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jurisdiction, namely, to try the summary case initiated by the application of the petitioner.

Then with reference to the ground upon which the Lower Court has held that s. 108 of the Code is inapplicable to this case, it is, I think, enough to say that when by s. 234 of the Code, the *ex-parte* decree is binding on the legal representatives of the deceased defendant, and when the opposite party has taken out execution proceedings against the petitioner as the legal representative of the deceased defendant, there can be no valid reason why the petitioner should be deprived of the remedy prescribed by s. 108, which may be the only remedy available to him against the *ex-parte* decree. It is true s. 108 speaks of the defendant applying to have the *ex-parte* decree set aside ; but it is no unreasonable straining of language to say that the defendant there includes the legal representative of a deceased defendant. I must, therefore, respectfully dissent from the view taken by the learned Judges of the Allahabad High Court, who decided the case of *Janki Prasad* v. *Sukhrani* (1).

S. C. G. *Rule made absolute.*

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Rampini and Mr. Justice Gupta.

1901
Sept. 4.

RAM NARAIN ROY . . . . . PLAINTIFF,

v

BAIJ NATH MALLA . . . . . DEFENDANT.*

Award—Application to set aside award—Limitation Act (XV of 1877) Art. 158—Arbitrators, misconduct of—Civil Procedure Code (Act XIV of 1882) s. 521.

An application to set aside an award on the ground that three out of five arbitrators were not present at the time the award was made and did not sign the award, although it purported to have been signed by all of

* Appeal from Order No. 114 of 1900, against the order of Babu Bepin Behari Mukerjee, Subordinate Judge of Mozufferpur, dated the 14th March, 1900, reversing the order of Moulvie Abdul Jabbar, Munsif of Madhubani, dated the 7th August 1899.

(1) (1899) I. L. R. 21 All. 274.

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them, is governed by Art. 158 of the Limitation Act (XV of 1877).

There was misconduct on the part of the arbitrators within the meaning of s. 521 of the Civil Procedure Code.

Muhammad Abid v. *Muhammad Asghar* (1) distinguished.

THIS suit was instituted for the recovery of a small amount of rent.

The parties went to arbitration and the arbitrators made their award and submitted their decision on the 26th of July 1899. After the lapse of twelve days from their doing so the present respondent objected to the award on the ground that it had really been signed by only two of the arbitrators and that the remaining three had not been present, when the award was made, and had not signed the award at all. The Munsif of Madhubani rejected this objection as barred under Art. 158 of the Limitation Act. The Subordinate Judge, on appeal, set aside the Munsif's decree holding that the said award was not an award, and therefore Art. 158 had no application and remanded the case to the Munsif to be tried on the merits. There was then an appeal by the plaintiff to the High Court, and by reason of a difference of opinion between Mr. Justice RAMPINI and Mr. Justice GUPTA the appeal was referred to the learned Chief Justice under the provisions of s. 575 of the Civil Procedure Code.

Babu Digambar Chatterji for the appellant.

Babu Satish Chunder Ghose for the respondent.

MACLEAN C. J. This case comes before me under s. 575 of the Civil Procedure Code by reason of a difference of opinion between Mr. Justice RAMPINI and Mr. Justice GUPTA.

The suit was a suit for recovery of a small amount of rent. The parties went to arbitration : the arbitrators made their award and submitted their decision on the 26th July 1899. On the 7th of August 1899, the defendant presented a petition asking to have the award set aside on various allegations, and those allegations, if true, amount to serious misconduct on the part of the arbitrators.

(1) (1885) I. L. R. 8 All. 64.

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The Munsif held that the applicant was out of time. Then there was an appeal to the Subordinate Judge, who held that he was in time and remanded the application to be tried out on the merits. There was then an appeal to this Court with the difference of opinion to which I have referred.

