

(1899) 02 CAL CK 0014

In the Calcutta High Court

Case No : Appeal from Original Jurisdiction No. 10 of 1898

Sm. Toolsimony Dassee and Others

APPELLANT

Vs

Sm. Sudevi Dassee and Others

RESPONDENT

Date of Decision : 17-02-1899

Acts Referred:

Citation : (1899) 02 CAL CK 0014

Final Decision : Dismissed

Judgement

Macleay, C.J.—This is an appeal from an order of Mr. Justice Sale, dated the 22nd March 1898, refusing to set aside an award made in the suit. The suit was for the recovery of jewellery of the value of Rs. 2,600 or thereabouts : it was by consent referred to arbitration on the 22nd February 1897, and the award which the present Appellants seek to set aside was made on the 9th January 1898.

2. It is sought to set aside the award on the ground of the misconduct of the arbitrators.

3. A preliminary objection, however, has been taken on behalf of the Respondents (the successful Plaintiffs in the suit) that no appeal lies to this Court, and that contention is based on two grounds : (1) that the right of appeal from the decision of a single judge conferred by sec. 15 of the Letters Patent of 1865 is controlled by sec. 588 of the Code of Civil Procedure, and (2) that the decision of Mr. Justice Sale is not a "judgment" within the meaning of sec. 15 of the Letters Patent.

4. To my mind the first of these points has been authoritatively decided against the view of the present Respondents by the Judicial Committee of the Privy Council in the case of *Hurish Chunder Chowdhry v. Kali Sunderi Debt* I. L. R. 9 Cal. 482, 494; L. R. 10 I. 4 (1882). I need not travel into the facts of that case but there, their Lordships said, "It only remains to observe that their Lordships do not think that sec. 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this where the appeal is from one of

the judges of the Court to the Full Court." It is clear from the report that the point was elaborately argued, and the clear expression of their Lordships' opinion must be read in connection with that argument. But we are told there are reported decisions of the High Courts of India which conflict with this view of the Privy Council, and that there is, virtually a Current of Judicial authority in this country against that view. Great reliance is placed upon a decision of the Allahabad High Court, *Banno Bibi v. Mehdi Hosain* I. L. R. 11 All. 375 (1889)., but the reasons there given for distinguishing that case from the one in the Privy Council are not, to my mind, sufficiently convincing. In a later case of *Muhammad Naimullah Khan v. Ihsanullah Khan* I, L. R, 14 All. 226(1892)., the same Court assigns other possible reasons for the decision of the Privy Council--but it seems a little forced to say these were the reasons of the Privy Council when their Lordships have said that sec. 588 does not apply "when the appeal is from one of the judges of the Court to the full Court." Then, again, we are referred to two cases of the Madras High Court, *Achaya v. Ratnavelu* I. L. R. 9 Mad. 253 (1885) and *In re Rajagopal* I. L. R. 9 Mad. 457 (1886).. But in neither of these cases, which were respectively decided in 1885 and 1886, was the case in the Privy Council cited, though previously decided in 1882: so they can scarcely carry much weight. In the case of *Vasudeva Upadhyaya v. Visvaraja Thirtha Sami* I. L. R. 20 Mad. 407 (1897). Mr. Justice Benson at p. 412 tells us what, in his opinion, their Lordships' language in the Privy Council amounts to, and it is this :--" Sec. 588, no doubt, has the effect of restricting appeals in the case of orders which are not decrees, but it does not apply to such a case as this before us which is an order in execution and, therefore, "a decree." When, therefore, such an order has been made by a single judge an appeal lies to the full Court." This may be what their Lordships meant, but it is not what they have said. And the learned judge goes on to say at the same page " it is impossible to suppose that their Lordships, in a mere observation of four lines, without any explanation or reasoning, laid down a rule of such farreaching importance, and opposed to what appears to be the plain language and intention of the Legislature."

