

cross). As the case has been pretended to this Court in an entirely different aspect from that in which it was presented to the Court below, due no doubt to the manner in which the plaintiff launched his case, we allow the appeal with costs, but without costs in the Court of first instance, and vary the decree to the extent we have indicated.

Appeal allowed.

Attorney for the plaintiff : Mr. *Mirza Hussein Khan.*

Attorneys for the defendant : Messrs. *Ardesir, Hormasji and Dinsha.*

1890
DEC. 22.
ORIGINAL
CIVIL.
17 B. 648.

17 B. 657.

ORIGINAL CIVIL.

Before Mr. Justice Parsons.

AHMED BIN SHAIK ESSA KHALIFFA AND OTHERS (*Plaintiffs*) v.
SHAIK ESSA BIN KHALIFFA AND OTHERS (*Defendants*),*
[4th April, 1892.]

Decree—Execution—Alteration of decree—Decree in terms of an award ordering (inter alia) delivery of moveable property—Loss of part of such moveable property and consequent failure to deliver—Application to insert in decree an order to pay value of such moveable property in event of failure to deliver—Civil Procedure Code (XIV of 1882), ss. 206-8—Practice.

A partition suit brought by a son against his father was referred to arbitration. On the 9th January, 1890, the award was published, and on the 27th March, 1890, the defendants moved for and obtained a decree in terms of the award. By this decree it was ordered that in satisfaction of the plaintiff's claim the defendant should pay to him Rs. 1,05,000 in the manner therein stated, *viz.*, Rs. 40,000 to be paid forthwith and the balance of Rs. 65,000 to be paid "upon the plaintiff's delivering to the defendant certain specified property, which included two vessels or buglows, called respectively the 'Nasri' and 'Sambuk'." In no event was defendant to be required to pay the Rs. 65,000 before the 15th November, 1890. At the date of the decree the vessel 'Sambuk' was at sea on a voyage, and on the 18th June, 1890, while still on the voyage, she was lost. On the 15th November, 1890, the plaintiff's attorneys demanded payment of the balance of Rs. 65,000. They offered to deliver the other properties specified in the decree, but stated that the vessel 'Sambuk' had been lost. They offered to pay its value, which they estimated at Rs. 1,000. The defendant, however, demanded the delivery of the buglow, which he stated to be worth a very large sum. The defendant having, under the circumstances, refused to pay the Rs. 65,000, the plaintiff applied for execution of the decree which was refused. He then obtained a rule calling on the defendant to show cause why the decree of the 27th March should not be amended [658] or rectified by stating therein the amount of money to be paid to the defendant as an alternative if delivery of the vessel 'Sambuk' could not be made, such delivery having become impossible.

Held, that the rule must be discharged. The objection was to an award, not to a decree. Possibly it might have been open to the parties to object to the award before it was filed, on the ground that it ought to have stated a sum to be paid to the defendant in case some of the property could not be delivered to him. If such an objection had been made, the Court might possibly have remitted the award, or refused to file it. No such objection, however, was taken, and the award was filed, and a decree obtained, in accordance with the award. The award could not be modified by the Court, nor could the decree, which must be in accordance with the award.

SUIT for partition. The first plaintiff was the son of the first defendant, and he brought this suit in September, 1886, praying that the

* Suit No. 383 of 1886; Appeal No. 746.

1892

APRIL 4.

ORIGINAL

CIVIL.

17 B. 657.

property of his grandfather Khaliffa bin Abdulla might be divided and partitioned among the parties entitled thereto according to their rights and interests therein.

By a consent order, made in the suit on the 15th August, 1889, the suit and all matters in difference between the parties were referred to arbitration. On the 9th January, 1890, the arbitrator made and published his award, which was filed on the 11th March, 1890. On the 27th March, 1890, on a motion made on behalf of the defendants, a decree was passed in terms of the award.

By this decree it was ordered that in full satisfaction of the claim of the plaintiff the first defendant should pay to the plaintiff the sum of Rs. 1,05,000 in the manner therein provided, *viz.*, that the sum of Rs. 40,000 should be forthwith paid by the said defendant and the balance of Rs. 65,000 should be paid "upon the said plaintiff's delivering over to the said Shaik Essa bin Khaliffa the five boxes mentioned in para. 5 of the plaint and two buglows 'Nasri' and 'Sambuk' referred to in the affidavit of Ahmed bin Essa, and the whole of the immoveable property in the Persian Gulf, &c." The said decree further provided that in no event should the defendant be required to pay the said balance of Rs. 65,000 before the 15th November, 1890.