The only question is, whether the application to set aside the award was or was not out of time, and the answer depends upon whether or not the application falls within Art. 158 of the Second Schedule of the Limitation Act. The article runs as follows: "Under the Code of Civil Procedure to set aside an award the period of limitation allowed is ten days from the time, when the award is submitted to the Court." If that article applies the applicant was out of time by two days. It is, however, contended for the respondent that that article does not apply and that it only applies to applications for setting aside an award upon some or one of the grounds stated in s. 521 of the Code, and reliance is placed upon the case of *Muhammad Abid* v. *Muhammad Asghar*, (1), a decision of the Allahabad High Court. It is, however, unnecessary to discuss whether that case, which in its circumstances is very different from the present, applies here, because I am satisfied, after looking at the petition of the defendant to set aside the award, that it was clearly an application to set it aside upon the ground of the alleged misconduct of the arbitrators, a ground stated in s. 521. On reading the petition, that cannot be seriously disputed. In that view the argument of the respondent falls to the ground. The application was clearly an application to set aside the award on the ground of misconduct of the arbitrators. It is true that the petition has not been printed in the Paper Book, but I can refer to it, especially as the learned Judge in the Court below refers to it, and his reference is not an accurate one, for he seems to have thought that the petition only alleged that "three of the arbitrators did not sign the award, although it contained their names and that they took no part in the decision of the suit." A reference to the petition itself shows that it makes many other charges of a grave nature.

On these grounds I think that the application falls within

(1) (1885) I. L. R. 8 All. 64.

Article 158 of the Second Schedule of the Limitation Act, and was consequently out of time.

The decree of the Subordinate Judge is reversed and that of the Munsif restored.

The appellant is entitled to the costs of this hearing, but there will be no costs of the hearing before the two learned Judges, who made the reference.

RAMPINI J. This is an appeal against an order of the Subordinate Judge of Mozafferpur setting aside an order of the Munsif, decreeing a suit in accordance with the award of certain arbitrators to whom the case had been referred under s. 508, Civil Procedure Code. The arbitrators submitted their award purporting to be duly signed by all of them. After the lapse of twelve days from their doing so the present respondent objected before the Munsif to the award on the ground that it had really been signed by only two of the arbitrators, and that the remaining three had not been present when the award was made and had not really signed it. The Munsif rejected this objection as barred under Art. 158 of the schedule to the Limitation Act, which prescribes a period of ten days for preferring an objection to an award. The Subordinate Judge on appeal set aside the Munsif's decree. He held the award was not an award, and that, therefore, the provisions of Art. 158 of the Limitation Act had no application. The party, in whose favour the award was made, now appeals.

It seems to me the Subordinate Judge has taken a mistaken view of the matter. The award is *prima facie* a legal and valid award, though it is impugned as irregular and illegal. But the award purports to be signed by all the five arbitrators, to whom the case was remitted, and there is nothing on the face of it to show that it is not what it purports to be, *viz.*, a perfectly good and valid award. It has been acted on as an award, and a decree given in accordance with it. It is, however, said that three of the arbitrators were not present at the time the award was made and that they did not affix their signatures to it. If the respondent had made these allegations within the time allowed him by the Legislature for the purpose, the Munsif would have enquired

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into the matter and an appeal might have lain from his order. But the respondent did not choose to apply to the Munsif in time and his right to demand an enquiry would seem to be gone, and there is therefore nothing to show that the award is other than what it purports to be.

The Subordinate Judge says the award is not an award, but only "a piece of forged document." This seems to me to be begging the question. This is unquestionably a mere assumption on the part of the Subordinate Judge. The objection of the respondent may or may not be well founded, but there is nothing on the record on which it can be held that the award is other than a legal one or anything but a perfectly good and valid award.

The pleader for the respondent goes further than the Subordinate Judge, and says this award is nothing but "a piece of plain paper" and that the Article of the Limitation Act applicable is Art. 120, which allows six years for "*suits* for which no period of limitation is provided elsewhere in the schedule." But the award is, in my opinion, not a mere piece of plain paper and the application of the objector is not a suit; so Art. 120 of the Limitation Act cannot apply. I see no article that can be applied to the case except Article 158.

I am further of opinion that, even if the allegations of the objector be true, the award will still be an award, for it is admittedly signed by two of the arbitrators, so that it can neither be regarded as wholly a forgery, or entirely a piece of plain paper. It is unquestionably an award of at least two of the arbitrators. If the other three were not present at the making of the award, and did not sign it, there would be misconduct within the meaning of s. 521 on the part of all the arbitrators. But this would not make the award anything but an award. But as the award is *prima facie* a legal award, and is not shown to be anything else, it is unnecessary to consider this question any further.