5. To my mind the language of the Judicial Committee is not very aptly described as " a mere observation."

6. Mr. Justice Benson's opinion, however, is not shared by his learned colleague in the case, and I am not disposed to accept the view that, in advising Her Majesty, the members of the Judicial Committee of the Privy Council are so unguarded in their language--especially when the precise point has been urged before them by most experienced counsel--as Mr. Justice Benson seems inclined to assume. I am but little disposed to whittle away decisions of the Privy Council; I prefer to accept, and, as I am bound, to follow them if really in point: and if they be regarded as requiring reconsideration to let them be reconsidered by the members of the Judicial Committee themselves.

7. I notice that two of the members of the Judicial Committee on this occasion

were retired Chief Justices of Bengal, and I may add that the majority of the Judges of this Court held that an appeal would lie and that Garth, C. J., dissented only because he doubted whether Mr. Justice Pontifex's decision was a judgment within the meaning of sec. 15 of the Letters Patent. In my opinion, then, the first question is concluded by the decision of the Privy Council, so also virtually is the second : for the decision proceeds upon the footing that Mr. Justice Pontifex's order was a judgment within the meaning of sec. 15 of the Letters Patent of 1865. But whether that be so or not, I am clearly of opinion that Mr. Justice Sale's order was a judgment within the meaning of that section.

8. I concur in the definition of a judgment given in the case of *The Justices of the Peace of Calcutta v. The Oriental Gas Company* 8 B. L. R, 452 (1872). Mr. Justice Sale's order was a decision upon the question of whether the award was to stand or to be set aside. If this be not a "judgment," I scarcely see what a judgment can well be. I therefore overrule the preliminary objection. I will now pass to the merits. The Appellants charge the arbitrators with misconduct and upon this they base their claim to have the award set aside.

9. The arbitration commenced on the 15th August, certain witnesses were examined" and cross-examined, and adjournments, were from time to time made, and although there was a little skirmishing as to whether the arbitrators should sit on Sundays or out of office hours, no case of misconduct is alleged against the arbitrators up to the early part of January 1898.

10. But on the 3rd January 1898 the Defendant's attorney received a letter from the Plaintiff's attorney saying that the hearing of the arbitration would be postponed for four weeks on account of the absence from Calcutta of one of the arbitrators. Notwithstanding that intimation, on the 7th January the arbitrators sent a notice to the Defendants that they intended to proceed with the arbitration at 6-30 that same evening. This to my mind was not reasonable conduct on their part, having regard to their notice a few days before, that the meeting had been adjourned for a month and, if the arbitrators had insisted on proceeding with the arbitration that evening, I am not prepared to say that my conclusion on the case would not have been adverse to the Plaintiffs. The Defendants say they did not receive this notice until 5 o'clock, but be that as it may, they attended the meeting, and the hearing was postponed until 7-30 on the following morning, although, as the Defendants say, they protested that this was too short an adjournment and that they would not have time to consult their attorney. The Plaintiffs say they heard nothing of any such protest. Except extending the time for making the awards, nothing was done at this meeting. The fact of fixing so early an hour in the morning for the meeting may appear somewhat strange to European ideas, but it must be remembered that this was an arbitration between Native litigants with Native arbitrators, that the evidence shows it was to be conducted out of office hours, and in that view a meeting at such an hour is, perhaps, nothing very extraordinary. However, on the 8th January the Defendants did not appear at the meeting, and after waiting for

nearly 2 hours, the arbitrators adjourned till 8 a. m. on the 9th, notice of which was given in the forenoon of the 8th to the Defendants and to their attorney.

