(1871) 05 CAL CK 0012

Calcutta High Court

Case No: Special Appeal Nos. 741 and 868 of 1870

Lala Iswari Prasad and Others		APPELLANT
	Vs	
Bir Bhanjan Tewari and Others Tarak Chandra Chatterjee and Others Vs Sashti Charan Chatterjee and Others		RESPONDENT

Date of Decision: May 23, 1871

Judgement

Norman, Officiating C.J.

No. 868 of 1870

1. It seems to me material to observe that, in order to set the Court in motion, and to establish its jurisdiction, a party coming u/s 327 would have to show, first, that there has been a reference to arbitration; secondly, that an award has been made; thirdly, that his application is within six months from the date of the award. The application would be, I suppose, by a petition duly verified. A notice would then issue calling on the parties to the arbitration other than the applicant to show cause why the award should not be filed. That cause might apparently be that there had been no consent to the reference, that no award had been made, or the like. If such party, in showing cause, should seek to introduce new facts, and to rely on matters not appearing on the face of the petition of the applicant, he would have to bring those facts to notice by a verified petition or statement on his own part. It appears to me that, if the Judge should see that there was a real and substantial contest between the parties as to whether there had been a consent to reference, or whether an award had been made, he should refuse to decide the matter on the conflicting statements or verified petitions of the parties. He ought to treat it as a sufficient cause why the award should not be filed, and leave the applicant to his remedy by suit on the award. It seems to me that the only order which the Judge is empowered to

make u/s 327 is simply an order that the award shall be filed. When the award is filed, it is to be enforced under the provisions of Chapter VI, Act VIII of 1859. Now the mode of enforcement of an award is by passing judgment and making a decree in accordance with the award. The judgment and decree which have been passed in the present case appear to be irregular. The conditions under which judgment on an award is to be pronounced seem to be prescribed by section 325. It is only in case the Court shall not see cause to remit the award, and if no application has been made to set aside the award, or if such an application has been made and refused, that the Court is empowered to pass judgment on the award.

2. I am disposed to think that an award filed under the provisions of section 327 stands in precisely the same position as an award submitted to the Court u/s 320. In both cases, before passing final judgment, the Court is empowered by section 322 to modify or correct the award; by section 323 to remit the award for reconsideration, first, if the award has left undetermined some of the matters referred to arbitration, or determined matters not referred to arbitration; secondly, if it is so indefinite as to be incapable of execution; thirdly, if an objection to the legality of the award is apparent on the face of the award; and, lastly, by section 324, the Court is empowered to set the award aside in certain cases.

3. The judgment, if given according to the award, u/s 325, has a particular quality; it is final. But it should be observed that the judgment which is to be final is a judgment in accordance with the provisions of section 325. Now, suppose in a case of reference by order of Court, instead of allowing the parties ten days'' time in which to apply to set aside or correct the award, the Judge were forthwith, without hearing objections to the award, to make a decree in accordance with the award, I think there can be no doubt but that such judgment and decree would not be such as is declared by section 325 to be final; see Maharaja Jaimangal Sing v. Mohanram Marwari Ante, p. 319 and Sunt Lall v. Baboojee 12 S.D.A. Rep., Agra, 1863, 42.

4. In the present case the Moonsiff, who was empowered by section 327 to make an order that the award should be filed, instead thereof at once gives judgment that the award be enforced. That judgment is apparently not such a judgment as is contemplated by section 325. It may be suggested that, although sections 322, 323, and 324 provide ample means for checking irregularities and correcting errors in the award, there are no means of correcting the error, if the Judge, in dealing with an application u/s 327, comes to a wrong decision upon the question whether the parties consented to the reference.

5. It is clear that a judgment on an award is not one from which no appeal lies. It is only if the judgment be in accordance with the award that the judgment is final and cannot be disturbed. Therefore, in order to make a final judgment, there must be, first, an award; and, secondly, a judgment in accordance with that award. It would follow that any objections which go to show that there is no award, would show that the judgment is not final. I think, for instance, that the defendant might object that the award was a forgery,

which is one of the objections in No. 741 of 1870; that it was made by persons other than the arbitrators named in the submission, as in the case of Baboo Surubjeet Narain Singh v. Baboo Goureepershad Narain Singh 7 W.R., 269. In such cases there would be no award in fact.

6. So again, if a Judge were to treat a mere statement of account made by a person having no authority at all as an arbitrator, such, for instance, as an account drawn up by the servants of a mercantile firm showing the balances due to the partners, as an award, an order for the filing of such a document would not make it an award.