At the date of the said decree the vessel "Sambuk" was at sea on a voyage, and on the 18th June, 1890, while still on the voyage, was lost.

[659] On the 15th November, 1890, the plaintiffs' attorneys wrote to the defendants' attorneys reminding them that the sum of Rs. 65,000 had become due on that day, and requiring payment. They offered to deliver the other properties mentioned in the decree, but stated that the vessel "Sambuk" had been lost at sea. In the correspondence which subsequently took place, the plaintiffs offered to pay the value of the lost vessel "Sambuk", but they and the defendants could not agree upon the value. The plaintiffs estimated her value at Rs. 1,000, but the defendants' attorneys in a letter of the 20th December, 1890, said: "Our client wants the said buglow under one of the conditions in the decree, as your clients (*i.e.*, the plaintiffs) are bound specifically to deliver the same and as it is worth a very large sum in our client's estimation.

The defendant having under these circumstances refused to pay the Rs. 65,000 the plaintiff applied for execution of the decree, but on the 16th July, 1891, his application was refused.

The plaintiff then (on the 19th March, 1892) obtained a *rule nisi*, calling on the first defendant to show cause why the decree of the 27th March, 1890, should not be amended or rectified by stating therein the amount of money to be paid to the said first defendant as an alternative if delivery of the vessel named "Sambuk" could not be made to the said first defendant, and "why such further or other order should not be made as justice and good conscience require in consequence of the loss of the said vessel 'Sambuk' and by reason of all the circumstances of the case as disclosed in the said affidavit, and why (if necessary) the amount of money to be fixed as an alternative for the delivery of the said vessel should not be ascertained by this Honourable Court or by the arbitrator, Mr. Shaik Abdul Aziz bin Ali Ebrahim heretofore appointed in this suit after taking such evidence as may be necessary." In his affidavit the plaintiff said "The plaintiffs are unable to execute the said decree for the balance thereof and interest without having the said decree amended by this Honourable Court in the following respect, namely, in regard to the delivery of the said vessel 'Sambuk', the delivery of which has become impossible by

[660] the act of God. Under the circumstances aforesaid this Honourable Court will be pleased to direct that the said decree should be amended by stating therein the amount of money, *i.e.*, the value of the said vessel 'Sambuk,' which is to be paid to the defendant in lieu of delivering the said vessel."

Jardine for the defendant showed cause.—The decree was in terms of an award. The Court cannot alter it. The decree provided for the payment of Rs. 65,000 on the plaintiff's handing over certain specified property, in which the ship "Sambuk" was included. If that property is not handed over, there is no obligation on the defendant to pay the money. Section 208 of the Civil Procedure Code (XIV of 1882) does not apply. He referred to rules Nos. 108 and 204 of the High Court Rules.

Kirkpatrick for plaintiff, *contra* :—We do not apply to alter the decree. We merely ask that the Court should make its decree in the form required by the law by inserting the words prescribed by s. 208 of the Code (XIV of 1882). It was for the Court to see that its decree was in proper form. The fact that the decree is on an award makes no difference. The decree is the decree of the Court and not that of the parties. Section 208 gives no discretion to the Court—*Daniell's Chancery Practice*, Vol. I, p. 822 (6th Ed.); *Ishwardas v. Dosibai*(1); *Karim v. Rajooma*(2); *In re Swire*(3); *Hughes v. Jones*(4); *In re Havelock's Trusts* (5). The Court has corrected the decree where the property was immovable property—*Ram Saran v. Persidhar Rai* (6); *Sundara v. Subbanna* (7); *Vithal Janardan v. Vithojirav* (8); *Shivapa v. Shivpanch Lingapa* (9); section 10 of Charter of Supreme Court.

JUDGMENT.

