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defendant as a trespasser for a declaration of right. The decree of the Court below is reversed, and the suit is dismissed with costs in all Courts.

PETHERAM, C. J.—I concur.

Appeal allowed.

1885
December 14.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.

MUHAMMAD ABID AND ANOTHER (PLAINTIFFS), *v.* MUHAMMAD ASGHAR (DEFENDANT).*

Arbitration—Agreement to refer not providing for disagreement of arbitrators—Appointment of umpire by Court—Award by umpire and one arbitrator—Decree in accordance with award—Appeal—Civil Procedure Code, ss. 508, 509, 511, 523—*Application to set aside award—Act XV of* 1877 (*Limitation Act*), *sch.* ii, *No.* 158.

In an agreement to refer certain matters to arbitration, which was filed in court under s. 523 of the Civil Procedure Code, and on which an order of reference was made by the Court, no provision was made for difference of opinion between the arbitrators, by appointing an umpire, or otherwise. The arbitrators being unable to agree upon the matters referred, the Court, on the application of one of them, appointed an umpire, and directed that the award should be submitted on a particular date. An award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court, which passed a decree in accordance with its terms. On appeal by the defendant in the case, the District Judge reversed the decree.

Held that an appeal would lie to the Judge from the decree of the first Court, where there had been no legal award, such as the law contemplated. *Lachman Das* v. *Brijpal* (1) referred to.

Held that, in the present case, there had been no legal award such as the law contemplated, inasmuch as the agreement to refer gave the Court no power to appoint an umpire, and required that the award should be made by the arbitrators named by the parties.

Held that s. 509 and the other sections preceding s. 523 of the Civil Procedure Code, relating to the power of the Court to provide for difference of opinion among the arbitrators, were only made applicable to cases coming under s. 523, so far as their provisions were consistent with the agreement filed under that section.

Held also that the defendant was not precluded from appealing to the Judge from the first Court's decree because he had not applied to set aside the award within the ten days allowed by art 158, sch. ii of the Limitation Act, inasmuch as that article applied to applications referred to in s. 522 of the Civil Procedure

* Second Appeal No. 191 of 1885, from a decree of E. B. Thornhill, Esq., District Judge of Jaunpur, dated the 21st November, 1884, reversing a decree of Maulvi Nasr-ul-la Khan, Subordinate Judge of Jaunpur, dated the 31st March, 1884.

(1) I. L. R., 6 All., 174.

Code, *i. e.*, applications to set aside an award on any of the grounds mentioned in s. 521, and the defendant did not contest the award on any of those grounds. 1885

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THE facts of this case are stated in the judgment of the Court.

Mr. *C. H. Hill* and Shah *Asad Ali*, for the appellants.

Mr. *T. Conlan* and Pandit *Ajudhia Nath*, for the respondent.

PETHERAM, C.J., and OLDFIELD, J.—This is a case coming under s. 523 of the Civil Procedure Code.

The plaintiff applied in writing to the Court of the Judge of Jaunpur to file an agreement entered into by him and the defendant to refer certain matters to arbitration. The agreement is dated the 27th August, 1879, and the application was presented on the 17th August, 1883.

This application was numbered and registered as a suit, as required by the section; and notice was given to the parties to show cause why the agreement should not be filed. The defendant filed some objections, which were disallowed; and the Court made an order of reference, as required by the section, to the two arbitrators named in the agreement.

By this agreement only two arbitrators were named, and no provision was made for difference of opinion, by appointing an umpire, or otherwise. It appears that one of the arbitrators applied to the Court to appoint an umpire, as the arbitrators could not agree; and the Court did appoint an umpire, and directed that the award should be submitted on the 17th March, 1884.

The defendant, on the 14th March, 1884, objected to the umpire appointed by the Court; and no notice would appear to have been taken of the objection; and an award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court on the 15th March, 1884.