7. It seems to me to follow that if, after a valid revocation of their authority, persons who had been named as arbitrators were to pretend to make an award, it would be open to a party against whom judgment, in accordance with that paper, had been pronounced, to contend by way of appeal that the paper was no award in consequence of the absence of authority on the part of the persons assuming to act as arbitrators to make any award. For these reasons I would answer the question proposed in the affirmative.

8. No. 741 of 1870.--In this case the appeal to the Subordinate Judge raised three questions: first, that there was no mutual submission to arbitration, inasmuch as the two documents put in as proving such submission on the part of the several parties differed in material points; secondly, that the defendant did not assent to the supposed agreement of reference; thirdly, that one of the arbitrators whose signature purports to appear on the award knew nothing about the award; that he had not signed it, and did not know who signed his name on the award; that his signature was a forgery.

9. I think it clear that the objection that on these grounds there was no award, was one which the appellant was not precluded from taking by anything to be found in the 325th section.

10. The question put to us is in these terms:--When an award has been ordered to be filed, and judgment has been given in accordance with it u/s 327 of Act VIII of 1859, is such judgment open to appeal? I would answer the question thus:--

It is open to an appellant to show that the paper which has been filed is not an award. If it is an award, and judgment is given in accordance with such award, such judgment is final.

Jackson, J.

11. I agree to these answers.

Loch, J.

12. It appears to me that the authority of a Civil Court under the provisions of section 327, Act VIII of 1859, is of a very limited character; for were it otherwise, the facility given by

the Legislature to the parties to have private awards enforced by Courts of Justice, would be open to great abuse, and parties appearing as petitioners under the above section, would be in a much better position than other suitors. No doubt, the Legislature has by the provisions of section 327 shown great consideration to parties who, instead of coming into Court, settle their disputes by private arbitration. But the law contemplates that there has been a bon■ fide award, which is sought to be executed, and there can be none, unless the parties were consenting to it. The law gives no countenance to fraud, and yet the Civil Courts might do so were the Judges to determine, under the provisions of section 327, questions relating to the genuineness of the award, and no appeal were admissible from their decision on the matter of fact, as in other cases when a decision on the fact is open to appeal. If the Civil Court under the provisions of section 327 can entertain, as an objection to the enforcement of an alleged award, any question as to its being genuine, or made with the consent of parties, and on the evidence before it determine in favor of the genuineness of the award, and then draw up a judgment in conformity with that award, which judgment is final, then there is room to fear that much injury may be done without remedy. I have no doubt that a judgment drawn up in conformity with an award is final, but I think a judgment of the kind cannot be made when the fact of the award having been made with the consent of parties is disputed. The law, so it appears to me, contemplates that an award of some kind has been made with consent of parties, which one or other of them seeks to have enforced, and therefore, before a Civil Court can proceed u/s 327, the fact of an award having been made must be admitted by the parties, and the objections which the Court can dispose of are objections to its being carried out as a decree of Court. When the fact of the arbitration is denied, or the award is challenged as a forgery or collusive, the Court should, I think, hold its hand, and refer the petitioner to a regular suit to try the validity of the award. If, however, it proceed to try the whole cause on its merits, an appeal would lie in the usual course, for the Court would in such case have tried questions which, under the circumstances, it had not authority to try. The objections which may be raised to the filing of the award, and can be disposed of by the Court under the provisions of section 327, are of a kind which relate to the carrying out of the award, such as subsequent arrangement, full satisfaction, payment, and the like; and if these objections be rejected, and a judgment be drawn up in conformity with the award, such judgment would, I apprehend, be final.

Kemp, J.

13. I am of the same opinion.

Paul, J.

14. This was an application u/s 327 of Act VIII of 1859 to enforce an award made under a reference to arbitration out of Court, According to section 327, an application of this kind is required to be numbered and registered as a suit; and this requisition having been duly observed, a notice was served upon the defendants requiring them to show cause within a specified time why the award should not be filed in Court. The defendants appeared to

show cause; they apparently admitted the submission to arbitration, but objected to the award on several grounds. Some of these grounds were highly technical and frivolous, and were very properly disposed of by the Moonsiff as untenable. The remaining grounds were leveled at the validity of the award, and, in consequence thereof, three issues were fixed for trial:--

1st--Whether the award was liable to be set aside on the ground of misconduct of the arbitrators.

2ndly,--Whether it was true that the arbitrators pronounced their decision after a repudiation of further proceeding by the defendants.

