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telling the truth. But it is in the main that he has disbelieved them, for the point of their story is that the defendant had actual knowledge. If that be disbelieved, I think it is impossible to give effect to the other vague evidence given after a lapse of over three years by witnesses who had no special reason to recollect the commonplace events in question and who are not free from the imputation of being interested in the cause. It should be observed further that the allegation now under consideration was not made against the plaintiff until a very late stage, and the evidence on which it is now sought to be supported is, in my opinion, insufficient. I, therefore, come to the conclusion that it cannot be said that the plaintiff was guilty either of wilful abstention from inquiry or of gross negligence. It follows that his claim under the mortgage is not subject to the defendant's charge. The decree of the Court below must, therefore, be reversed and there must be a decree in the terms stated by the Chief Justice.

Decree reversed.

Attorneys for the appellant: *Messrs. Jehangir, Gulabbhai and Bilimoria.*

Attorneys for the respondent: *Messrs. Mirza, Mirza & Mangaldas.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

RUKHANBAI, PLAINTIFF, *v.* ADAMJI SHAIK RAJBHAI AND OTHERS, DEFENDANTS.*

1908.
April 3.

Suit for administration—Reference to Commissioner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Civil Procedure Code (Act XIV of 1882), s. 375—Adjustment of suits, what is—Written submission necessary.

The parties to an arbitration suit consented to it being referred to the Commissioner to take the usual accounts and to determine their respective shares. In the usual course, the matter came before the Assistant Commissioner for taking accounts, and a large mass of accounts, objections and sur-

* Suit No. 77 of 1906.

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charges were filed by the various parties. On appearing before the Assistant Commissioner the parties came to an understanding that the matter in dispute should be left to be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections and surcharges filed before him. The 1st and 6th defendants with their attorney were present at this meeting and after their attorney had agreed to the above course suggested by the Assistant Commissioner, the Assistant Commissioner himself explained to the 1st and 6th defendants in turn his proposal and told them that whatever award he made would be binding on them. To this they agreed, the 1st defendant even saying he would take one rupee if that was the sum awarded to him. It was also agreed that the Assistant Commissioner should draw up his findings in the form of a consent decree to be taken by the parties as that would save the parties a large sum in costs. At another meeting before the Assistant Commissioner the latter recorded his findings and then proceeded to draw up the consent decree embodying these findings therein but the defendants 1 and 6 refused to be bound by his decision. Upon application being made by the plaintiff that an adjustment of the suit might be recorded under section 375 of the Civil Procedure Code on the basis of the Assistant Commissioner's decision.

Held, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by section 4 of the Indian Arbitration Act, and, consequently, there had been no legal and valid reference to arbitration and the Assistant Commissioner's award (for it really was an award and nothing else) had no legal foundation, and could therefore have no legal consequences. As there had been no reference to arbitration and no award there could be no adjustment to give effect to under section 375 of the Civil Procedure Code.

Samibai v. *Premji Pragji*(1) and *Pragdas* v. *Girdhardas*(2) considered and distinguished.

THE facts of this case appear sufficiently from the headnote and judgment.

Strangman for plaintiff.

Davar for defendant 2.

Chamier for defendants 1 and 6.

BEAMAN, J.—This was an administration suit: a decretal order was passed referring it to the Commissioner to take the usual accounts. When the matter came before the Assistant Commissioner Mr. Modi, it appears from his notes (the substantial correctness of all the facts contained in which is not disputed) that

(1) (1895) 20 Bom. 304. (2) (1901) 26 Bom. 76.

with the object of saving parties considerable delay and expense, he proposed that they should leave the settlement of all matters in dispute between them in his hands. All the parties consented. From Mr. Modi's record, it is clear that they then agreed unreservedly and without any qualification to allow him to deal summarily with all the disputed matters and to draft (as he calls it) a decree by which they were to be finally bound. He says he fully explained every term of this proposal to the parties and in particular impressed upon the defendants that even should his decree award them no more than a rupee they were to be bound by it. To these terms all the parties assented. Thereupon Mr. Modi made what he calls a draft decree. Mr. Strangman for the plaintiff and defendant No. 4 now moves the Court to confirm this report and give a decree in its terms. Defendant No. 6 represented by Mr. Chamier objects on the ground, as I understand him, that the principle upon which Mr. Modi has arrived at his conclusion is incorrect and not a principle upon which he (the sixth defendant) thought he would act. When the motion came on, Mr. Strangman asked the Court to record Mr. Modi's report as an adjustment, compromise or satisfaction of the suit under and within the meaning of section 375 of the Civil Procedure Code and thereon pass a decree in accordance therewith. To this Mr. Chamier objected that he had received no notice of any such application, that he was entitled to notice; and that not having been given notice, this application could not now be proceeded with.

