

1924.

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 HANAM-  
GOWDA  
SHIDGOWDA  
v.  
IRGOWDA  
SHIDGOWDA.
 

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Court was right in its conclusion that the adverse possession of the defendant really commenced in March 1908 when he took possession of the mortgaged property. This conclusion appears to work out a just result namely that the defendant who has paid the mortgage amount to the mortgagee will be able to recover his mortgage amount and the property will go to the rightful owner, the adopted son.

We, therefore, reverse the decree of the lower Court and pass a decree in favour of the plaintiff, directing that he should pay Rs. 1,100 to the defendant within six months, and on his paying that sum the defendant should hand over possession of the properties in suit free from all incumbrances. The plaintiff to pay half the costs of the defendant in the lower Court, and to get the costs of the appeal here from the defendant. If such payment is not made in six months, the plaintiff shall be debarred from all right to possession of the property on the decree being made final.

*Decree reversed.*

R. R.

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 APPELLATE CIVIL.
 

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*Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and  
Mr. Justice Fawcett.*

LAXMAN BABURAO SONAR AND OTHERS (ORIGINAL DEFENDANTS),  
APPELLANTS v. RAMCHANDRA RAJARAM SONAR (ORIGINAL PLAINTIFF), RESPONDENT<sup>2</sup>.

1924.

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 June 27.
 

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*Civil Procedure Code (Act V of 1908), Schedule II, Paras. 11, 16—Special Case—Statement permitted only on question of law—Award—Pronouncement of judgment thereon—Indian Limitation Act (IX of 1908), Schedule I, Article 158.*

The scope of the special case contemplated under Para. 11 of the Second Schedule, Civil Procedure Code, 1908, is limited to questions of law.

<sup>2</sup>Appeal from Order No. 10 of 1922.

1924.

LAXMAN  
BABURAO  
v.  
RAMCHANDRA  
RAJARAM.

*Held*, per *Shah, Ag. C. J.*, that the Court should not pronounce judgment according to the award immediately on delivering its opinion on a special case so stated, but should give to the parties the necessary period in which to file their objections, as contemplated by Article 158 of the Indian Limitation Act, 1908, after the award is complete.

APPEAL against the order passed by J. N. Kale, First Class Subordinate Judge of Ahmednagar.

The facts material for the purposes of this report and the arguments of counsel, are sufficiently stated in the judgment of the Acting Chief Justice.

*Coyajee*, with *G. V. Bhandarkar*, for the appellants.

*Thakor*, with *D. C. Virkar*, for the respondent.

SHAH, AG. C. J.:—It is necessary to state a few facts for the purposes of this appeal. A suit for partition was filed by Ramchandra in April 1916. On July 29, 1918, this matter was referred to arbitration through the Court. Apparently the arbitrators could not agree, and we have on the record a report of one of the arbitrators, dated June 4, 1919. Then the matter was referred to an umpire. He made his first award apparently on November 29, 1920, but the Court remitted the matter for reconsideration to him on the same day. On October 7, 1921, he prepared an award with the statement of a special case for the opinion of the Court. In that statement of the case the following three questions were stated by the umpire:—

1. Does plaintiff prove that the ornaments mentioned in the plaint are in the possession of the defendants and whether the same are joint ?

2. Does defendant prove Rajaram was handed over ornaments worth Rs. 40,011 in 1895 ?

3. Does defendant prove that ornaments worth Rs. 10,500 or of any less sum are with the plaintiff still to which the defendant is entitled ?

The learned Judge considered that it was doubtful whether the award was in proper form of a special case within the meaning of the paragraph 11 of the Second Schedule of the Civil Procedure Code. He thought that the umpire should have expressed it in more precise and clearer language. The result was that the award was remitted to the umpire in order that he may either himself determine the point left undecided or he may state his award on that point in the Form of a special case for the opinion of the Court under paragraph 11 of the Second Schedule. If he still thought that the question of ornaments should not be decided by him but should be stated as an award in the form of a special case, leave was granted to him to do so. This order was made by the Court on November 7, 1921. Ultimately the umpire stated the special case for the opinion of the Court on November 16, 1921. That statement is to be found at pages 36 and 37 of the paper book. It is enough to state that the questions for the opinion of the Court remained practically as they were stated before.