3rdly.--Assuming that this was so, whether sufficient grounds existed for the repudiation of the arbitrators.

15. The 2nd and 3rd issues in reality resolve themselves into the 1st issue, as they equally with the 1st issue relate to misconduct imputed to the arbitrators. It may be observed in passing that the ground of misconduct, as vitiating an award, is expressly recognized in section 324. The Moonsiff duly tried the above issues, and deciding them against the defendants upheld the award, and decreed the suit in favor of the plaintiff. It would have been more regular to have followed the course of procedure indicated in section 327, namely, on deeming the Cause shown insufficient, to have ordered the award to be filed, then to have pronounced judgment in terms of the award, and to have drawn up a decree accordingly. The single order passed in the case is substantially composed of the order, judgment, and decree which I have just mentioned as contemplated by the Code of Procedure. From this decision of the Moonsiff, an appeal was preferred to the Officiating Subordinate Judge, who, on the case coming on before him, held that no appeal lay, and consequently dismissed it. From this decision an appeal was preferred to the High Court. This appeal came on to be heard before the Chief Justice and Mr. Justice Mitter. Both their Lordships were clearly of opinion that no appeal lay from the decision of the Moonsiff to the Subordinate Judge, but they were induced to refer the question whether an appeal lies or not, in consequence of a decision pronounced by a Division Bench of the High Court (Steer and L.S. Jackson, JJ., presiding) in Hulodhur Sungiree v. Gunesh Santhal 6 W.R., 60 not having been noticed in, nor over-ruled by, a decision of the Full Bench in Baboo Chintamun Singh v. Roop Kooer Case No. 353 of 1866: 31st August 1866, This reference, therefore, clearly raises the question whether the decisions in Hulodhur Sungiree v. Gunesh Santhal 6 W.R., 60 and Madhusudan Das v. Adaita Charan Das Ante, p. 316 are correct or erroneous.

16. In order to answer the question, it is necessary to consider the various proceedings which are to be taken before an award made under a reference out of Court can be enforced. As previously remarked, an application to have the award filed in Court must be first made. On this application notice issues to the parties against whom it is intended to enforce the award calling upon them to show cause against the filing of the award. On

cause being shown, a decision must be come to in one of two ways, either that the cause shown is sufficient, in which case the award cannot be enforced in a summary manner, or that the cause shown is insufficient, and the application to have the award filed is granted. The decision must conclude with an order, either refusing or granting the filing of the award. It appears to me that an order directing the filing of an award is not a decree in its ordinary signification; and being in its nature a proceeding ancillary to the passing of judgment and decree, it is an order made in the course of a suit (commenced by an application) and relating thereto, prior to decree. Consequently, under the terms of section 363 of Act VIII of 1859, no appeal lies from such an order or from the decision of the Moonsiff on which it is based. It is however contended, on the authority of the case in Syad Wali Alam v. Mussamat Bibi Nasran 3 B.L.R., App., 104, that an order of this description is in reality a decree; if this were so, no further decree would be necessary under the provisions of sections 327 and 325, but it appears clear that, unless an order directing an award to be filed is followed up by judgment and decree, no execution can issue. If the Legislature intended to attribute to such an order, the efficacy and force of a decree, the latter part of section 327, would have been worded differently, it would have run thus:-- "If no sufficient cause has been shown against the award, the award shall be filed and enforced as an ordinary decree under the provisions of this Act." This, however, is not the language of the section; and I have already shown that the order for filing an award is not a decree.

17. The decision of the Division Bench in Hulodhur Sungiree v. Gunesh Santhal 6 W.R., 60 is mainly rested on an earlier decision of the same Division Bench and on a more recent decision of a Division Bench consisting of the late Chief Justice and Mr. Justice L.S. Jackson therein referred to. The latter authority, i.e., the more recent decision, is of little or no weight with reference to the question submitted to us, as in that case the appeal was dismissed on the ground that, in the circumstances attending it, no appeal lay. The former authority, namely the earlier decision, has not been shown us; I am, therefore, ignorant of the reasoning contained in it, and cannot test its ratio decidendi. The decision in Hulodhur Sungiree v. Gunesh Santhal 6 W.R., 60, considered independently of the reasoning which led to it, must be taken to have ruled that an appeal lies from an order deciding against the want of consent to the agreement of reference raised by the defendant. I can find nothing in the proceedings prescribed by Act VIII of 1859 for the enforcement of an award made on a reference to arbitration out of Court, which warrants the conclusion arrived at by their Lordships in the case last cited. I must confess, however, that I entertain grave doubts as to whether section 327 intended to provide for the enforcement of an award when the order of reference under which the same is based is disputed by the defendant. That section seems to take for granted two things, namely that the matter has been referred to arbitration, and an award has been made, and then provides for the enforcement of such an award. I should say that the denial of an order of reference by the defendant ought to be considered "sufficient cause" shown against the award within the meaning of section 327. The Judges of the Courts at Westminster frequently refuse applications by way of motion for the enforcement of the

