from a judgment of Mr. Justice AMBER ALLI, dated 8th of December 1899.

One Denomoney Dasse, a Hindu widow, was the original plaintiff in this suit. She obtained upon partition a one-third share

* Appeal from Original Civil, No. 2 of 1900, in Suit No. 794 of 1898,

(1) (1886) L. R., 18 Q. B. D., 7.

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of the house No. 6, Gobinda Chunder Sen's Lane in Calcutta, to be enjoyed by her during the term of her natural life, and her two sons Ram Kinkur and Hari Das the remaining two-thirds. The sons sold their shares, and Chooney Money, the defendant, ultimately became the owner of the whole house subject to the life-interest of the plaintiff Denomoney.

On the 16th of September 1898 Denomoney brought a suit against the defendant for an injunction, and damages for certain acts of trespass alleged to have been committed by the defendant on the property allotted to Denomoney on the partition.

The parties, however, came to terms before trial: the plaintiff agreed to sell, and the defendant agreed to take over, the share of Denomoney on a valuation to be fixed by two referees appointed by the parties. It was arranged that if the said referees differed, the matter should be referred to Mr. R. Belchambers, as an umpire, whose decision as to the price of the plaintiffs' share should be final; and that on the payment by the defendant to the plaintiffs' attorney of the sum to be ascertained by the said referees, or the umpire, as the case might be, the plaintiff would convey all her share and rights in the said property to the defendant, free from incumbrances; and an application to that effect was presented by the plaintiff to the Lower Court, on which the following order was by consent made in chambers on the 22nd of June 1899:—

“Upon reading a petition of the plaintiff, and the consent of Messrs. Watkins & Company, attorneys for the defendant, to the prayer thereof filed this day and the plaint filed in this suit—and upon hearing Mr. N. C. Bose, attorney for the plaintiff, and Babu Narain Prasad Seal for Messrs. Watkins & Company, attorneys for the defendant,—It is ordered that it be referred to the final decision of Babu Jodu Nath Sen, of Shibnarain Dass' Lane, and Babu Bepin Behari Dhur of No. 98, Clive Street, in the town of Calcutta, to settle the price of the plaintiff's share and interest in the disputed property the subject matter of this suit, and which was allotted to her on partition in the said plaint mentioned, and to make their award in writing, and submit the same to this Court, together with all proceedings, depositions and exhibits in this suit, on or before the said third day of August next; and in case of difference of opinion between the said arbitrators, the said matter be referred to the final decision of Robert Belchambers, Esquire, the Registrar of this Court, as umpire, who is to make his award in writing, and submit the same to this Court, together with all proceedings,

depositions and exhibits in this suit, on or before the third day of August next; and it is further ordered, that, upon payment by the defendants to the plaintiff's attorney of the price so to be settled as aforesaid by the said arbitrators or umpire as the case may be, the plaintiff do convey all her share and interest in the said property to the defendant free from incumbrances if any created by her: And it is further ordered, that the said arbitrators or umpire as the case may be, are to be at liberty to examine the parties to this suit and their witnesses upon oath or solemn affirmation, which they or he are or is hereby empowered to administer: And it is further ordered, that the said arbitrators or umpire, as the case may be, shall have all such powers or authorities as are vested in arbitrators under the provisions of the Code of Civil Procedure: And it is further ordered that the Registrar of this Court do deliver over to the said arbitrators the records of the suit: And it is further ordered that the hearing of this suit be adjourned for six weeks from the date thereof.

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"Dated this twenty-second day of June in the year of our Lord one thousand eight hundred and ninety-nine."

The reference was duly made, and the said referees having differed as to the price of the widow's share, the matter went before Mr. Belchambers, who, on the 4th September 1899, made his award, which was filed on the 6th September 1899.

On the 13th of September 1899 Denomoney died; and on the 18th of September 1899 her two sons, Ram Kinkur and Hari Das (the present respondents), applied to the Lower Court, as her only sons, heirs, and legal representatives, to be substituted in her place on the record, and to have the suit revived in their names; and by an *ex parte* order, dated the 18th September 1899, their names were placed on the record in the stead of the deceased plaintiff Denomoney, as her representatives.

The defendant Chooney Money then applied to have the *ex parte* order of the 18th September 1899 set aside, and to have it declared that the suit had abated on the grounds that on the death of Denomoney her interest in the property ceased, and that no right to sue survived in the persons who attempted to revive the suit, and that inasmuch as the two sons had nothing left in them to convey, and obtained no interest on the death of their mother who was a Hindu widow, the suit must be regarded as abated.