The learned Judge after hearing the parties decided the questions which were stated for his opinion on November 30, 1921. The reasons for this opinion are stated at length in the judgment which he delivered on that day, and he at once proceeded to pass a decree in terms of the award as completed by his opinion.

Defendants Nos. 1—3 have appealed to this Court from this order of November 30, 1921. Two points have been urged in support of this appeal. First, it is contended that on a proper interpretation of paragraph 11 of the Second Schedule, the points for the opinion of the Court must be points of law, and not of fact. The questions referred to the Court for opinion being questions of fact, it is urged that the special case stated to the Court for its opinion under paragraph 11 was not

1924.

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LAXMAN  
BABUBAO  
v.  
RANCHANDRA  
RAJARAM.

1924.

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LAXMAN  
BABURAO  
v.  
RAMCHANDRA  
RAJARAM.

competent. Secondly, it is urged that in any case the lower Court should have given time to the appellants to file their objections to the award as finished on November 30, as contemplated by paragraph 16 of the Schedule, and as provided in Article 158 of the Indian Limitation Act, Schedule I.

As regards the first point, it is urged that the Form of the special case given in the Appendix to this Schedule, (Form No. 4) indicates that the questions to be stated in the form of a special case should be questions of law, and a reference is made to paragraph 23, according to which the forms set forth in the Appendix with such variations as the circumstances of each case require are to be used for the respective purposes there-in mentioned. It is further urged that so far as the present point is concerned paragraph 11 substantially corresponds to section 7, clause (b) of the English Arbitration Act of 1889, 52 & 53 Vict. c. 49. That section provides that the arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power, among other things, to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court. It is contended that under this section of the English Statute, the special case has been held to mean a statement relating to questions of law for the opinion of the Court. It is urged that if that is the meaning of the expression "special case" used in the English Arbitration Act, and if paragraph 11 of the Second Schedule of the Civil Procedure Code is enacted for the purpose practically in the same terms as section 7 of the English Act, the same meaning should be put upon that expression, and that the scope of the special case contemplated under paragraph 11 should be limited to questions of law. Our attention has not been invited in the course of the argument to any Indian decision on the point.

1924.

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 LAXMAN  
 BABURAO  
 v. SRI  
 RAMCHANDRA  
 RAJARAM.
 

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On behalf of the respondent-plaintiff it is urged that though the Legislature has expressly provided in section 10 of the Indian Arbitration Act IX of 1899 that the special case shall be stated on questions of law, there is no such limitation in the wording of paragraph 11 of Schedule II of the Code, and that the Court should not read these words of limitation in the Statute when the Legislature has not thought it proper so to limit the scope of the rule. It is further urged that the indication afforded by the form cannot be taken as decisive of the point, and that it should not be used even as indicating that the scope of the rule contained in paragraph 11 is limited to questions of law. It is also pointed out that under Order XXXVI, Civil Procedure Code, which contains rules about special cases to be stated by the parties for decision of the Court, there is an express reference to questions of fact and of law. It is urged that that is the meaning which should be put upon the expression "special case" occurring in paragraph 11 of the Second Schedule.

After a careful consideration of the arguments on both sides, I have come to the conclusion that the scope of paragraph 11 is really limited to questions of law. It is true that it is not expressly stated in this paragraph that the statement of the special case must relate to questions of law; but it seems to me that sufficient indication in this direction is given as to the scope of this rule by the wording of the Form No. 4 of the Appendix to this Schedule which expressly refers to questions of law to be stated for the opinion of the Court.