terms of an award when the points raised against the validity of an award are nice and difficult, leaving the party applying to his remedy by action (see instances in Wright v. Graham 18 L.J. Ex., 29, and Barton v. Ranson 3 M. & W., 722). I do not see why, when serious questions of fact which go to the root of the award arise, or when difficult questions of law arise as to the validity or construction of an award, such matters should not be held to amount to sufficient cause within the meaning of section 327. I do not think, when u/s 326, an application to file an agreement to refer to arbitration is met, on showing cause, by the statement of the defendant that the agreement is a forgery, the Civil Court would entertain and try the preliminary question of forgery so raised between the parties. The Civil Court would be quite justified in holding, and would doubtless hold, the denial of the defendant to be sufficient cause against the agreement, and leave the party applying to his legal remedy. If this be so, there is no reason for holding that the cause to be shown against an award made on an agreement to refer out of Court, which may traverse (amongst other matters) the making of the agreement to refer, should so far as this traverse or denial is unanswered be different to and of wider operation (so as to necessitate the raising and trial of an issue thereon) than the cause which may be shown u/s 326, as regards the same traverse or denial. Moreover, our Indian Legislature, which guards moat carefully the interests of the revenue in matters of litigation, could hardly have intended that the right to recover possession of landed property of great value under a disputed award, should, with all the intricate issues of law and fact relating thereto, be tried in a summary manner upon and pursuant to an application engrossed on a stamp of 8 annas. Unless such a construction be put on the terms of section 327 as would exclude the trial of all sorts of difficult questions of law and fact which would arise in an action upon an award disputed by the defendant, and would limit the operation of that section as far as judicial decision is concerned to the determination of causes and matters specified in sections 324 and 325, the decisions of Subordinate Courts, pronounced in the course of summary proceedings on matters arising out of a contested award, would stand on a different footing from decisions of the same Courts in regular suits and relating to the same matters; the former being conclusive and final, and the latter inconclusive and open to appeal. This anomalous state of things furnishes an additional and forcible argument in support of the contention suggested with reference to the words "sufficient cause" in section 327, and generally to the terms of that section.

18. Having regard to the appeal addressed to us in the interests of justice by the pleaders who have argued the affirmative of the question submitted, against the inexpediency and injustice of laying down a rule of law which would hold as conclusive a single judgment in matters of vital importance, bearing in mind that it was assumed in the case in Hulodhur Sungiree v. Gunesh Santhal 6 W.R., 60 that a Subordinate Court was competent to decide in a proceeding u/s 327 the issue of agreement or no agreement to refer to arbitration arranged out of Court, and believing it possible that, on the basis of this assumption, the argument against the injustice of concluding parties by a single judgment might have prevailed so as to have led to the decision in that case, I have been in a manner forced to consider what construction should be put on section 327. I trust the

construction I have suggested, and the consideration I have bestowed on section 327, will have the effect of eliminating what I may be permitted to designate the disturbing element already adverted to as existing in Hulodhur Sungiree v. Gunesh Santhal 6 W.R., 60, and of allaying the contention and anxiety felt in the cause of justice, and expressed in the course of the argument adduced in support of the right of appeal against which I am about to decide.

19. On the whole, then, for the reasons I have given, as well as for the reasons advanced by both their Lordships, the Chief Justice and Mr. Justice Mitter, I am of opinion that the decisions in Syad Wali Alam v. Mussamat Bibi Nasran 3 B.L.R., App., 104, Madhusudan Das v. Adaita Charan Das Ante, p. 316, and Hulodhur Sungiree v. Gunesh Santhal 6 W.R., 60, so far as they are relevant to the question before the Court, should be expressly over-ruled, and the question submitted should be answered in the negative.

20. No. 741 of 1870.--The question submitted in this case is--When an award has been filed, and judgment given in accordance with it under the provisions of section 327 of Act VIII of 1859, is such judgment open to appeal?