11. But on the 8th the Defendant's attorney wrote the letters set out at pages 9 and 10 of the paper-book. After that at page 9 had been written--but whether or not before it had been sent is not apparent on the evidence--the Defendant's attorney received the notice of the postponement of the meeting until the 9th and thereupon wrote the letter on p. 10 saying " the whole thing seems to be a farce, my clients will have nothing further to do with the arbitration." Now were the Defendants under these circumstances justified in withdrawing from the arbitration ? I think not. The arbitrators to put it at the lowest had displayed a readiness to adjourn the case when the Defendants said they were not prepared to go on : they adjourned the meeting on the 7th and again they adjourned it on the 8th, and proceeded on the 9th only after they had been told that the Defendants had withdrawn. It is their action on these occasions which is said to constitute the misconduct on their part. I do not think such action amounts to misconduct. On the contrary I think the Defendants, under the circumstances, put themselves in the wrong by withdrawing from the arbitration. When they were told the meeting was adjourned until the 9th their reasonable course would have been to have appeared before the arbitrators, and urged the necessity, if it existed, of a further and reasonable adjournment. Looking at some of the objections raised from time to time by the Defendant's attorney, I am not disposed to think that the Defendants were over-anxious that the arbitration should proceed with too much rapidity. However be that as it may, I agree with Mr. Justice Sale that there was no misconduct on the part of the arbitrators, and the rule must be discharged with costs.

Prinsep, J.

12. This appeal is against an order of Mr. Justice Sale under sec. 522 [521 ?] of the CPC refusing to set aside an award.

13. A preliminary objection has been taken to the hearing of this appeal on the ground first, that it is barred by sec. 588 of the CPC and next that if not so barred it is not appealable as a judgment within the terms of sec. 15 of the Letters Patent.

14. Briefly the law bearing on this subject may be thus stated :--

15. Suits brought in the Ordinary Original Civil Jurisdiction may be tried by one judge whose proceedings are regulated by rules and orders made by the High Court as far as possible in accordance with the Code of Civil Procedure.

16. Sec. 15 of the Letters Patent, 1865, declares that an appeal shall lie to the High Court from the judgment, not being a sentence or order passed or made in a criminal trial, of one judge. Sec. 15 therefore constitutes a Court of Appeal in such cases and it further declares that the appeal would lie from a judgment of a single judge.

17. It is contended that this section of the Letters Patent, 1865, has been modified by the Code of Civil Procedure, 1882, and especially by sec. 588 of that Code.

18. The Supreme Legislative Council has the power to amend the Letters Patent (sec. 44), but the question is whether such power has been exercised in this respect.

19. Sec. 15 of the Letters Patent, 1865, is like the Bengal Civil Courts Act and similar Acts constituting a Court to hear appeals in cases where the right of appeal is given by law, but sec. 15 goes further than those Acts because it limits the cases appealable. It provides for an appeal to the High Court against the judgment of a single judge of that Court not being a sentence or order passed or made in a criminal trial and this applies where such judgment may have been passed by such judge sitting as a Division Court in exercise of civil jurisdiction either as a Court of Appeal or as a Court of Original Jurisdiction. But the right of appeal is against a judgment only and against the judgment of only a single judge. I do not refer to the other part of this section because it is irrelevant for the purposes of the case now before us. Without sec. 15 of the Letters Patent although an appeal might lie under the Code of Civil Procedure, 1882, there would be no Court constituted to hear the appeal against a judgment, decree or order on the Original Civil Jurisdiction of the High Court, for sec. 16 relates to a different matter and it would confer no such Appellate Jurisdiction, and the portions of the CPC which relate to appeals to Her Majesty in Council would give the right of appeal only in a small number of cases of a special character either in regard to the points of issue or the value of the subject-matter of the particular suit. We have it, therefore, that if, beyond sec. 15 of the Letters Patent, 1865 sec. 588, CPC gives the right of appeal against any order of the description specified therein, there is no Court of Appeal constituted to hear it if such order not being a judgment, has been made by a judge on the Original Side of the High Court. There would be another difficulty which it is inconceivable that the Legislature should have contemplated. If irrespective of sec. 15 of the Letters Patent an appeal lies under sec. 588 of the Code, it must be against an order passed by any Division Court exercising the Original Civil Jurisdiction of the High Court. To what Court would it be ? There is no Court constituted by the Letters Patent or by any local law to hear it. Sec. 16 of the Letters Patent does not apply nor does sec. 15. Then again if such an order be appealable, it would be appealable if passed by a Division Court consisting of more than one judge. The Court might have consisted of the majority or even of all of the judges of the High Court. I would also point out that the same difficulty would arise if an order of remand be passed by a Division Court hearing an appeal, whether that appeal be from the High Court on its Original Jurisdiction or from a Subordinate Court, such as the Court of a District Judge or Subordinate Judge. These considerations lead me to conclude that it was never intended by the Legislature to alter the effect of sec. 15 of the Letters Patent by such indirect legislation. If it had been intended to do so, the alteration in the law would have been expressly declared,