Further it seems to me that this expression when used with reference to arbitration has been understood in that sense so far as the English Statute is concerned. That is clearly indicated in the remarks at pages 142 and 143 in Russell on Arbitration and Award, 10th Edn.,

1924.

LAKMAN  
BARURAO  
v.  
RAMCHANDRA  
RAJARAM.

hearing on this clause of section 7 of the English Arbitration Act. The decision in *North and South Western Junction Railway Co. v. Assessment Committee of the Brentford Union*<sup>(1)</sup> supports the appellants' contention. The following observations of Lord Halsbury appear to me to be material to our present purpose :—

"But the case as stated in each of the alternative propositions suggests to your Lordships for decision questions of fact, and even suggests the question which of two alternative methods is the best for arriving at the conclusion of fact. My Lords, no Court has ever given directions in such a case. As the Master of the Rolls said, when the process by which the conclusion has been arrived at has been set forth the Courts have decided whether or no the process so adopted was in accordance with or against the provisions of the Statute. I asked the very learned counsel who argued the question whether he could point to a single instance where a Court had given directions as to the preferable course when it was admitted that neither course was in itself contrary to law...

I am therefore of opinion, my Lords, that your Lordships should avoid establishing a precedent which has never, I believe, hitherto been adopted, namely of giving directions to the arbitrator how he should arrive at the fact."

In that case the matter was remitted to the arbitrator and the Court declined to express any opinion upon the question stated for the opinion of the Court. This decision was in the year 1888. But the provision contained in section 7 (b) of the English Arbitration Act is in substance a reproduction of the provision which was then in force (see 17 & 18 Vict. c. 125, s. 5).

That is the interpretation of this expression under the English Statute. The clause we have to construe is enacted for the same purpose. Having regard to the indication given by the Legislature by the wording of the form given in the Appendix to Schedule II of the Code, it is fair to put the same interpretation upon the expression "special case" within the meaning of paragraph 11 of the Schedule II of the Code. It may be mentioned that the corresponding section 517 in the

(1) (1888) 13 App. Cas. 592.

Code of 1882 was almost in the same words, but there was no form in that Code such as we have in the Code of 1908.

No doubt the consideration urged on the other side is that the specific words used in section 10 (b) of the Indian Arbitration Act are not to be found in this paragraph 11 of the Second Schedule, and that the Court should be slow to read words in a statutory provision which are not there. I have given due weight to this consideration; and I recognise its force. But I am unable to think that the wording of paragraph 11 was intended to have a more comprehensive scope than clause (b) of section 10 of the Indian Arbitration Act. The express reference to questions of fact or law in Order XXXVI, Rule 1, does not appear to me to present any difficulty. In fact it affords an indication, if at all, that the scope of paragraph 11 is limited in the sense contended for by the appellants. If the reference to the Court was to be on questions of fact and law, the Legislature would have expressly said so, and where the purpose of the reference to arbitrators is to have the questions decided by the arbitrators, it does not seem to have been contemplated by the Legislature that the arbitrators could really refer back the matter on questions of fact to the Court for the opinion of the Court. Paragraph 11 is clearly intended to meet a class of cases in which any question of law which the arbitrator or umpire may feel himself unable to decide can be referred to the Court for its opinion with the leave of the Court. I am, therefore, of opinion, after a consideration of the arguments, that the special case stated for the opinion of the Court went beyond the scope of paragraph 11 of the Second Schedule, and that it was not open to the Court to decide questions of fact raised by the umpire. It was for the umpire to decide them. •

1924.

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LAXMAN  
BABURAO  
v.  
RAMESHCHANDRA  
RAJARAM.

1924.

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 LAXMAN  
 BABURAO  
 v.  
 RAMCHANDRA  
 RAJARAM.

