

APPELLATE CIVIL.

(6)

Before Mr. Justice West and Mr. Justice Pinhey.

1878

August 5.

VISHNU BHAI JOSAI (ORIGINAL PLAINTIFF), APPELLANT, v. RAVJI BHAI JOSHI AND OTHERS (ORIGINAL DEFENDANTS,) RESPONDENTS.*

Code of Civil Procedure (Act VIII of 1859), ss. 325 & 327—Arbitration—Award—Appeal.

A decree passed by a civil Court in accordance with an award of arbitrators made without the intervention of a Court of Justice under s. 327 of the Civil Procedure Code (Act VIII of 1859) is not subject to appeal.

Decision in *Lakhsman Shivaji v. Rama Esu Nal* (1) dissented from, and the dictum in *Vyanhatesh Ramchandra Joyekar v. Balajirav bin Anandrav Nal* (2) approved and followed.

THIS was a special appeal against the decision of H. Batty, Assistant Judge at Tháná, reversing the decree of the Subordinate Judge of Alibág.

The parties to this cause, having a dispute concerning some moveable and immoveable property, referred it to the decision of arbitrators appointed by themselves. Their award was filed in the Court of Alibag under s. 327 to Act VIII of 1859, and a decree was passed in accordance therewith. The respondents, being dissatisfied with it, appealed to the District Court at Thana. Mr. Batty, on a review of the authorities cited before him, held that an appeal lay against the decision of the Subordinate Judge, which he reversed on the merits.

Ghanasham Nilkanth Nadkarni for the appellant.—No appeal lies against a decree passed in accordance with a private award. Section 327 provides that the Court shall give notice to the parties to the arbitration, other than the one who applied to the Court to file the award, to show cause why the award should not be filed. Such a notice was served on the respondents, who showed no cause. As provided at the end of that section, the award was filed, and should be enforced exactly in the same way as any other award made under the provisions of the chapter on arbitration,—that is to say, without allowing the dissatisfied party a right of appealing against a decree passed in terms of the award. In case of a reference to arbitration by an order of Court, the Legisla-

* Miscellaneous Special Appeal, No. 2 of 1878.

(1) 8 Bom. H. C. Rep. 17, A. C. J. (2) 1 Bom. H. C. Rep. 134.

ture by s. 325 expressly gives finality to such a decree; and there is no reason why an award made without its intervention should be treated differently: *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee*,⁽¹⁾ *Vyankutesh Ramchandra Jogekar v. Balajirav bin Anandrav*,⁽²⁾ The case of *Lakshman Shivaji v. Rama Esu*,⁽³⁾ on which the Assistant Judge relies, is not conclusively against the appellant, for Mr. Justice Lloyd makes on allusion in his judgment to the finality clause in s. 325

Pandurang Balibhdra for the respondents.—The case of *Vaynkatesh v. Balajirav* does not decide that no appeal lies against a decree passed in accordance with an award made without the Court's intervention. The remark of Couch, J., to that effect is a mere *obiter dictum*. Section 327 does not provide for the finality of a decree or judgment. It only provides for the filing and the enforcement of the award. Under its provisions a judgment must follow an award, but it need not be final. The only case decided by the Bombay High Court is in our favour.

The judgment of the Court was delivered by

WEST, J.—Section 327 of the Code of Civil Procedure (Act VIII of 1859) says that an award accepted under its provisions “shall be filed, and may be enforced as an award made under the provisions of this chapter.” The means of enforcing such an award are provided by s. 325. “The Court shall proceed to pass judgment according to the award and upon the judgment which shall be so given, decree follow In every case in which judgment shall be given according to the award, two judgment shall be final.” In the present case it has been argued that though a judgment and a decree must follow on an award filed under s. 327, yet that does not imply that the judgment is to be final. The decree, it is contended, is, like other decrees, subject to appeal.

It seems to have been the view of Lloyd, J., in the case of *Lakshman v. Ramu*,⁽⁴⁾ but in his judgment there is no reference to the finality clause of s. 325. The learned Judge declines to follow the opinion expressed by Couch, J., in an earlier case—

(1) 8 Beng. L. Rep. 315.

(2) 1 Bom. H. C. Rep. 184.

(3) 8 Bom. H. C. Rep. 17, A. C. J.

(4) *Ibid.*

1878

VISHNU
BHAI JOSHI
v.
RAVJI BHAI
JOSHI.

1878

VISHNU
BHAU JOSHI
v.
RAVJI BHAU
JOSHI.

Vyankotesh v. Balajirav(1)—as being only an *obiter dictum*; but it is plain that the *dictum* failing, the ground of the decision in that earlier case would fail, too. The construction, therefore, though not binding on the parties to that earlier case as *res judicata*, because not directly entering in to the constitution of their mutual legal relation as declared by the Court, was, as an enunciation of the law pertinent to the case, and according to the line of reasoning pursued, essential to the judgment. Because on a judgment according to the award there would be no appeal, Couch, J., says it is equitable that there should be no appeal against a refusal to file the award. The conclusiveness of the reasoning may perhaps, be doubted, as the reasons for a refusal to file should be in strict accordance with the law, and being fully recorded by the Court could be fully investigated by the Court of Appeal, while a submission to arbitration implies a dispensing with any strictly prescribed method of investigation, and a waiver of some irregularities, in consideration of the advantages in other respect of that process; but the *dictum* of the learned Judge was certainly not, according to our view, in any way extrajudicial.(2) It was, therefore, a precedent which we must take to have been somewhat misconstrued. The other case cited, that of *Walee Alam v. Bibi Misran*,(3) relates only a dispute arising in execution, which is quite apart from a question as to the nature of the Judgment as final or appealable.

It is only on a Judgment and decree (no other appeal being provided for) that an appeal could be made according to the chapter on arbitration, and the only Judgment provided for being, pronounced final, we must adjudge that the District Court was without Jurisdiction to hear the appeal made to it, and on that ground, as a special appeal has been admitted, reverse its decree and restore that of the Court of first instance, with costs of both appeals on the present respondent.

District Court's decree reversed, and that of the Subordinate Judge restored with costs.

(1) 1 Bom. H. C. Rep. 184.

(2) See *per Buller, J.*, in *R. v. Tolpudde*, 4 T. R. at p. 677, and *per Chambre, J.*, in *Brisbane v. Deeres*, 5 Taunt. at p. 159, on the opinion of De Grey, C. J., expressed in *Farmer v. Arundel*.

(3) 12 Calc. W. R. 50 Civ. Rul.