and such difficulties as I have indicated would have been provided for. The contention of the learned counsel proceeds upon secs. 632 and 638 of the Code of 1882. Sec. 632 provides that " except as provided in the chapter the provisions of this Code apply to such" that is, to all High "Courts" established by 24 and 25 Victoria, Chap. 104, and sec. 638 sets out the sections of the Code which are so excepted. Amongst these sec. 588 does not appear and so it is contended that an appeal lies under sec. 588 against an order passed on the Original Civil Jurisdiction of the High Court, that only such orders as are specified in sec. 588 are appealable : and lastly, that as the order on the case before us is not within sec. 588 it is not appealable. But to complete this line of argument it would be necessary to go further and to hold that the term "judgment " in sec. 15 of the Letters Patent must be read as synonymous with decree as defined in the Code. There is no authority for this and we cannot alter the meaning of "judgment" in the Letters Patent, 1865, as it has always been accepted, by inferentially making it synonymous with the definition of decree as given in the Code of 1882. "I have so far considered this matter as if it were *res Integra*. But fortunately we have authority for our guide. In *Hurrieh Chunder Chowdhry v. Kali Sunderi Debia* I. L. R. 9 Cal. 482, 494; L. R. 10 I. A. 4 (1882). their Lordships of the Privy Council held that an order made by Mr. Justice Pontifex on the Original Side of the High Court under sec. 610 of the Code rejecting an application to execute an order of Her Majesty in Council is a judgment, and in dealing with that case their Lordships were pressed with the argument that the right of appeal in that case was regulated by sec. 588 of the CPC which had modified sec. 15 of the Letters Patent. Their Lordships of the Privy Council disposed of this in these words : " It remains only to observe that their Lordships do not think that sec. 588, Act X of 1877, which has the effect of restricting certain appeals applies to such a case as this where the appeal is from one of the judges of the Court to the Full Court." I observe that Act X of 1877 is here mentioned, but as a matter of fact the order under appeal was passed in 1880 and was consequently under the Act of 1877 as modified by Act XII of 1877 and the CPC in this respect is the same as the Code of 1882 which is now in force. I understand this to mean that sec. 588 does not affect any matter coming within sec. 15 of the Letters Patent, and if I may venture to say so, the reasons which led to the expression of that opinion and which have not been given in the judgment reported, may be those stated by me for arriving at the same conclusion. It is much to be regretted that the terms of sec. 638 of the Code should have been so expressed as to give good ground for entertaining a doubt, but in my opinion the matter has been definitively settled by the highest authority in the case mentioned by me.

20. Some cases have been cited to us in which there has been a reluctance to accept this expression of opinion regarding the operation of sec. 588 and endeavour has been made to explain it as not binding to the full extent of the meaning. I find myself unable to accept that view of our law both because the terms of this expression of opinion by their Lordships are clear and emphatic and also because if I may be permitted to say so a careful examination of the law on

the subject fully bears it out.