Some objections were filed to it by the defendant, on the 27th March, which were disallowed; and the Court passed a decree in conformity with the award. The defendant then appealed to the Judge, who reversed the decree, on the ground that the award was illegal, inasmuch as it was not consistent with the agreement for the Court to appoint an umpire, or for the award to be made by the umpire and one only of the arbitrators named.

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In appeal by the plaintiff, it has been urged that no appeal lay to the Judge, and that the defendant was precluded from appealing, inasmuch as he had not applied to set aside the award within the ten days allowed by art. 158 of the Limitation Act, and that it was within the power of the Court to appoint an umpire, and for the umpire and one arbitrator to make the award.

We think the appeal must fail. An appeal will lie to the Judge from the decree of the first Court with reference to the Full Bench ruling of this Court to which the Judge refers (1), where there has been no legal award such as the law contemplates; and this is the case here, as it seems to us that the agreement gave the Court no power to appoint an umpire, and required that the award should be made by the two arbitrators named by the parties.

It has been contended that s. 509 of the Civil Procedure Code gives the Court a power to provide in the way it did for difference of opinion among the arbitrators; and we were also referred to s. 508.

But s. 509 and the other sections preceding s. 523 are only made applicable to cases coming under s. 523 (like the one we are dealing with,) so far as their provisions are consistent with the agreement filed under s. 523.

The terms and intentions of the agreement itself must therefore be looked to, to see if s. 509 or s. 511 could be properly applied in this case; and we think they could not, as no implied power to appoint an umpire can be gathered from the agreement of the parties, which appears to have been that the two arbitrators named by them should alone and in consultation arbitrate between the parties, by coming to some unanimous decision upon the matters referred. There will be therefore no legal award in this case.

We do not think that there is any force in the plea that the defendant-respondent is precluded from contesting by way of appeal the decree of the first Court, because he did not apply to the Court to set aside the award within the time allowed by art. 158 of the Limitation Act.

This article applies to applications under the Civil Procedure Code to set aside an award, that is, to applications referred to

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in s. 522, which are those to set aside an award on any of the grounds mentioned in s. 521.

The defendent, in appeal, however, does not contest the award on any of those grounds.

His objection is that the persons who made the award had no power at all to make it; and there was, in consequence, no legal award; and he questions the legality of the procedure. Whether or not the defendant would be precluded in appeal from making objections on any of the grounds mentioned in s. 521, because he had not applied to set aside the award on those grounds within the time allowed by the Limitation Act for making the application, is a question we need not determine, as it does not arise here; but there is nothing with reference to the Limitation Act to prevent him from raising the question he now does.

A long argument was addressed to us by Pandit *Ajudhia Nath* on behalf of the defendant, that the plaintiff-appellant's application to file the agreement was itself barred by limitation under art. 178 of the Limitation Act; but taking the view here taken, that the appeal fails, it is unnecessary to discuss it.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

1885 *December* 14.

GOPAL DAI (PLAINTIFF) v. CHUNNI LAL (DEFENDANT)*

Execution of decree—Attachment of property—Payment into court of money due under decree—Civil Procedure Code, s. 295—Assets realized by sale or otherwise.

G and *C* held decrees against *B*, and took out execution of them, and the judgment-debtor's property was attached, but no sale took place. The judgment-debtor paid into court the sum of Rs 1, 200 on account of *G's* decree.

Held that *G* was entitled to the sum of Rs. 1,200 paid into court by the judgment-debtor, and it could not be regarded as assets realized by sale or otherwise in execution of a decree, so as to be rateably divisible between the decree holders under s. 295 of the Civil Procedure Code, inasmuch as it could not be said that there was a realization from the property of the judgment-debtor.

Purshotamdass Tribhovandass v. *Mahanant Surajbharthi Haribharthi* (1) approved.

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* Second Appeal No. 1663 of 1884, from a decree of Babu Pramoda Charan, Judge of the Small Cause Court, Agra, exercising the powers of a Subordinate Judge, dated the 26th August 1884, affirming a decree of Lala Baij Nath, Munsif of Agra, dated the 9th May, 1884.

(1) I. L. R., 6 Bom., 588.