It appears, however, that the suit was down on the board for passing a final decree in terms of the Assistant Commissioner's report, and I am not disposed to defer my decision upon what is substantially in issue in order to give effect to this technical objection. Mr. Strangman for the plaintiff strongly relies on the cases of *Samibai* v. *Premji Pragji* [1] and *Pragdas* v. *Girdhardas* [2]. The latter case was decided in appeal by Sir Lawrence Jenkins, C. J., and Starling, J. There the suit was for dissolution of partnership and accounts. The suit was called on for hearing on the 24th February 1899 and by consent a decretal order

(1) (1895) 20 Bom. 304. (2) (1901) 26 Bom. 76.

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was made referring it to the Commissioner to take the accounts. On the 31st March 1899 before any accounts were brought into the Commissioner's office, the parties referred the subject matter of the suit to arbitration and on the 28th of June 1900 the arbitrators made their award. On the 7th December 1900 the plaintiffs gave notice that they would move in Court, that the agreement and the award be recorded under section 375 of the Civil Procedure Code. A decree was passed accordingly on the 13th December 1900 in which the submission and the award were recorded under the said section and the terms of the award were embodied in it. The Appeal Court held that the reference and the award constituted an adjustment of the suit by a lawful agreement or compromise and upon that ground upheld the decree of the Court below. Their Lordships referred with approval to the case of *Samibai* v. *Premji Pragji*[1] which had been decided in the same way and upon the same principle by Starling, J., on the Original Side of the High Court. It is certainly not easy to distinguish the principle of those decisions from the principle upon which Mr. Strangman now asks me to act. And were I satisfied that no distinction could be drawn, notwithstanding that in some points the conditions of those cases and this case are different, I should feel myself bound by those decisions. After having carefully studied not only those cases but many others dealing with the same question decided in the other High Courts, while I must admit that the weight of authority is heavily on the plaintiff's side I feel very grave doubts as to some parts at least of the reasoning upon which many of those decisions rest. Reference was made in *Pragdas* v. *Girdhardas*[2] to the Full Bench case of *Brojodurlabh Sinha* v. *Ramanath Ghose*[3], where although the decisions of the majority were substantially in accord with the view taken by Starling, J., in *Samibai* v. *Premji Pragji*[1] O'Kinealy J., in a dissenting judgment, doubted the correctness of that decision. For my own part, speaking with all respect to the eminent Judges who have adopted the contrary opinion, I think that that Judge's doubt was well founded. Again Jenkins,

(1) (1895) 20 Bom. 304.
(2) (1901) 26 Bom. 76.
(3) (1897) 24 Cal. 908.

C. J., says "that the decision in *Samibai* v. *Premji Pragji*[1] has met with the approval of Farran, C. J., in *Ghellabhai* v. *Nandubai* [2]" The passage referred to however is merely an *obiter dictum*. So, too, in the case of *Lakshmana Chetti* v. *Chinnathambi* [3] in which Sir Lawrence Jenkins says that Mr. Justice Starling's view, if not affirmed, certainly was not rejected; the most that can be said is that the Judges there in an *obiter dictum* seem to have approved of it. It is perhaps worth noting that the submission to arbitration in *Pragdas* v. *Girdhardas*[4] was made before the Indian Arbitration Act had come into force. I do not myself think that that circumstance materially affects what seems to me the fundamental principle of the decision: The learned Chief Justice says: "First it is said that Chapter 37 of the Civil Procedure Code, 1882, is an exhaustive exposition of the power to refer to arbitration pending a suit. I can find nothing, however, in Chapter 37 which invalidates a proceeding not in accordance with its provisions beyond the result that non-compliance deprives a party of a right to claim the consequences the Chapter prescribes." And I apprehend that the same process of reasoning would apply to any submission to arbitration which does not comply with the requirements either of Chapter 37 of the Civil Procedure Code or of the Indian Arbitration Act IX of 1899. But it seems to me that where a special procedure is provided for extraordinary extra-judicial methods of settling disputed claims, it must have been the intention of the legislature that that procedure and no other was to be followed. To say that Chapter 37 was not, before the passing of the Indian Arbitration Act, an exhaustive exposition of the powers to refer to arbitration and that a reference to arbitration not made in accordance with its provisions might nevertheless be given much more speedy and peremptory effect to by bringing it in under section 375 for the reason that "non-compliance deprives a party of a right to claim the consequence the chapter prescribes"—seems to me, speaking with the greatest respect, a questionable proposition. Because the reason advanced to support it will, when closely examined, become, I think, quite inadequate. What is