21. In *Banno Bibi v. Mehdi Hosain* I. L. R. 11 All. 375 (1889). the case of *Hurrish Chunder Chowdhry v. Kali Sunderi Debt* I. L. R. 9 Cal. 482, 494; L. R. 10 I. A. 4 (1882), was considered, and that case was distinguished, having regard to the matter then before their Lordships of the Privy Council. With every respect to the learned judges I am unable to agree with their views of the distinction. Whatever may have been the grounds upon which two of the judges (White and Mitter, JJ.) may have decided that matter, it was considered by their Lordships of the Privy Council that they had held that Mr. Justice Pontifex's order was "a judgment within the meaning of sec. 15 of the Letters Patent" and in their observations in dealing with the dissentient judgment of Garth, C. J., they show no indication of any doubt on this point. On the contrary they follow this up by adding "their Lordships do not think that sec. 588, Act X of 1877 (Code of Civil Procedure), which has the effect of restricting certain appeals applies to such a case as this when the appeal is from one of the judges of the Court to the Full Court." I observe that Edge, C. J., in this case states that "considerable difference exists between sec. 588 of the present Code and sec. 588 of Act X of 1877 which was the Act under consideration in the case before the Judicial Committee." I cannot find to what the learned Chief Justice refers, for after a careful comparison of these sections of the two Codes of 1877, as amended by the Act of 1879 and of 1882, I am unable to find any difference affecting this particular matter.

22. Two cases in I. L. E. 9 Mad. 253 and 147 were relied upon in the case of *Banno Bibi v. Mehdi Hosain* I. L. R. 11 All. 375 (1889). In the first of these cases it was held that notwithstanding sec. 15 of the Letters Patent there was no appeal against, the order of a single judge of the High Court rejecting an application for review of judgment. The reason given for this was that sec. 15 of the Letters Patent was controlled by sec. 629 of the Code which declared that such an order shall be final. The other case is exactly in point as it was there held that sec. 15 of the Letters Patent was controlled by sec. 588 of the Code which gave no appeal against an order rejecting an application to sue in forma pauperis. But the reports of these cases show that in neither of them was the judgment of their Lordships of the Privy Council cited or considered. I do not therefore propose to discuss them in detail. It is sufficient to state that they express a different view of the law, which I am not disposed to follow against the higher authority of the Judicial Committee of the Privy Council.

23. In *Muhammad Naimullah Khan v. Ishanullah Khan* I. L. R. 14 All. 226, 230 (1892). the case of *Hurrish Chunder Chowdhry v. Kali Sunderi Debi* I. L. R. 9 Cal. 482, 494; L. R. 10 I. A. 4 (1882) is incidentally referred to, the interpretation of that, expressed in the earlier case of that Court, being maintained.

24. The matter was also considered by the Madras High Court in *Vasudeva Upadyaya v. Visvaraja Thirthasami* I. L. R. 20 Mad. 407 (1897). which was an appeal under sec. 15 of the Letters Patent, 1865, against the order of a single

judge of the High Court dismissing an appeal against an order passed by a lower Appellate Court remanding a suit. The learned judges in that case (Benson and Subramanya Ayer, JJ.) did not take the same view of the law regarding the effect of the sec. 588 of the CPC on sec. 15 of the Letters Patent. The order under consideration was, I would again state, so as to express the case clearly, an order passed by a single judge of the High Court sitting as an Appellate Court on an appeal under sec. 588 from the order of a lower Appellate Court remanding a suit. Benson, J., held that sec. 15 of the Letters Patent had been modified by sec. 588 of the Code, that is to say, of the Code of 1882, that the order in question was not appealable under sec. 588 because it was an order passed by a single judge in an appeal which had been heard under sec. 588 and the concluding words of sec. 588 barred a further appeal; whether such an order would be a judgment within the terms of sec. 15 of the Letters Patent apparently was not considered.