21. Section 327 provides, "if no sufficient cause be shown against the award, the award shall be filed and enforced as an award made under the provisions of this Chapter." The provision for passing judgment is contained in section 325, which in substance states that, if the award be upheld, the Court shall proceed to pass judgment according to the award. The same section further enacts that, "in every case in which judgment shall be given according to the award, the judgment shall be final." In the present case judgment was given according to the award, it is therefore final. If this was the only point intended to be referred, it is wholly unnecessary to discuss any decisions on the subject, as the words of the law are perfectly clear. My answer, therefore, to the question submitted is that the judgment given according to the award is final, and not open to appeal.

22. If it was intended to submit in this case for the consideration of a Full Bench the question referred in Special Appeal No. 868 of 1870 as to whether an appeal lies from the decision of a Moonsiff directing the filing of an award made under a reference out of Court, I desire to refer to my judgment in the last case in which I have considered at some length this question, for the proper answer, namely that no appeal lies. In this case, I observe that the Moonsiff, after having allowed oral evidence to be adduced on the subject of the issue, whether the defendant consented or not to refer matters to arbitration, decided upon such evidence against the defendant, and held that he had consented. If the views I have expressed in the last case, with reference to the meaning of section 327 are correct, the denial by the defendant of the submission to arbitration should have been held to amount to sufficient cause shown against the award, so as to have stayed further action on the part of the Court. As, however, no appeal lies in this case, any error which has been committed cannot be rectified by this Court sitting as a Court of Appeal. If the parties consider the position I have advanced tenable, they will probably take proper steps to have the decision of the Moonsiff set right.

(1) Before Mr. Justice L.S. Jackson and Mr. Justice Markby.

The 26th June 1869.

Madhusudan Das v. Adaita Charan Das (Plaintiff).*

Baboo Prasanna Kumar Roy for the appellant.

Baboo Tarak Nath Dutt for the respondent.

Jackson, J.--I think it is quite clear that the Subordinate Judge was wrong in entertaining this appeal. The plaintiff, or petitioner in the Moonsiff''s Court, made an application, not precisely under the terms of section 327, but asking that the private award of the arbitrators be enforced, and that he get possession of the lands and other things thereby awarded to him.

The Moonsiff, it seems to me quite clear, intended to give judgment for the plaintiff in exact accordance with that award, and in so far as he refused anything to the plaintiff, it was where the plaintiff had sought, under cover of this application, to get possession of something not given him by the award. I think, therefore, that the judgment of the Moonsiff was intended to be, and was, in accordance with the award, and, being so, was final, and that the Subordinate Judge, in entertaining the appeal and going into evidence as to what the arbitrators really meant to give, acted without jurisdiction. The plaintiff will, doubtless, be entitled to retain possession of the land standing beneath, and covered by, the premises awarded to him; but as I do not understand that the defendant would have offered any opposition to his retaining that land, I think that the plaintiff must bear the costs of this Court and of the lower Appellate Court.

Markby, J.--I am of the same opinion.

(2) Before Mr. Justice Norman, and Mr. Justice E. Jackson.

The 14th September 1869.

Maharaja Jaimangal Sing (Defendant) V. Mohanram Marwari and Another (Plaintiffs).*

Mr. Allan and Baboo Budh Sen Sing for the appellant.

Mr. Paul (with him Baboo Anand Chandra Ghosal) for the respondents.

The facts of the case are fully stated in the judgment of the Court, which was delivered by

Norman, J.--This is a case which was remanded by an order of this Court made by a Division Bench (Mr. Justice Kemp and Sir. Justice E. Jackson), dated the 6th of March 1868, to the Judge of Bhagulpore, to try whether anything and what was due from the

defendant, Maharaja Sir Jaimangal Sing Bahadur, to the plaintiff upon two accounts, which are described in the judgment of Mr. Justice Jackson, as a "roka account" and a "cloth account."

After the case went hack to the Judge of Bhagulpore, it was referred to two arbitrators, one of whom was Mr. Sandys, the former Judge of Bhagulpore, and the other was Moulvi Wahidudin, the Judge of the Small Cause Court, under an order stating that, with a copy of that order, the case be forwarded to each of the arbitrators, and also all papers connected with the suit, and that the arbitrators having decided the case in the presence of the pleaders of all parties, should send back the papers and their award within one month from the date of that order. This order was dated the 22nd May 1868. On the 23rd June, the arbitrators, in the presence of both parties, stated that, when the case came back, it was transmitted to them as arbitrators; that from the petition and the order under which they were appointed, it did not appear in what manner they were to deal with the case, whether in obedience to the order of the High Court or with general powers.