The Lower Court refused the defendant's application to set aside the order of the 18th of September 1899, and was of opinion

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that " what was settled by the award, gave rise to a right of action which did not expire on the death of the plaintiff Denomoney " ; and it gave judgment in favor of her representatives in terms of the award of Mr. Belchambers purporting to act under s. 522 of the Code of Civil Procedure.

The defendant now appealed.

1900, Nov. 23. Sir *Griffith Evans* and Mr. *Garth* for the appellant.—If the price for a purchase is left to be determined by a referee his decision is not an award but merely a valuation. In this case the referees having differed in opinion as to the price of the widow's share the matter was referred to Mr. Belchambers to ascertain the price of the widow's interest in the house in suit. He fixed the value at a certain sum, and it is in no sense an award.

The agreement between the parties was that the defendant was to purchase the share for the value to be determined by the referees, and the widow was to execute a proper conveyance therefor. She is dead, and her sons have no interest in the property to convey, having already sold their shares to the defendant. The widow had only a life-interest which terminated on her death.

Under the Transfer of Property Act, a contract for sale of land passes no interest to the intending purchaser ; see s. 54 of the Transfer of Property Act. The suit has abated, and the respondents are not entitled to any decree in their favour. *Russell on Awards* (8th Edition), p. 37 ; *Carus-Wilson v. Greene* (1), *Phillips v. Homfray* (2).

Mr. *A. Chaulhuri* and Mr. *Sinha* for the respondents.—Here the agreement between the parties was in settlement of the suit. The original decree, which was by consent, directed that the defendant was to pay the amount found by the referee (Mr. Belchambers) on giving his decision. It was after such decision the widow died. She had offered to convey for the price determined before her death. It is immaterial whether it is considered an award or merely a direction for payment. The contract was complete

(1) (1886) L. R., 18 Q. B. D., 7.

(2) (1883) L. R., 24 Ch. D., 439.

before her death and she could enforce it. The suit has been properly revived in the name of the sons. The widow became entitled to the money before her death, and her sons representing her estate are now entitled to that sum. The order obtained upon the original decree was by consent treated as a reference to arbitration. It is too late now for the defendant to say that it was not a proper reference to arbitration, having herself been a party thereto, having throughout the proceedings described it as such, and also having treated the finding of Mr. Belchambers as an award upon arbitration. Under s. 523 of the Code of Civil Procedure parties may refer any matters in difference between them to an arbitrator and get a decree upon such reference, and they may also refer matters outside the scope of a pending suit; the objections are therefore purely technical. The suit has been properly revived in the names of the sons of the widow, and although the appellant could have appealed from the order of revival there was not any appeal from that order within the time given by the Limitation Act.

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S. 51 of the Transfer of Property Act merely says that a contract for sale does not of itself create any interest in, or charge on, such property: see s. 40 of the Act which shows that the purchaser acquires a right under that section which he can enforce against a gratuitous transferee, &c. The purchaser also takes the risk of destruction of the property from the date of the contract.

Sir *Griffith Evans* in reply:—Under a contract for sale the equitable interest in the property does not pass to the intending purchasers under the Transfer of Property Act. It has no effect on the property. What the defendant agreed to purchase was the life interest of the widow, which has terminated. What has the defendant to get for the purchase money, and what conveyance can the sons execute? The decree made upon the alleged award is bad, as there could have been no award at all.

Cur. adv. vult.

1900, DECEMBER 21, The Court (MACLEAN, C. J., PRINSEP and HILL, JJ.) delivered the following judgments:—

MACLEAN, C. J.—The original plaintiff in this suit was one Sreemutty Denomoney Dasse, a Hindu widow, and on the 16th

1900 September 1898, she brought an action against the defendant
 CHOONEY MONEY DASSEE (the present appellant) alleging in effect
 that the defendant had wrongfully trespassed and encroached
 upon the plaintiff's property, and asking for a declaration that the
 defendant had no right to do what she was doing, for an injunction,
 damages, and costs.