PARSONS, J.—I am unable to interfere in this matter, which is really an objection, not to a decree, but to an award, and the cases cited do not touch that point. The parties referred their [661] dispute to private arbitration, and the award made was filed under s. 526 of the Civil Procedure Code (XIV of 1882), and a decree followed thereon. Possibly it might have been open to the parties to have objected, before the award was filed, that the award ought to have stated the amount of money to be deducted from the sum payable to plaintiff in case the latter could not deliver all the moveable property he was ordered to deliver to the defendant before he got the Rs. 65,000. Had such an objection been taken, the Court possibly might have either remitted the award or refused to file it. No such objection, however, was taken, and the Court, with the consent of all parties, ordered the award to be filed, and a decree followed in accordance with the award. It is impossible for the Court now to set aside that decree and remit the award to the arbitrator for him to determine afresh what sum the plaintiff shall receive now that the ship has been lost and the plaintiff is unable to deliver it to the defendant, and it is equally impossible for the Court to determine the then value of the ship itself and order that the plaintiff shall receive the sum of Rs. 65,000 less that value on delivering to the defendant all the property except the ship. The award cannot be so modified by the Court, and if the award cannot, then the decree which follows it cannot, for it must be in accordance with the award. There is

(1) 7 B. 316.

(4) 26 Beav. 24.

(7) 9 M. 354.

(2) 12 B. 174.

(5) 35 L. J. (Ch.) N. S. 228.

(8) 6 B. 586.

(3) 30 Ch. D. 239 (246).

(6) 10 A. 51.

(9) 11 B. 284.

1892
APRIL 4.
—
ORIGINAL
CIVIL.
—
17 B. 657.

1892
APRIL 4.
ORIGINAL
CIVIL.

no injustice whatever in the case, for the delivery of the property was at the option of the plaintiff, and the impossibility of delivery of all the property may have been in the mind of the arbitrator when he made the award.

Rule discharged.

17 B. 657.

Attorneys for the plaintiff :—Messrs. *Payne, Gilbert and Sayani.*
Attorneys for the defendant :—Messrs. *Little, Smith, Nicholson and Bowen.*

17 B. 662=Chitty's S.G.C.R. 375.

[662] SMALL CAUSE COURT REFERENCE.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Starling.

GIRDHAR DAMODHAR (Plaintiff) v. KASSIGAR HIRAGAR, (Defendant).
[7th July, 1893.]

Jurisdiction—Foreigner—Non-resident foreigner carrying on business by his munim in Bombay—Small Cause Court—Small Cause Courts Act (XV of 1882), s. 18.

Where a foreigner who did not reside in Bombay carried on business there by his *munim*.

Held that under s. 18 (1) of the Small Cause Courts Act (XV of 1882) the Small Cause Court in Bombay had jurisdiction to try a suit brought against him in that Court.

Per SARGENT, C.J.—Prima facie the word 'defendants' in cl. (b) of s. 18 has the same meaning in each of the three cases in which that clause gives [663] jurisdiction to the Court; and as the word clearly includes non-British subjects among the defendants over whom the clause gives jurisdiction if they are "resident," or "personally work for gain," within the territorial limits of the Small Cause Court, it would be a strained construction to hold that it did not include them among the defendants over whom the clause gives jurisdiction on the ground that they are "carrying on business" within the limits.

* Small Cause Court Suit No. 21864 of 1892.

(1) Section 18 of the Presidency Small Cause Courts Act (XV of 1882):

Subject to the exceptions in s. 19, the Small Cause Court shall have jurisdiction to try all suits of a civil nature.

When the amount or value of the subject-matter does not exceed two thousand rupees; and

(a) the cause of action has arisen, either wholly or in part, within the local limits of the jurisdiction of the Small Cause Court, and the leave of the Court has, for reasons to be recorded by it in writing, been given before the institution of the suit; or

(b) all the defendants, at the time of the institution of the suit, actually and voluntarily reside, or carry on business, or personally work for gain, within such local limits; or

(c) any of the defendants, at the time of the institution of the suit, actually and voluntarily resides, or carries on business, or personally works for gain within such local limits, and either the leave of the Court has been given before the institution of the suit, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution.

Explanation I.—When in any suit the sum claimed is, by a set off admitted by both parties, reduced to a balance not exceeding two thousand rupees, the Small Cause Court shall have jurisdiction to try such suit.

Explanation II.—Where a person has a permanent dwelling at one place, and also a lodging at another place for a temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging.

Explanation III.—A corporation or company shall be deemed to carry on business at its sole or principal office in British India, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.