The explanation of that probably is that the arbitrators, reading the judgments of JACKSON and KEMP, JJ., in which those two learned Judges do not exactly agree in their views of the case, may have felt embarrassed as to what question they had to decide.

On the 23rd of June the arbitrators had stated that they could not act without full powers. On the 30th of June, the plaintiff presented a petition stating that it was intended that the arbitrators should decide with general powers. That petition was presented to the arbitrators, and not to the Judge.

On the 2nd July, the defendant also presented a petition to the arbitrators consenting that the case should be decided by them with general powers.

The arbitrators held sittings on the 2nd, 9th, and 22nd July; on the 20th, 24th, and 25th August; on the 1st September; and on the 7th and 8th December 1868.

It is clear, not only from this, but from the reasons which Mr. Sandys has given for his decision that the arbitrators went into the matters in dispute very fully.

On the 10th of December, Moulvi Wahidudin wrote and signed a paper as his award; and on the 28th of December, Mr. Sandys wrote and signed a separate paper, giving the reasons in full for the conclusion at which he had arrived. These papers appear to have been filed in Court on that same 28th of December.

On the 7th of January 1869, the defendant filed a petition of objection to the two papers which had been put in as the award of the arbitrators, objecting, amongst other things, that a number of khata books which had been filed as exhibits in the case had been given out by the arbitrators without his consent, and had not been submitted to the Court, as required by the provisions of section 320, Act VIII of 1859. He also objected that Moulvi

Wahidudin in particular had decided the case on hearsay and rumour, and not on evidence.

On the 29th January 1869, the Judge made this order:--

The Court is of opinion that the arbitrators should conjointly sign their award, with reference to the provisions of section 320.

Let the separate awards be sent to the arbitrators, with a copy of this order and with a request that the arbitrators will conjointly sign the award.

The Judge considers that the recitals in the awards may be dispensed with, unless the arbitrators especially desire they should be filed.

''The Judge annexes a form of award made (meaning perhaps ''to be made'') by the arbitrators which, if correct, they can sign.''

The form which they signed was as follows:--

We, the undersigned, having been appointed arbitrators, u/s 315, Act VIII of 1859, for final decision of the suit herewith submit our award u/s 320.

We award the plaintiff a sum of Rs. 22,828-8, with proportionate costs and interest on the said sum, from the date of institution of the suit till the 10th December 1868, at one percent, per mensem, and interest on the whole from this day (10th December) to date of realization, at one per cent per mensem, and plaintiff must pay costs of defendant, on the unproved portion of the claim, at one per cent per mensem from this 10th December to date of realization.

Wahidudin, T. Sandys, Arbitrators.

The signatures at the foot are in the handwriting of the arbitrators.

There is written in the margin of it and as part of the form,--''The 10th December 1868, date of delivery of award.''

Mr. Sandys also signed a minute, and Wahidudin likewise signed a minute, dated respectively as appears from the minutes themselves, which are as follows:--

I sign this award, as formally required to do so, by the Judge''s proceedings of to-day''s date, but must respectfully decline its being unaccompanied by the recital of the award given by me on 28th December last. I could not give such an award, without placing my reasons for the same on record. It is also the only record of what actually took place in connection with it.

The 29th January 1869. T. Sandys, Arbitrator.

I sign this award, as required by the Judge"s proceeding of the 28th January 1869. I thought it my duty to give the grounds in my award, anticipating that, in case my co-arbitrator, T. Sandys, Esq., should differ from me and the appointment of an umpire should have been necessary, that umpire would be able to give his opinion, by the perusal of the grounds set out by both the arbitrators, respectively; but as the said co-arbitrator has come to the same conclusion with me, I have no objection in my recitals being now dispensed with.

"The 31st January 1869. Wahiduddin, Arbitrator."

On the 3rd of February 1869, the Judge took up and disposed very shortly of the objections made to the two papers filed at the end of December previous. On the same day he gave judgment in favor of the plaintiff as follows:--

In accordance with the award of the provisions of section 325, the Court decrees to the plaintiff a sum of Rs. 22,828-8, with proportionate costs and interest on the said sum, from the date of institution of the suit, till the 10th of December 1868, at one per cent per mensem, and interest on the whole, from the 10th December to date of realization, at one per cent per mensem; and plaintiff must pay costs of defendant, on the unproved portion of the claim, at one per cent per mensem, from the 10th of December to date of realization.