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The plaintiff's case was briefly as follows: Her husband died many years ago leaving herself and two sons, Hari Das and Ram Kinkur, surviving him, and leaving as part of his estate a certain house in Calcutta known as No. 6, Gobinda Chunder Sen's Lane. This house was eventually partitioned, and on the 16th June 1900 one-third of the house in question was allotted to the plaintiff to be held and enjoyed by her as a Hindu mother during the term of her natural life. By divers conveyances and acts in the law the defendant ultimately became the owner of the whole house, subject to the above interest of the plaintiff in one-third of it. According to the plaintiff's story the defendant then demolished a portion of the buildings allotted to the plaintiff for her life, and committed other acts of trespass, and hence the action. The defendant by her written statement denied the alleged encroachment and trespass. On or about the 22nd June 1899 the plaintiff presented a petition to the Court, and in paragraphs 4 and 5 stated as follows:—

“That it has been arranged between the parties, that this suit should be settled on the following terms, *viz.*, that the defendant shall buy the plaintiff's share and interest in the disputed property at a price to be settled by Babu Jodu Nath Sen of Sib Narain Dass' Lane and Babu Bepin Behari Dhur of '98, Clive Street, Calcutta, as arbitrators, and in case of difference between them the question of the price is to be referred to the umpirage of R. Belchambers, Esquire, the Registrar of this Honourable Court, whose decision will be final and binding on both the parties.

“That on the payment by the defendant to the plaintiff's attorney of the sum to be fixed by the said arbitrators or the umpire, as the case may be, the plaintiff will convey all her share and right in the said property to the defendant or as she may direct,” and the petitioner asked for an order referring to the arbitration

of the arbitrators named "to settle the price of the plaintiff's interest and share in the disputed property," and for further relief consequential upon that price being so determined.

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On the 22nd June 1899 the order set out at page 7 of the Paper Book* was made, and this order, to my mind, has created the difficulty in the case. It provided for a reference to two persons named to "settle the price of the plaintiff's share and interest in the disputed property," with a proviso for reference, in the case of difference, to Mr. Belchambers, the Registrar of the Court as umpire, and ordered, that upon payment by the defendant to the plaintiff's attorney of the price, so to be settled as aforesaid, by the said arbitrators or umpire, as the case may be, the plaintiff to convey all her share and interest in the said property to the defendant free from incumbrances, if any, created by her. This order, I understand, was made by consent and in chambers, and, apparently, without any discussion. It evidently purports to be made under s. 506 of the Code of Civil Procedure.

The matter then proceeded : the arbitrators differed as to the price ; and Mr. Belchambers found the price to be Rs. 2,850, treating the plaintiff as entitled to an absolute interest in the property. This so-called award was dated the 4th September 1899, and the plaintiff died on the 13th of the same month, after having, as is alleged, offered to execute a conveyance to the defendant, and after demanding Rs. 2,850, as the purchase money, determined by Mr. Belchambers. By an *ex parte* order dated the 18th September 1899, her sons, Hari Das and Ram Kinkur were upon their own petition placed upon the record in the stead of the deceased plaintiff, as her heirs and representatives. On the 16th November 1899 the defendant gave notice of motion to discharge the above *ex parte* order.

The application to discharge this *ex parte* order, as also, as I understand, an application for judgment on Mr. Belchambers' award came before Mr. Justice Ameer Ali sitting on the Original Side, who refused to set aside the order of the 18th of September 1899, and gave judgment in terms of the award of Mr. Belchambers under s. 522 of the Code of Civil Procedure.

* *see ante*, pp. 156, 157.

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Hence the present appeal.

We have then to deal with two points :—

(1) Whether the Judge in the Court below was right in refusing to discharge the order of the 18th September 1899, and

(2) If so, whether he was right in giving judgment in terms of the award under s. 522.

Upon the first question, whilst it is perfectly true that we are not dealing with the case of the heir to the property which has been injured seeking to carry on the action commenced by his predecessor in title for damages for that injury, as, in the present case, Hari Das and Ram Kinkur have no interest in the property which belongs to the defendant, it is, I think, at least doubtful whether the principle of the cases of *Oakey & Sons v. Dalton* (1) and *Jones v. Simes* (2) rather than that of *Phillips v. Homfray* (3) does not apply. But be that as it may, the order of the 22nd June must be taken into consideration in dealing with this part of the case, and that order appears to me to make a substantial difference in arriving at our conclusion. That is still a subsisting order : it has not yet been discharged, and we are bound therefore to give some effect to it. It changed the position of the parties in the litigation. So far as one can judge, it was intended to be an order to give effect, in some shape or other, to the compromise at which the parties had arrived ; it obviously contemplated the payment to the plaintiff of the purchase money awarded with a consequent conveyance by her. Assuming for the moment that Hari Das and Ram Kinkur as her representatives are, under this order, entitled to the purchase money awarded—a point upon which I express no opinion—can it be rightly said that the right to sue for it did not survive, or that they are not entitled to be placed in her shoes so that they may be able to receive it, and to enforce the order of the 22nd June? Was it intended that all the proceedings under this order were to determine on the death of the original plaintiff? I think not. The order of the 18th September is, perhaps, not very happily or carefully worded, but it must, I

(1). (1887) L. R., 35 Ch. D., 700.