25. Mr. Justice Benson referred to the case before the Privy Council and notwithstanding the emphatic terms on which their Lordships expressed their opinion that sec. 588 does not apply to a case such as that before them in which the appeal is from one of the judges of the High Court to the Full Court he stated that in his opinion " these words refer only to the actual case before the Privy Council. " Whatever may have been the case before their Lordships, their observations clearly were directed to every case in which the appeal is from "one of the judges of the High Court to the Full Court" which I understand to be that, notwithstanding sec. 588 of the Code, sec. 15 of the Letters Patent, 1865, remains in full force and untouched, and I certainly do not agree in the paraphrase of these observations, as expressed by that learned judge in page 412 of the report.

26. Mr. Justice Subramanya Ayyar on the other hand reluctantly yielded to the force of authority in previous cases of the Madras High Court, supported by the Allahabad cases which I have mentioned but he was not prepared to set aside the opinion of their Lordships of the Privy Council as mere dicta. He says : " The tenor of the observations seem clearly to indicate that they were intended to be a decision on the point, irrespective of the circumstances of the particular case in which the observations were made, " and he left the matter to be finally settled at some future time by a Full Bench of the Madras High Court. I may here state that in another case *Sankaran v. Raman Kutti* I. L. R. 20 Mad. 152 (1896) the Madras High Court (Collins, C.J., and Benson, J.) held that, in a similar case, an appeal did not lie, by reason of the concluding words of sec. 588, against an order passed on appeal by a single judge of that Court against the order of a lower Appellate Court remanding a suit. The case before the Privy Council was not referred to in the report of that case. The High Court followed previous cases on the subject and amongst these the case of *Loki Mahto v. Aghore Ajail Lall* I. L. R. 5 Cal. 144 (1876). I have not referred to that case as it was decided before the case before the Privy Council. There are only two reported cases of this High Court in which the ease of *Hurrish Chunder Chowdhry v. Kali Sunderi Debi* I. L.

R, 9 Cal, 482, 494; L. R. 10 I. A. 4 (1882). has been referred to and in each of these cases, that case was explained and distinguished in this way, that their Lordships held that where the order of a single judge decided finally or otherwise any question at issue in the case or the rights of any of the parties to the suit, it is appealable to this Court under sec. 15 of the Letters Patent. How far sec. 588 of the Code has touched sec. 15 of the Letters Patent, 1865, has never, that I am aware of, been considered until now.

27. I do not desire to discuss this subject any further. I entirely agree with the manner in which Mr. Justice Subramanya Ayyar has expressed himself in the words I have quoted from I. L. R. 20 Mad. 407, and I have no doubt that we are bound to follow to the fullest extent the opinion expressed by their Lordships of the Privy Council that sec. 588 of the Code does not apply to the case now before us and that this matter has thus become settled law.

28. I confess, however, to have had some doubt whether the order under sec. 522 of the Code refusing the application to set aside the award is a judgment within the terms of sec. 15 of the Letters Patent and whether the appeal before us has not been prematurely made. Sec. 522 declares that after such an order "the Court shall proceed to give judgment according to the award and that upon judgment so given a decree shall follow."

29. This appeal has been preferred before judgment and decree on the case and it seems therefore to have been somewhat premature. This, however, is after all a mere matter of form; the question is whether the order is a judgment within sec. 5 of the Letters Patent, 1865. The order is so far final that judgment must follow on it on the terms of the award and it so far concludes the rights of the parties in the suit. So far therefore, as held in Hurrish Chunder Chowdhry's case, it is a judgment within the meaning of sec. 15 of the Letters Patent. There are other cases to the same effect to which I might refer but this is unnecessary.

30. On the merits of this appeal I agree with the judgment of my Lord the Chief Justice just delivered.

Ameer Ali, J.

