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ADVOCATE
GENERAL OF
BOMBAY

v.

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against your *cestui que trust*, and I cannot put them into the bill of costs which will have to be paid out of the trust estate ; therefore, if you require it to be done, you must pay for it personally, and you will understand it is a personal matter between you and me.' * * I think, therefore, it is the duty of the solicitor to tell the trustee ' This is not wanted for the administration of the trust, and if you insist upon its being done, it is for your private convenience, and, therefore, cannot be charged against the trust estate.' So regarding it I have looked at this bill and I have no doubt that the client did order it all ; but then the application of the rule I have mentioned appears to me to be necessary, and then comes this question, which is properly a question for the Taxing Master to determine, is it proper or necessary or fit for the administration of the trust that certain things should be done ?" The Master of the Rolls then goes on to say that the question of *quantum* and *quoties* is one in which the opinion of the Taxing Master as to how much of the trustees' bill ought to be charged against the *cestui que trustenti* ought to be accepted.

I think I must follow this decision and refuse to disturb the decision of the Taxing Master that the items now under discussion ought not to come out of the mosque funds.

Attorneys for the Advocate General :—Messrs. *Ardesir, Hormasji and Dinsha*.

Attorneys for the defendants :—Messrs. *Nanu and Hormasji*.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

SAMIBA'I, PLAINTIFF, v. PREMJI PRA'GJI, DEFENDANT.*

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August 31

Civil Procedure Code (Act XIV of 1882), Sec. 375—Agreement adjusting suit—Power of Court to determine fact of agreement having been made—Arbitration—Reference of suit to arbitration—Award—Submission and award filed as an agreement—Civil Procedure Code (Act XIV of 1882), Sec. 525—Practice—Procedure.

The plaintiff sued the defendant to recover certain property of which she alleged he had taken possession. Subsequently the " matters in difference in the said suit " were by a signed submission paper referred to arbitration. An award was made

* Suit No. 40 of 1895

ordering the defendant to pay to the plaintiff Rs. 6,000, and cancelling a certain account. It also decided the claim of the plaintiff to two ornaments, which was a matter not included in the "submission paper," but had been verbally referred to the arbitrator in the course of the arbitration. The plaintiff now applied that the submission and award should be filed as an agreement adjusting the suit under section 375 of the Civil Procedure Code (Act XIV of 1882), or, in the alternative, that the award should be filed under section 525. The defendant disputed the agreement and denied the validity of the award.

Held, that under section 375 of the Civil Procedure Code, the Court had jurisdiction to determine whether, as a fact, the alleged agreement adjusting the suit has been made, and if it was satisfied that it has been made, to record it. Whether that fact should be tried on affidavit or by oral evidence, is entirely for the discretion of the Court.

The Court accordingly, holding that this suit had been adjusted by the submission and award, ordered the same to be filed and the adjustment recorded.

Held, further, that the Court could make no order as to that portion of the award which dealt with matter not relating to the subject-matter of the suit. A separate application should be made with regard to the ornaments.]

THE plaintiff and her sister Gomti were the only children of one Kánji Khimji who died in October, 1888, leaving them his only heirs and legal representatives. Kánji died possessed of a considerable amount of moveable and immoveable property.

On the 26th January, 1895, the plaintiff filed this suit against the defendant, who was her brother-in-law, the husband of her sister Gomti, alleging that he had taken possession of all Kánji's property on his death and that Gomti had died childless and intestate. The plaintiff claimed to recover from the defendant all the property left by her father Kánji, save such portion as was disposed of by Gomti during her life.

On the 30th March, 1895, the parties to the suit signed a document in the following terms, submitting the matters in difference to the arbitrators named therein :—

"To Thákur Versey Karumsey and Thákur Mowji Premji Tulsidás written by the undersigned Bái Samibái, wife of Thákur Walabhdás Hurry, and Thákur Premji Prággi, to wit : I, Bái Samibái, have filed a suit, No. 40 of 1895, in the Bombay High Court against Thákur Premji Prággi. We, Bái Samibái and Thákur Premji Prággi, have appointed you sole arbitrators to decide the matters in difference in the said suit, and we and our heirs bind ourselves to abide by such orders as you both persons may make. Whatever decision shall be made by you shall be accepted by us two persons in Court. Your decision on the above matter should be made in two months.

