APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

1912

Feb. 29.

SHIB KRISTO DAW & CO.

v.

SATISH CHANDRA DUTT.*

Arbitration—Award—Decree following award—Appeal, right of—Civil Procedure Code (Act V of 1908) Second Schedule, rules 15 & 16—Letters Patent of 1865, clause 15.

Where an application to set aside an award on the ground that it was made after the expiration of the period allowed by the Court has been refused, and subsequently judgment has been given according to the award, no appeal lies from such judgment on the same ground whether under the Letters Patent or under the Code of Civil Procedure.

APPEAL by the plaintiffs from the order of Harington J.

On the 10th July 1909 the plaintiffs instituted this action against the defendants for the recovery of the sum of Rs. 15,982-14-9 which they claimed as due to them under an award in certain arbitration proceedings and in the alternative for an account of the dealings and transactions which had taken place under an agreement of the 31st March 1905.

By an order of Court made on the 21st February 1910, with the consent of both parties all matters in dispute in the suit were referred to the arbitration of Mr. Saroda Charan Mitter who was directed to make his award in writing and to submit the same to the Court together with all proceedings, depositions and exhibits within two months from the date on which an office copy of the order should be delivered to him, with liberty to him to extend such time for a

* Appeal from Original Civil, No. 33 of 1911, in Suit No. 704 of 1909.

further period of two months. By an order of the 8th August 1910, the returnable date was further extended till the 6th October 1910, with the result that the time expired during the long vacation of the High Court. The arbitration was completed by the 2nd September 1910, but the award was not signed till the 21st November 1910, the date of the reopening of the High Court, after the vacation; on which date also the award was submitted by the arbitrator to the Registrar of the High Court.

In his award, the arbitrator disallowed the plaintiffs' claim, allowed the defendants the sum of Rs. 5,272-4-9, and directed each party to pay their own costs.

On the 8th February 1911, at the request of the Registrar, the arbitrator submitted the proceedings of the arbitration to the Registrar and on the same date the Registrar issued the following notice to the parties: "Take notice that the award of the arbitrator appointed in this suit under an order of Court, dated the 21st February 1910, has this day been submitted to my office, and that the same will be filed on either party providing the requisite stamps and that the Court will proceed to pass judgment on such award on the 20th February 1911."

On the 27th February 1911 the plaintiffs applied for an order that the arbitration may be superseded and that the suit may proceed on the ground that inasmuch as the arbitrator had failed to submit his award within time, the award was void and of no effect. This application was refused.

On the 13th March 1911, on the application of the defendants, Harington J. gave judgment on the award, observing :—

"This is an application for judgment on an award and it is objected to on the ground that the award was made out of time. There are no merits

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at all in the objection, and I have to consider whether the award should be given effect to. It appears that an order was made under which the arbitrator was allowed two months' time from the 6th August to file his award in this suit. That time would expire when the Courts were closed in the vacation, so when the two months expired it was impossible to comply with the order to file the award within the specified time. What the arbitrator did was to file it as soon as the Court reopened, and it is contended by Mr. Sircar who applies for judgment in terms of the award that by virtue of section 10 of the General Clauses Act of 1907 inasmuch as the act directed by the order was an act to be done in Court and the Court was closed the act was properly done on the day the Court reopened. On the other side it is contended that the aribtrator was bound to have signed his award within the two months and that not having been done the award is bad. In my view that contention fails because the order extending the time having fixed a time which expired during the vacation and by virtue of clause 10 of the General Clauses Act the time was extended to the first day on which the Courts reopened. There is nothing stated in the order with regard to the signing or making of the award. In my view, therefore, the effect of the order was to extend the time for the making of the award up to the day the Courts reopened because it was an order to do an act to which section 10 of the General Clauses Act applies. I therefore hold that the award is a valid one and there must be judgment in terms thereof with costs."

From this judgment and order the plaintiffs appealed.

Mr. B. Chakravarti (*Mr. P. K. Sen* with him), for the appellants. The further time allowed for filing the award was two months from August 6th, 1910. The award cannot be said to have been filed till the 9th February 1911. In consequence, the alleged award was invalid, and a nullity. The application made by the plaintiffs on the 27th February 1911 was wrongly refused, in view of rule 15 of the Second Schedule to the Code of Civil Procedure. Rule 16 of the Schedule contemplates a valid award, and not one that is a nullity, to which it can have no application. The finality contemplated by rule 16 is finality in respect of matters of fact or matters of law. An award which

is *ab initio* illegal or invalid cannot be confirmed or made a decree of Court: *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1), *Saturjit Pertap Bahadoor Sahi* v. *Dulhin Gulab Koer* (2), *Ramesh Chandra Dhar* v. *Karunamoyi Dutt* (3). In any event an appeal lies under clause 15 of the Letters *Patent*.