31. After the well reasoned judgments just delivered it only remains for me to express my entire concurrence with them.

32. I only wish to observe that where the Legislature intended to give finality to an order whether made by a single judge of a High Court established by Royal Charter or by any other judge it has declared so in explicit terms. The effect, therefore, of according to the objection taken by the learned counsel for the Respondent would be to cut down by implication the provisions of cl. 15 of the Letters Patent, which I think would be against all principle, for a right or power vested by Statute can be taken away or divested only by express enactment and not by mere suggestion based upon inferences. In my opinion sec. 588 of the CPC applies only to orders made by Subordinate Courts which derive their

powers from the Code. The CPC is applicable to the Original Side of the High Court in so far as the procedure is concerned, and some of its provisions have no doubt had the effect of curtailing the right of appeal by giving finality to certain orders of a judge exercising simply the Ordinary Original Civil Jurisdiction of the High Court. In other words it lays down a uniform procedure for all Courts of Original Civil Jurisdiction, including the High Court on its Original Side. But the powers of the High Court are not derived from the Code and consequently an order of a judge of the High Court exercising its Original Civil Jurisdiction though made in accordance with the procedure laid down in the Code can hardly be said to be made "under the Code." Besides sec. 589 of the Code indicated, to my mind, that the preceding section was applicable only to the orders of Subordinate Courts. Another argument advanced on behalf of the Respondent requires some attention, It was contended that it would be anomalous to give a right of appeal from every order of a judge of the High Court exercising singly its Ordinary Civil Jurisdiction whilst restricting that right in the case of orders made by Subordinate Courts. To my mind the anomaly suggested is hypothetical. In the first place only such orders of a judge of this Court are appealable under cl. 15 as fall within the category of "judgments." In the second place many of the orders of Subordinate Courts not appealable under sec. 588 are subject to revision under sec. 622 of the Code. And as this section is not applicable to the High Court, the Legislature, it seems to me, has advisedly left untouched the provisions of cl. 15. Apart therefore from the express ruling in the case of *Hurish Chunder Chowdhry v. Kali Sunderi Debi* I. L. R, 9 Cal. 482, 494; L. R, 10 I. A. 4 (1882)., I am of opinion that the objection is untenable. The Madras and Allahabad High Courts have tried to restrict the decision of their Lordships on the point in question to what is called "the facts" of the particular case. I am not prepared to adopt either the reasoning or follow the views expressed by the learned judges. The scope of their Lordships' decisions must be understood by the light of the contention raised before them.

33. As regards the contention that the order appealed against is not a "judgment" within the meaning of cl. 15, it must be remembered that it was made under sec. 521 of the Code, which provides the different grounds on which (and no other) an award shall be set aside, one being the corruption or misconduct of the arbitrators or umpire. And it decides the merits of the question between the parties by determining the right of the Appellant to have the award set aside on the ground of the misconduct of the arbitrators. Sec. 522 does not affect the character of the decision under sec. 521, for the judgment under sec. 522 follows as a matter of course when the right of the party questioning the award is one determined or adjudicated. The order therefore falls strictly within the definition of the word "judgment" in cl. 15 given by Couch, C. J., in the case of *The Justices of the Peace of Calcutta v. Oriental Gas Co.* 8 B. L. R. 433, 452 (1872).

34. I agree therefore in holding that the present appeal is maintainable. As regards the merits of the case it seems to me difficult to say that the view taken

by Mr. Justice Sale is incorrect. It is possible that the arbitrators acted somewhat unreasonably in cancelling the date fixed on the 3rd of January and taking up the case on the evening of the 7th. That evening, however, nothing was done in consequence of the protests of the Appellants, and the arbitrators appointed next morning to proceed with the arbitration. On the 8th neither the Appellants nor their attorney appeared and the case was again adjourned. On that same date Mr. Rutter, attorney for the Appellant, wrote to the arbitrators the letter to which attention has already been called. No step was taken to obtain an adjournment from the arbitrators or to represent to them in a proper spirit that the hasty manner in which they were proceeding prejudiced the Appellants and that they, the Appellants, required more time to get themselves ready. Had the arbitrators refused to accede to such an application, matters might have stood on a different footing but in the face of Mr. Rutter's letter it is difficult to say that the learned judge in the Court below is wrong in holding that the Appellants had failed to make out a sufficient case for setting aside the award. I therefore agree in dismissing the Appeal No. 10 of 1898.