"(Sd.) H.R. Maddocks, Judge."

The 3rd February 1869.

From that decree an appeal has been presented to this Court. The first point that I propose to consider is whether that decision passed on the 3rd February 1869 was a judgment passed in pursuance of the provisions of section 325, Act VIII of 1859; because if that is the case, it is final, and no appeal lies. (After reading sections 322--325 of Act VIII of 1859, His Lordship continued):--

The first question is,--What was the award in the present case?

Now I think it plain that the two papers which were sent in to the Judge signed, one on the 10th, and the other on the 28th of December 1868, are not an award; and that the Judge, in remitting those papers to the arbitrators, did so on the grounds that the objection to the legality of those papers as an award was apparent on the face of the award.

Now, the making of the award is a judicial act that must be done by the arbitrators in the presence of one another and at the same time. Section 320 appears to show that the award is to be one single instrument complete in itself.

The decision contained in two papers signed by Mr. Sandys and Moulvi Wahidudin, if award it can be called, could only have been gathered from a comparison of the two

papers above referred to. If arbitrators were allowed to sign different papers expressed in different terms, though intended by them to show that they had arrived at the same conclusion, there would be no means of determining that the arbitrators were both precisely of the same mind as to what they had awarded and decided, except from argument and inference. The award could not be final and complete in itself.

We have no doubt therefore that the Judge was quite right in sending back the papers to Mr. Sandys and Moulvi Wahidudin, and requesting them to sign their award conjointly. The Judge so disposed of the matter on the ground that the illegality of the award was apparent on the face of it.

Roscoe on Evidence, title, Action on an Award, says:--"An award to be made by two arbitrators must be signed by them in the presence of each other, and at the same time and place. And it is no award unless so signed."

Moulvi Wahidudin"s decision is not with the papers, and we do not know what it was or what it contained. But by the decision of the Judge, we take it to be settled that the papers of the 10th and 28th December were not an award. And indeed, for reasons already given, we think it clear that an award to be collected from two papers separate and distinct from each other, and signed at different times, could not be an award.

The papers of the 10th and 28th of December not being an award, the only award before the Judge was the paper signed and sent in by the arbitrators on or subsequent to the 29th of January 1869. The judgment on this award, which was passed on the 3rd of February following, was therefore at most only five days after the date of the award.

The Judge, before passing that judgment, appears to have disposed of certain objections made by the defendant. But these were not objections to the award, but to the papers of the 10th and 28th of December which, as we have seen, were not an award. It appears to us plain, on considering the provisions of section 825, that the Court has no power to pass judgment according to an award under that section until after all objections to it have been finally disposed of, or until the time during which an application may be made to set aside an award has elapsed. It is clear that, down to that time, the Court is not in a position to say whether the Court can or will see cause to set aside the award, or if no objection has been made, whether any application will be made to have the award set aside or not, or whether such application ought to be refused or not.

It appears to me that, if a decree which was passed before the disposal of objections to the award, or within ten days after the submission of the award to the Court, could be allowed to stand as a judgment u/s 325, it would deprive the opposite party of the opportunity of objecting to the award reserved to such party by the provision in section 324. After judgment has passed on the award u/s 325, it is final, There is nothing in this section which empowers the Court which has pronounced judgment on an award to set aside such judgment by review or otherwise.

Now, in holding that a judgment passed within ten days after the award has been submitted to the Court is not a decision u/s 325, we are following a decision of a Full Bench of the Agra Sadder Court, in the case of Sunt Lall v. Baboojee 12 S.D.A. Rep., Agra, 1863,42.

The judgment now appealed against was, in our opinion, not a judgment under the 325th section, and consequently not one against which no appeal lies. We think that the judgment and the decree of the Court below must be reversed with costs.

It has been pressed on us that the award which was made in pursuance of the suggestion of the Court on the 29th of January 1869 is itself bad, because it was signed by Mr. Sandys and Moulvi Wahidudin on different days, namely, the 29th and 31st of January respectively. There is no distinct evidence to show when the original signatures were affixed, and we are not disposed to draw inferences one way or the other on a matter on which, if the party intended to rely, he ought to have given distinct and positive evidence. Moreover, this point may be raised before the Judge, where a satisfactory explanation may possibly be given.