Mr. B. C. Mitter (*Mr. Sircar* with him), for the respondent. It is submitted that no appeal lies. Although there may have been some conflict between the decisions under the old Civil Procedure Code of 1882, rules 15 and 16 of Schedule II of the new Code of 1908 place the matter beyond doubt. The object under both codes was to secure the finality of an award. As indicated by Mukerjee J. in *Chintamoni Aditya* v. *Haladhar Maiti* (4), the decisions in *Kali Prosanno Ghose* v. *Rajani Kant Chatterjee* (5), and *Mahomed Wahiduddin* v. *Hakiman* (6) were in effect overruled by the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* (7), where it was held that where an award has been made and the Court has refused to set it aside, the Court must pass a decree thereon, and from such decree no appeal lies. *See* also *Hansraj* v. *Sundar Lal* (8). *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1) was a decision under the old Code of 1882.

In *Kanakku Nagalinga Naik* v. *Nagalinga Naik* (9) it was held that no appeal would lie under the old Code on the ground that the award was void *ab initio*. Reading rules 15 and 16 of Schedule II to the new Code together, it is clear that it was competent to the Court

(1) (1891) I. L. R. 13 All. 300.
(2) (1897) I. L. R. 24 Calc. 469.
(3) (1906) I. L. R. 33 Calc. 498.
(4) (1905) 2 C. L. J. 153, 158.
(5) (1897) I. L. R. 25 Calc. 141.
(6) (1898) I. L. R. 25 Calc. 757.
(7) (1901) I. L. R. 29 Calc. 167.
(8) (1908) I. L. R. 35 Calc. 648; L. R. 35 I. A. 88.
(9) (1909) I. L. R. 32 Mad. 510.

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of first instance to consider the question of the invalidity of the award on the ground of its having been made out of time, and on the Court of first instance refusing the application to set aside the award and giving judgment according to the award, no appeal can now lie under the Code on the ground that the award was void *ab initio*. Further no appeal lies under clause 15 of the Letters Patent: *Walii Mathuradas* v. *Ebji Unersey* (1). So far as the power of appeal under clause 15 of the Letters Patent is concerned, it does not matter whether the award is void *ab initio* or not.

Mr. Chakravarti, in reply.

JENKINS C. J. In my opinion, no appeal lies in this case. It has to be seen first what is that from which the present appeal is preferred. It is from the judgment pronounced and the decree made on the 13th day of March 1911. Now, what was the decree made on that day? It is a decree whereby it was declared that the award therein mentioned ought to be carried into effect and the same was ordered and decreed accordingly. The judgment was the judgment on which that decree followed.

Then how did the judgment and decree come to be pronounced and passed? It was in compliance with rule 16 of the Second Schedule to the Code of Civil Procedure. That rule provides that "(*1*) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award. (*2*) Upon the

(1) (1904) I. L. R. 29 Bom. 285.

judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award". There, therefore, is an explicit provision that from the decree there should be no appeal, and that provision is, to my mind, conclusive as to the power of appeal from the decree as such, notwithstanding the provisions in clause 15 of the Letters Patent of this Court. But it is sought to escape from the provisions of rule 16 by suggesting either that there was no award or that there was an application to set aside the award, and from the determination of that application, at any rate if it was adverse to the present appellants, an appeal would lie. I fail to see how it can be said, in view of the language used in rule 15 that there was no award, because that rule deals explicitly with the position of an award having been made after the expiration of the period allowed by the Court, and it does not, as the Code of 1882 did, provide that such an award shall not be valid, but that such an award must be set aside, so that it seems to me that it cannot be said that there was no award. The most that could be said is that this award was liable to be set aside.

But if it be said that there is a right of appeal from the order refusing to set aside the award, the answer is that this is not an appeal from such an order. The appeal is from the judgment and decree of the 13th of March 1911, that being the only judgment and decree with which the appellants profess to be dissatisfied. I am unable to find anything that justifies the view that the decree of the 13th of March was in any sense an order under rule 15. Had it been such an order, then we should have had to consider whether an appeal would lie under the Letters Patent. In the view I take no such question arises.

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The result is that this appeal must be dismissed with costs.

WOODROFFE J. I agree.

Appeal dismissed.

Attorney for the appellants: *Benode Behary Banerji.*
Attorneys for the respondents: *S. D. Dutt & Ghose.*

J. C.

APPELLATE CIVIL.

Before Justice Sir Richard Harington and Justice Sir Asutosh Mookerjee.

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March 5.

PURNA CHANDRA SARMA

v.

PEARY MOHAN PAL DAS.*

Mortgage—Right to foreclosure and Right to redeem, if co-extensive—Covenant to pay the mortgage money within a year, effect of.

Unless there is an agreement to the contrary, the right of foreclosure and the right of redemption must be deemed co-extensive. In each particular instance, therefore, it must be determined upon the terms of the contract between the parties whether there is any special provision in the contract which takes the case out of the general rule.

Where the covenant in the mortgage deed was that the mortgagor shall pay the amount of principal and interest within the term of one year:

Held, that this clause was inserted for the benefit of the mortgagor so that he may be at liberty to pay the principal with interest before the expiry of the year.

Rose Ammal v. *Rajarathnam Ammal* (1) relied on.

* Appeal from Appellate Decree, No. 69 of 1910, against the decree of Dandadhari Biswas, Subordinate Judge of Chittagong, dated Dec. 2, 1909, reversing the decree of Nisi Kant Guha, Munsif of Patiya, dated May 31, 1909.

(1) (1898) I. L. R. 23 Mad. 33.