"The 30th March, 1895.

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The time originally fixed for making the award was extended to the 1st July, and on the 30th June, 1895, the said arbitrators made their award as follows:—

To Bâi Sami, wife of Thâkur Walabhdâs, dated the 7th of Asâd Sud, 1951, the 30th June, 1895.

“We, the undersigned Thâkur Versey Karumsey and Thâkur Mowji Premji Tulsi-dâs, (write as follows):— Bâi Sami, wife of Thâkur Walabhdâs Hurry, has filed a suit, No. 40 of 1895, against Thâkur Premji Prâgji in the Bombay High Court. We were appointed arbitrators to decide the questions relating to the subject. Having heard the arguments of both parties we give (our) decision as follows:—

“1. Thâkur Premji Prâgji shall pay to the plaintiff, Bâi Sami, Rs. 6,000, namely six thousand, within 8 days from this date.

“2. Thâkur Premji Prâgji shall deliver to Bâi Sami the *chakur* and *chakri* belonging to Bâi Sami.

“3. The account of Rs. 2,000, which Thâkur Premji Prâgji has given to Bâi Sami at Jâmnagar in a book, shall be considered as cancelled. Dated the 7th of Asâd Sud, 1951, the 30th June, 1895.”

On the 17th July, 1895, the plaintiff applied by petition to have the award recorded as an agreement under section 375 of the Civil Procedure Code (Act XIV of 1882) or filed as an award under section 525.

The following was the concluding paragraph of the petition:—

“The plaintiff submits that the said submission and award are an agreement wholly adjusting the aforesaid suit, and prays that the same may be recorded under the provisions of section 375 of the Civil Procedure Code, and a decree passed by this Honourable Court in accordance therewith, and in the alternative the plaintiff prays that the said award may be filed under the provisions of section 525 of the said Code, and that all necessary directions may be given in that behalf.”

On the 22nd July, 1895, the plaintiff served notice on the defendant calling on him to show cause “why the submission and award should not be filed as an agreement wholly adjusting the above suit, or why, in the alternative, the said award should not be filed.”

The defendant in his affidavit contended that the award was not made until after the time fixed by the submission paper; that it included matters not referred to arbitrators and did not decide all the matters referred; that it was made without making due inquiry and without taking accounts; that it was made under the influence of the plaintiff's husband; and that the defendant

was unable to carry out the award, as he had not recovered all the moneys belonging to the plaintiff's father Kánji Khimji.

Inverarity, for the defendant, showed cause :—The agreement is disputed, and the Court cannot try whether the suit has been adjusted by agreement. The decision in *The Goculdás Dulabdás Manufacturing Company v. James Scott*⁽¹⁾ does not apply where a dispute has been referred to arbitration. If the Court deals with the matter, it should take oral evidence on the points raised by the defendant. Section 525 of the Code does not apply to this case. That section only applies when no suit is in existence.

Lowndes, for the plaintiff, *contra* :—The submission and award constitute an agreement adjusting the suit which may be recorded under section 375—*Dagdusa Tilakchand v. Bhukan Govind Shet*⁽²⁾.

STARLING, J. :—The plaintiff in this suit seeks as the surviving heiress of her father, one Kánji Khimji, to recover from the defendant the estate of her father alleged to be in his hands, and for discovery and accounts, if necessary. The defendant in his written statement denies his own liability; denies the title of the plaintiff; alleges that she, if entitled to anything, is only entitled to what was specifically bequeathed to her by her father's will, and that there had been an adjustment between the defendant and the plaintiff, and that in accordance therewith an account had been opened in his book in her name and Rs. 2,000 credited to her therein.

On the 30th March, 1895, the plaintiff and the defendant by a submission paper referred all matters in difference in the suit to the decision of two arbitrators, and on the 30th June, 1895, these two arbitrators published their award, whereby they directed the defendant to pay to the plaintiff the sum of Rs. 6,000 and ordered that the account of the plaintiff in the defendant's books should be cancelled. They also decided the plaintiff's claim to two ornaments said to be in the possession of the defendant which was not referred to them by the submission paper, but which was said to have been verbally referred to them during the course of the arbitration.

