Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mirza Sadik Husain v. *Musammat Kaniz Zohra Begam, from the Court of the Judicial Commissioner of Oudh; delivered the* 21*st July* 1911.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD SHAW.
LORD MERSEY.
MR. AMEER ALI.

[DELIVERED BY LORD SHAW.]

This Appeal is presented from an Order dated the 27th November 1906, made by the Court of the Judicial Commissioner of Oudh, which affirmed an Order dated the 5th September 1906, made by the District Judge of Lucknow.

It appears that one Mirza Agha Hasan Khan died on the 27th December 1901. He was survived by a widow, a daughter, and a son. They were heirs of the deceased under the Mahomedan law of the Shiah sect, and the property fell to be divided amongst them in certain proportions. Mirza Agha Hasan Khan's property, however, was situated in various districts, and while the arithmetical division of the shares fell to be determined by law, it was considered by the heirs that it would be to their advantage that, instead of a large variety of fractional portions of property being taken by each heir in subjects situate, it might be, at a considerable distance

from each other, an arrangement should be carried out by arbitrators whereby the shares falling to the ladies should be consolidated in one district, and other arrangements for convenience of management entered upon. Accordingly a compromise and agreement in this sense was drawn up.

In April 1903 the Respondents had brought a suit claiming administration of the estate, and on the 1st August 1905 the compromise was made, and on the following day, namely, the 2nd August 1905, the Decree which raises the crucial question in this case was pronounced by the Subordinate Judge of Lucknow, which bore that " It is ordered " that in terms of the compromise herewith an- " nexed, marked 'A.' . . . . Plaintiffs' claim be " decreed under Sections 157 and 375, Civil Pro- " cedure Code ; and as regards costs, the Court " orders that parties do bear their own costs." Section 157 seems to have no bearing upon the procedure and to have appeared in the judgment by mistake, but Section 375 deals with the matter of compromise of suit and provides that " if a suit be adjusted wholly or in part by any " lawful agreement or compromise . . . . such " agreement, compromise, or satisfaction shall be " recorded and the Court shall pass a Decree in " in accordance therewith, so far as it relates to " the suit, and such Decree shall be final so far " as relates to so much of the subject-matter of " the suit as is dealt with by the agreement, " compromise, or satisfaction."

As has been pointed out, the agreement or compromise in this case went by its nature beyond the actual matter of suit between the parties. But it is also clear that the Decree thus, so to speak, ratifying the compromise, was a final Decree. The Court has discharged itself of the *lis* between the parties, and by their own agreement thus ratified the settlement of the points

upon which they had agreed fell to be made by the tribunal of arbitration to which the parties had consigned it.

By the agreement two arbitrators were appointed to settle, allocate, &c., the respective rights of parties. One of these, for reasons which need not be entered upon (he was the Advocate for the Respondents), refused to act as arbitrator. Thereupon the Respondents, on the 23rd August 1906, presented a petition in the Court of the District Judge, narrating this fact and averring that "owing to his refusal to act, it "has become necessary that the honourable "Court should itself examine the schedule and "bring it in conformity with the terms of the "compromise, or, failing that, it should appoint "a commissioner and direct," &c. The Respondents declined to nominate another arbitrator on their behalf; and, in fact, it seems clear that they held, not only that this declinature was within their rights, but that it was also not in the power of the Court to nominate another arbitrator to supply the gap which had been caused by the declinature. The Court accordingly was asked to take the matter into its own hands. Before seeing how the Civil Procedure Code and the Indian decisions bear upon the point, it may be added that the District Judge acceded to the view presented and to all intents and purposes superseded the arbitration and entered upon the scrutiny of the lists of properties and the determination of the allocation—in short, performed the duties of the tribunal of arbitration as if the agreement or compromise had authorised that procedure. This was confirmed in the Court of the Judicial Commissioner of Oudh by the Order appealed from.

By Section 510 of the Code of Civil Procedure, 1882 (Act XIV.), it is provided that "if the "arbitrator, or, where there are more arbitrators

" than one, any of the arbitrators . . . . dies,
" or refuses or neglects or becomes incapable to
" act . . . . the Court may in its discretion
" . . . . appoint a new arbitrator . . . .
" or make an order superseding the arbitration,
" and in such case shall proceed with the suit."
What had happened in the present case was that after the arbitrator had been appointed he refused to accept office as such, or to act. It appears, however, that the Courts in India have construed this section of the Code as meaning that the section can only apply if the arbitrator who refuses had accepted office before refusing. These decisions are, *Pugardin Ravutan* v. *Moidinsa Ravutan* (I.L.R., 6 Madras, 414), and *Bepin Behari Chowdhry* v. *Annoda Prosad Mullick* (I.L.R., 18 Calcutta, 324). In both of these cases it was held that the Court has power, under Section 510, to appoint a new arbitrator in the place of another only when that other had first consented to act and thereafter refused or become incapable. In their Lordships' opinion this is not a proper construction of Section 510 of the Code. It appears to their Lordships that, when an arbitrator is nominated by parties, his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. His refusal to act necessarily follows, for he has not performed the first action of all, namely, to take up the office by signifying his assent to his appointment. Their Lordships do not enter at length into the matter as it appears that any other construction would open the way to an easy defeat of the provisions of the Statute. Nor do their Lordships doubt that the decisions referred to proved in the present case an embarrassment to the Courts below and have probably prevented the District Judge doing what would have supplied all that was required, namely, to appoint another arbitrator instead of the one

who had declined to accept nomination. Had that been done the tribunal of arbitration would have been set up and the proceedings could have gone forward. Furthermore, the appointment was in the hands of the District Judge, and he was in no way precluded from making it by the fact that the party whose arbitrator had declined refused to assist the Court by suggesting another name. In their Lordships' opinion the procedure of the Courts below in this particular, and the decisions upon which they manifestly proceeded, were erroneous.

What was done, however, was (apparently under the same section which was held to make it incompetent to appoint a fresh arbitrator), to adopt the other course of superseding the arbitration and entering upon the determination of the matters submitted by the agreement. It was this latter which was done, and not proceeding with the suit. To "proceed with the suit" (to use the language of Section 510) was in this case in their Lordships' view, impossible. The suit was at an end, and something different from and going much beyond the suit had been entered upon. The Decree of the 2nd August 1905, was not a Decree for partition nor for administration. It was simply a Decree ordering the agreement and compromise of parties to be carried into effect, and that Decree was final It put an end to the suit, and that was the very object of the compromise. The alternative in Section 510 is impossible, because there is no suit now pending with which the Court can proceed. All that the Courts in India could do was to take advantage of the sections of the Code which enabled them to keep the machinery of arbitration going. This could have been done, and, had it not been for the decisions cited would in all probability have been done, by simply naming a fresh arbitrator. Parties who agree to set up

a tribunal of arbitration are not bound to submit the case referred to to another tribunal, such as a District or other Judge. It may be regretted that the supersession of the arbitration and the interposition of the judge himself to settle the points referred to arbitrators should not have been assented to. But the objection which has been taken—that the rights having been remitted to one tribunal have been settled by another—is, in their Lordships' opinion, a fatal objection.

Their Lordships will accordingly humbly advise His Majesty that the Appeal be allowed and the Decrees of the Courts below reversed with costs. The Respondent, Kaniz Zohra Begam, must pay the costs of the Appeal.

MIRZA SADIK HUSAIN

v.

MUSAMMAT KANIZ ZOHRA BEGAM.

DELIVERED BY LORD SHAW.

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