As regards the second point, it appears to me that the award would be completed when the Court would express its opinion upon the case submitted to it for opinion. Until then there was no complete award, and the parties were not called upon to file their objections, if any, to the award, until that was done. It was not open to the Court to direct on that very day, i.e., on November 30, that a decree should be passed in terms of the award. The parties should have been given the necessary period contemplated by Article 158 after the award was complete. That was not done and it seems to me that the second objection urged on behalf of the appellants is good. It is, however, immaterial having regard to the view which we take of the first point. The question as to what order we should make under the circumstances is not easy. This arbitration has been allowed by the Court to take a very leisurely course. The umpire has taken considerable time over the matter and has even expressed his inability to decide certain questions in his statement of the case. The Court cannot compel the umpire to decide them. But on the whole I think that we should remit the matter to the umpire so that he may have an opportunity of completing the award.

The result is that we set aside the order made by the learned Judge on November 30, 1921, and remit the matter to the umpire. We allow one month's time to the umpire from the date when he receives the papers back to complete the award. The appellants to have their costs here and the costs in the lower Court in connection with these proceedings.

FAWCETT, J.:—I agree. I think that special weight must be attached to the form of special case provided in the Appendix to the Second Schedule of the Civil Procedure Code. That form is copied almost word for

word from the form of special case appended to the Second Schedule of the Indian Arbitration Act, and having reference to section 10, clause (b) of that Act under which a special case is confined to questions of law. There is no such form appended to the English Arbitration Act of 1889, and there was no such form appended to the Code of 1882, so that it is obvious that the form was copied from that appended to the Indian Arbitration Act, as already mentioned. That form is put in a way which clearly contemplates nothing but questions of law being submitted for the opinion of the Court, in contradistinction to the facts which have to be first stated by the arbitrator; and if the Legislature had intended that questions of fact might be raised in a special case, I think the form would not have been put in that positive form. The forms can be looked at as a useful guide to interpreting a doubtful expression in an Act, as was done, for instance, by the Privy Council in *Futteh Chund Sahoo v. Leelumbar Singh Doss*<sup>(1)</sup>. I think also that, as this paragraph 11 is obviously based on the corresponding enactment in section 7 of the English Arbitration Act, and reproduces it practically word for word, with the addition of the words "with the leave of the Court", it must be taken that the Legislature had regard to the practice of the English Courts under which such special cases are confined to questions of law. The whole basis of arbitration is that the arbitrators should themselves decide the questions referred to them. But it is recognised that they should be allowed the assistance of experts who have special knowledge in regard to matters of science, etc., and the whole object of allowing arbitrators to state a special case for the opinion of the Court is that they may have the benefit of the Courts' explicit decision on questions of law or

1924.

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LAXMAN  
FABURAO  
v.  
RAMCHANDRA  
RAJARAM.

<sup>(1)</sup> (1871) 14 Moo. I. A. 129.

1924.

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LAXMAN  
BABURAO  
v.  
RAMCHANDRA  
RAJARAM.

that the award should be made dependent on the opinion of a Court on these legal questions arising. The case of *Jephson v. Howkins*<sup>(1)</sup>, cited in Russell on Arbitration and Award, 10th Ed., p. 140, is an instance where the Court objected to the arbitrator leaving it to the Court to draw inferences of fact. It was there held that this was not a proper exercise of the duties entrusted to them, as, having heard the evidence and seen how it was given, the arbitrators should have drawn the inferences of fact. Still more should an arbitrator, who has actually taken the evidence, decide the questions of fact that arise, however difficult they may be, and it is quite outside the proper scope of arbitration for the arbitrator to put on the Court the responsibility of deciding such questions of fact. It really takes the case from the hands of the arbitrator to whom the parties have confided the decision by the reference to him. The Court clearly has no jurisdiction in the matter while this reference remains in force. The umpire is, according to our information, still available, and therefore, there seems to be no alternative but to do what the Subordinate Judge should have done, that is, to have refused to act upon this so-called award upon a special case, and returned the case to the umpire to decide it himself. I agree, therefore, in the order proposed by the learned Chief Justice.

*Order set aside.*

J. G. R.

<sup>(1)</sup> (1841) 2 M. & Gr. 366.

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