(1) (1895) 20 Bom. 304.
(2) (1896) 21 Bom. 335.
(3) (1900) 24 Mad. 326.
(4) (1901) 26 Bom. 76.

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implied in it is that by not complying with the statutory provisions regulating submission to arbitration, the worst that can befall a party so failing to comply is the loss of some advantage that he would have gained by compliance. But if notwithstanding that he can take the benefit of section 375, so far from being in a worse he is in a much better position than if he had been bound by the provisions either of the Indian Arbitration Act or of Chapter 37. In both the latter cases a party, who, after making a proper submission, is dissatisfied with the award, has a right of challenging it before it can be converted into a decree or any further action taken upon it. Whereas under the principle of *Pragdas* v. *Girdhardas*(1) no sooner has a party made an irregular submission, on which an award, no matter how full of defects, has been passed, than the other party can bring it in under section 375 and, without having any objections investigated, get a final decree upon it. This appears to me, speaking with all proper respect, one fatal objection to the principle upon which the plaintiff here relies. Another objection which I myself feel very strongly, though I cannot deny that this does seem to have been present to the mind of other more learned and eminent Judges who have nevertheless no difficulty in overcoming it, is that a mere agreement to refer a matter to arbitration, cannot logically and without unduly straining language, be fairly called an adjustment of a suit. Nor do I think that that difficulty is removed by the fact that an award is made. No doubt if the parties accept the award, then the agreement to refer plus the award which they had accepted, would constitute an adjustment of the suit by a lawful agreement. But mere submission to arbitration cannot, I think, be carried further than a step towards the adjustment of a suit. This difficulty is dealt with in *Pragdas* v. *Girdhardas*(1). The learned Chief Justice, relying upon *Lievesley* v. *Gilmore*(2), says: "But every submission to arbitration implies an obligation to perform the award of the arbitrator; so that here there was an agreement to perform the award in adjustment of the suit, and that is an adjustment of the suit by agreement." One obvious

(1) (1901) 26 Bom. 76 at p. 78. (2) (1866) L. R. 1 C. P. 570.

objection to that reasoning is that it does away at once with the necessity for all the special procedure prescribed in the Indian Arbitration Act and Chapter 37 of the Civil Procedure Code. For if that principle be uniformly sound and accepted, parties submitting to arbitration would be under an implied promise to accept the award, whatever be its nature and however it has been arrived at. That is in fact what they are obliged to do by applying the principle in the same manner in which it has been applied in those cases, so as to enable a party wishing to enforce the award to do so directly under section 375. It would be easy to pursue this analysis further by way of explaining and justifying the doubts I feel about the correctness of the decision in *Pragdas* v. *Girdhardas*(1). But, as I have said, unless I can distinguish that from the present case I should undoubtedly feel myself bound to follow it. There is, however, one passage in the learned Chief Justice's judgment, which does, I think, warrant me in saying that this is a different case. He says: "it is conceded, and I must assume correctly, that under the special circumstances of the case the submission is valid." I will not pause, as I might do, to amplify the implication contained in these words beyond saying that notwithstanding what has preceded, the learned Chief Justice evidently thought that a submission to arbitration, before it can be treated as an adjustment of the suit, must be "valid," that is to say, made in conformity with the law governing arbitration proceedings. I need not further dwell upon the difficulty which an accurate analysis of what is herein implied might introduce in logically and consistently interpreting the whole judgment. It is enough for my present purpose to point out that had the learned Chief Justice felt any doubt as to the validity of the submission, it is at least fairly arguable whether he would have come to the conclusion he did. In that case, as indeed in all the other cases to which it refers, there was a written submission. It is true that, at that time, the Indian Arbitration Act was not in force, and that presumably as this submission was held not to fall within the scope of Chapter 37, there was no statutory need for a written

(1) (1901) 26 Bom. 76.