(1) I. L. R., 16 Bom., 202.

(2) I. L. R., 9 Bom., 82.

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On the 18th July, 1895, the plaintiff presented a petition praying that the submission and award might be recorded under section 375 of the Civil Procedure Code, as an adjustment of the suit, or else be filed under the provisions of section 525 of the Civil Procedure Code. The usual notices were issued, and the matter came on for argument on the 31st August, when the defendant contended that there was no jurisdiction to file the award, because he did not now admit that it was a valid one, and made certain allegations in support of his contention that it was not valid and binding upon him.

The first question to be decided is whether when one of the parties to a suit sets up an agreement whereby, it is alleged, the suit has been adjusted, but that agreement is disputed by the other, the Court has jurisdiction under section 375 to determine the fact whether such agreement has been come to, and, if it is satisfied that such is the case, to record it. The point has been decided several times in Madras and Bombay in the affirmative—*Karuppan v. Rámásámi*⁽¹⁾; *Appásámi v. Mánikam*⁽²⁾; *Ruttonsi Lálji v. Pooribáí*⁽³⁾; and *Goculdás Bulabdás Manufacturing Company v. James Scott*⁽⁴⁾.

I agree with the decisions in these cases rather than with that in *Hara Sundari v. Kumár Dukhinessu*⁽⁵⁾. Section 375 does not say "if the parties agree that a suit is adjusted," nor "if the parties certify to the Court that a suit has been adjusted," but "if a suit *be* adjusted," which is a fact which is capable of being proved although one party may deny it. It is a fact which is alleged in the course of the suit, and which, in my opinion, ought to be tried by the Court in the same way as any other relevant fact which is alleged and denied in the course of the suit. Whether it should be tried on affidavit, or by oral evidence, is a matter, it seems to me, entirely for the discretion of the Court. If on such trial the Court finds that the suit has been adjusted, then it is the duty of the Court to record the act or document by which such adjustment is arrived at, and to pass a decree in accordance therewith as far as it relates to the suit.

(1) I. L. R., 8 Mad., 482.

(3) I. L. R., 7 Bom., 304.

(2) I. L. R., 9 Mad., 103.

(4) I. L. R., 16 Bom., 202.

(5) I. L. R., 11 Cal., 250.

As regards that portion of the award which does not relate to the subject-matter of the suit, if the application that it should be filed had been a separate one and had been wrongly endorsed as in this suit, or if it had not been numbered at all, I should have had no hesitation in ordering the endorsement to be amended, or the application to be numbered as a suit. The numbering is the act of the Court through its officer, and is a mere formal matter intended simply for the convenience of reference, and has nothing to do with the merits of the case; and if an application has been made to the Court otherwise in proper form, and due notice has been given to the opposite party, he can sustain no damage through the application not having been numbered or having been wrongly numbered. This case, however, is different. A double application has been made in this suit, and it would be exceedingly inconvenient to have among the records of this suit those of another, and I shall, therefore, make no order on the application under section 525 of the Civil Procedure Code, but leave the plaintiff to make a proper separate application with regard to the ornaments, or else bring a suit as she may be advised.

Having held that I have power to enquire whether there has or has not been an adjustment of this suit, the next thing I have to do is to determine that fact. [His Lordship then discussed the affidavits and continued:—] Holding that this suit has been adjusted by the submission and award, I order the same to be filed and the adjustment to be recorded, and do also order that the defendant do pay the plaintiff's costs of this application and order, and I pass a decree for the plaintiff for the sum of Rs. 6,000, and I order that the account for Rs. 2,000 in favour of the plaintiff in books given by the defendant to the plaintiff at Jám-nagar be cancelled. As to the costs of the suit, I can make no order. The suit (which, of course, includes the costs) has been settled by the adjustment, and the award saying nothing about costs, I must assume that the Rs. 6,000 includes everything that can possibly be claimed in the suit, including costs.

Attorneys for the plaintiff:—Messrs. *Bicknell, Mervánji and Motilál.*

Attorneys for the defendant:—Messrs. *Matubhai and Jamiet-rám.*

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