We do not desire to do more than point out to the Judge the principle of the law, on this subject. That principle is stated by the Chief Justice in the case of Kelut-chunder Ghose v. Tarachurn Koondoo Chowdhry 6 W.R., 272 and Mahomed Akil v. Asudoonisa Bibi Case No. 253 of 1863: 14th December 1867, and the rule applicable to arbitrators is shortly expressed in the passage already cited from Roscoe on Evidence, page 324. The Judge appears to have understood that, because he remitted the award to the arbitrators, in order that they ought to sign it conjointly. But this they did not do. The Judge will consider whether it would not be proper again to send back the papers signed in pursuance of his former suggestion that an award may be duly and regularly signed by the arbitrators in the presence of each other.

We desire to observe that it would have been better that the Judge should not have dictated the form of the award. The parties having consented to submit to the arbitration of the persons chosen, those persons should have been left free to draw up their award in whatever manner seemed fit and proper to them. If there were any error in their mode of procedure or in their award, the Judge should have pointed it out to them, and have allowed them to correct it. By suggesting a form, the Judge may probably have prevented the arbitrators from deciding on the separate accounts referred to in the judgment of the High Court.

It has been brought to our notice that the conduct of one of the arbitrators was exceedingly irregular in allowing certain papers of accounts and khata books to be removed from the record. He attempts to excuse this conduct, but his explanation only makes the matter worse. Section 320 provides that,--"When an award in a suit shall be made, either by the arbitrator or arbitrators, or by the umpire, it shall be submitted to the Court under the signature of the person or persons by whom it may be made, together

with all the proceedings, depositions, and exhibits in the suit."

Now, if Moulvi Wahidudin had parted with any books and documents which had been put in the course of the inquiry before the arbitrators, he would have done that which appears to be distinctly forbidden by section 320. But when he, as an arbitrator, took upon himself to allow books and papers which were entrusted to him by the Court to be removed from the nathi, he was not only wrong as an arbitrator, but forgot his duty to the Court, as we are surprised to find that a judicial officer of his position and standing should have done. The documents were entrusted to him by the Court, and it was his plain and simple duty to return them to the Court. As an arbitrator, he had no right whatever to allow them to be removed from the nathi by any one. Still less was he justified in parting with these documents in a case where their genuineness and bona fides was in question. At the same time, we do not say or suppose that, in parting with those papers, he did so from any bad or improper motives, but he has undoubtedly laid himself open to observation by his conduct.

We have a further remark to make regarding the paper put in by Moulvi Wahidudin, and signed by him on the 10th December 1868. It is clear that that had become a proceeding in the suit, and it ought not therefore to have been withdrawn from the record; but as laid down by section 320, it should have been returned to the Court along with the other papers of the record. More particularly, it ought not to have been withdrawn after the defendant objected to it, charging the Moulvi with having decided the case on rumour and hearsay, and not on evidence. It is difficult to see how the Judge could have decided on that objection satisfactorily after he had allowed that paper to be withdrawn and kept back by Moulvi Wahidudin. Our impression is that, for reasons suggested by us above, as it stands at present, the award is bad. We leave it to the Judge, on hearing any objections made by the defendant, or on the application of the plaintiff for that purpose, to remit the award to the arbitrators under the provisions of the 323rd section, if he thinks that the ends of justice will be served thereby. We think that, with the award to be returned to the Court after such remittal, all books and exhibits, together with the proceedings which have been removed from the nathi, including the decision of Moulvi Wahidudin should be brought into Court with the award. The money which was paid into Court by the defendant will remain in Court until further orders, which the Judge will pass on the subject.

Jackson, J.--I am not prepared to acquiesce in holding that the last award of the arbitrators is bad, because it was signed by the arbitrators, one on the 29th, and one on the 30th. A decision of a Court would not be set aside on a question of form, which I hold this to be; much less an award of arbitrators. It did not in any way affect the decision of this case on the merits. As, however, my learned colleague is of an opposite opinion, I am ready to concur with him in remanding this case to the Judge, in order that he may take steps to have the award formally signed by the arbitrators at the same time, and not on different dates. I think also that there must be a remand, in order that the appellant may obtain ten days" time after the award is signed within which to prefer any objections he can legally urge against the award. I think that Moulvi Wahidudin"s decision, as originally

sent, should be restored to the record, as well as the account books which that officer allowed the plaintiff to take away.

* Special Appeal, No. 3285 of 1868, from a decree of the 1st Subordinate Judge of Hooghly, dated the 11th September 1868, modifying a decree of the Moonsiff of that district, dated the 18th March 1868.

* Regular Appeal, No. 107 of 1869, from a decree of the Judge of Bhagulpore, dated the 3rd February 1869.