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submission. Now, however, section 4 of the Indian Arbitration Act requires that wherever that Act is in force, submission to arbitration must be in writing. In the present case there has been no such written reference or submission. I am not denying that this is a technical rather than a substantial distinction because, from Mr. Modi's record, it is quite clear that what he wrote down in the present case fairly and fully expressed all the wishes and intentions of the parties, and had they signed his notes there would have been, to all intents and purposes, a written submission of the kind required by law. As the facts stand, there has been no legal and valid reference to arbitration at all. Mr. Modi's award therefore, (for it really is an award and nothing else) has no legal foundation, and can, therefore, have no legal consequences. That, I think, is sufficient, in the view I take of section 375 and of the decisions upon it, to relieve me from the necessity of following against my own judgment the majority of those decisions. As, then, there has been no reference to arbitration and no award, what adjustment of the suit can there be to which I am asked to give effect under section 375 ? It appears to me that there can be absolutely none. I come to this conclusion with great reluctance because it is clear that all the merits are on the plaintiff's side. There can be no question that all the parties did authorise Mr. Modi to settle their disputes and did agree to accept his decision as finally binding upon them. When, however, that decision came to be known, the defendant 6 repudiated it. He has thus gone back upon his own distinct undertaking and I cannot pretend that I feel the least sympathy with him because he has succeeded upon a highly technical point. Indeed I feel so strongly in this matter that although he is here nominally successful, I shall order him to pay all costs which may have been incurred from the date on which all parties, including himself, agreed before Mr. Modi, that he should finally decide their disputes, up to the date of the final order upon this motion.

Upon these terms I direct that the motion be dismissed and that the matter be referred back to Mr. Modi to take it up as and from the date upon which the parties agreed to make him their sole arbitrator.

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Special Commissioner to pay the costs of the other parties out of the share of defendant 6.

Attorneys for the plaintiff: *Messrs. Jehangir and Seervai.*

Attorney for defendants 1 and 6: *Mr. N. B. Vakil.*

Attorneys for defendant 2: *Messrs. Mehta and Shomji.*

Attorneys for defendant 4: *Messrs. Jehangir and Seervai.*

B. N. L.

APPELLATE CRIMINAL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1908.

August 17.

EMPEROR *v.* TRIBHOVANDAS PURSHOTTAMDAS MANGROLE-WALLA.*

Criminal Procedure Code (Act V of 1898), sections 225, 233, 234, 235, 236 and 237—Charges—Joinder of charges—Misjoinder of charges—Indian Penal Code (Act XLV of 1860), sections 124A, 153A—Sedition—Promoting enmity, etc., between classes—Publication, what constitutes.

The accused was charged at one trial with having committed offences punishable under sections 124A and 153A of the Indian Penal Code, on two charges, one with respect to each of the two articles he published on different dates in his newspaper called the *Hind Swarajya*. At the trial there was no other evidence of the publication of the newspaper in Bombay except the declaration made by the accused under the Press Act, and the depositions of witnesses who received the newspaper in Bombay as Government servants in their capacity as such. The accused was convicted on both the charges and sentenced separately on each of them. It was contended in appeal that there was no evidence of the publication of the newspaper in Bombay, and that there was a misjoinder of charges vitiating the trial.

Held, that the evidence on record was sufficient to prove the publication of the newspaper in Bombay.

Held, further, that the trial was not bad as there had been no misjoinder of charges.

Per CHANDAVARKAR, *J.*:—It is true that the Magistrate framed two charges one with respect to each of the two articles. But in each charge the offences are mentioned as being those punishable under sections 124A and 153A of the

* Criminal Appeal No. 237 of 1908.