(2) (1890) L. R., 43 Ch. D., 607.

(3) (1883) L. R., 24 Ch. D., 439.

think, be regarded as an order enabling Hari Das and Ram Kinkur to proceed with the suit, as it then stood, that is, as modified or partially determined by the order of the 22nd June, in which view, having regard to the terms of that order, I think the Court below was right in its conclusion upon this part of the case. In short that order gave the plaintiff certain fresh rights, or, at least possible rights, in respect of which the right to sue survived to her representatives. On this point, then the appeal fails.

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Upon the second point, I, unfortunately, am unable to agree with the learned Judge in the Court below. He has declared that the award ought to be carried into effect. What is there in the so-called award to carry into effect? Mr. Belchambers has only determined the amount of purchase money; he has done nothing else. The appellants say the amount has been determined upon a wrong principle, *viz.*, upon the view of the mother having an absolute interest in the one-third share, when she had only the interest of a Hindu mother. I say nothing about that now.

The difficulty arises from the terms of the order of the 22nd June and from the circumstance that it appears to have been treated as if it were one under s. 506 of the Code. It may well be that it was intended, in making that order, to make one under s. 506; but obviously it cannot properly be regarded as one under that section, for what the so-called arbitrators and umpire were to decide was not any matter in difference between the parties in the suit but merely to settle the price of the plaintiff's share and interest in the disputed property. They were, in effect, rather valuers than arbitrators; (see *Carus-Wilson v. Greene*) (1) and if the reference were not properly a reference under s. 506, it is reasonably clear that no order could properly be made under s. 522, the section under which the learned Judge purported to act. This seems to conclude the matter. I may add that this point, which has been carefully argued before us, does not appear, so far as one can judge from his judgment, to have been drawn to the attention of the Judge in the Court below. The appeal, then, succeeds on this point.

Then what is the proper course to be pursued? I think this order of the Court below must be discharged, and the case

(1) (1886) L. R., 18 Q. B. D., 7.

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remanded to the lower Court with liberty to either party to apply to that Court as they may be advised. If the present respondents consider they are entitled to the purchase money as determined by Mr. Bechambers, it may be that they can make a proper application to the lower Court for an order directing payment to them; but I express no opinion as to whether they are so entitled, nor has that question been, as yet, determined by the Court of First Instance. If on the other hand, no step be taken by the respondents it will, probably, be open to the appellant to apply to the lower Court for an order determining the litigation for want of prosecution. But I do not see that we can properly do more, at the present juncture, than remand the case. As regards costs the victory has been divided, and there will be no costs of the appeal, the more so as the present appellant was a consenting party to the order of the 22nd June to which I attribute most of the difficulty which has arisen. As regards the costs of the hearing before Mr. Justice Ameer Ali each party will bear his own costs. We do not interfere with his order refusing to discharge the order of the 18th September.

PRINSEP, J.—I am of the same opinion.

HILL, J.—I am also of the same opinion.

Case remanded.

Attorneys for the appellant : Messrs. *Watkins & Co.*

Attorneys for the respondents : Mr. *N. G. Bose* and Babu *Sarat Chunder Dutt.*

B. D. B.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Handley.

LAL MAHMUD SHAIK, COMPLAINANT (PETITIONER) v. SATCOWRI

BISWAS AND OTHERS, ACCUSED (OPPOSITE PARTY).*

1900
May 7.

Compensation—Order of payment of compensation and imprisonment in default of such payment—Legality of such order—Compensation recoverable as fine—Code of Criminal Procedure (Act V of 1898), ss. 250, 386, 387, 388, and 389.

A Magistrate passed an order under s. 250 of the Code of Criminal Procedure directing the complainant to pay compensation in a certain sum, and he

* Criminal Revision No. 255 of 1900, made against the order passed by S. L. Gupta, Esq., Deputy Magistrate of Narail, dated the 24th of February 1900.