The Subordinate Judge has relied on the case of *Muhammad Abid* v. *Muhammad Asghar* (1), in which it has been held that Art. 158 does not apply to an illegal award. With reference

(1) (1885) I. L. R. 8 All. 64.

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to that case it is sufficient for me to say that the facts of it are clearly distinguishable from those of the present. In that case the award had been signed by only one of two arbitrators and by an umpire, who had not been legally appointed. Such an award is *prima facie* an illegal award. No enquiry is necessary to establish this fact. This is a perfectly different case from the award we have now to consider, which is *prima facie* a legal award, and which can only be shown to be illegal, after an enquiry into the allegations of the objector has been made. The objector by his own laches has prevented any such inquiry taking place.

The object of the Legislature in allowing so short a period for the preferring of objections to awards would seem to me to meet a case such as the present. Litigants may be very willing to have their cases referred to the decision of arbitrators, whom they regard as amicably disposed towards them, but the moment the arbitrators decide against them they do their utmost to resile from their agreement and to set aside the award. The Legislature has framed Art. 158 of the Limitation Act with the object of discouraging and preventing such discreditable attempts. If the provisions of Art. 158 are loosely interpreted, and if an award is to be held not to be an award simply because any sort of *unsubstantiated* objection is made against it, then the object of the Legislature will be defeated and the provisions of Art. 158 will be practically erased from the Statute Book.

For these reasons, I would decree this appeal with costs, but as my learned brother GUPTA does not agree, the case must be laid before the Hon'ble Chief Justice for reference to a third Judge.

GUPTA J. I much regret that I am unable to agree with my learned brother Mr. Justice RAMPINI in this case. I am of opinion that Art. 158 of the Limitation Act has no application in the case of an award, which is a forged document, or which is not signed by all the arbitrators appointed by the Court. Such an award is no award, but only a nullity in the eye of the law. Therefore there is no award to be "set aside" within the meaning of Art. 158. No decree can be based on such

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an award, and, if the fraud or alleged fraud is brought to the notice of the Court before a decree has been actually passed, the Court is bound to enquire. If the fraud is discovered after a decree has been passed the remedy would be by an application for review or by separate suit to set aside the decree on the ground of fraud within the period of limitation prescribed for such application or suit.

It was held in *Muhammad Abid* v. *Muhammad Asghar* (1) that Art. 158 of the Limitation Act applies only to applications to set aside an award on any of the grounds mentioned in s. 521 of the Civil Procedure Code. It may also be conceded that an award is not reversible except under s. 521. But this pre-supposes that the award is an award of the arbitrators appointed by the Court and must therefore be signed by them. The Munsif's order on the order sheet shows that 12 days after the receipt of the award in Court the defendant put in a petition alleging that three of the five arbitrators (which three were named) "were not present at the time of making the award and their signatures on the award were not made by them." The Munsif admitted that the application was not one falling under s. 521, but rejected it on the following grounds : "I am not called upon to call in question the genuineness of the signatures" and "further the objection should have been made on the 5th instant." The same day he decreed the suit in accordance with the terms of the award.

The Lower Appellate Court was of opinion that the rule of 10 days' limitation did not apply to this case and decreed the defendant's appeal holding that the "Munsif was wrong in refusing to hear the objection of the defendant" and remanded the case "for trial of the objection preferred by the defendant."

There is no reported case exactly in point. But by way of analogy I may refer to the case of *Malkarjun* v. *Narhari* (2) in which their Lordships of the Privy Council did not dissent from the principle that, where a judicial sale is null and void *ab initio*, and therefore a nullity in law, the rule of one year's limitation under Art. 12 of the Limitation Act would not apply to a suit

(1) (1885) I. L. R. 8. All. 64. (2) (1900) I. L. R. 25 Bom. 337.

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brought in order to the setting aside of the sale. The Bombay High Court had held that the particular sale in question was a nullity and that Art. 12 had therefore no application. Their Lordships of the Privy Council reversed that finding on the ground that the sale had been held with jurisdiction and was therefore not a nullity.

In the case under consideration the objection taken was that the award was a forgery. If so, it would be a nullity, and I think the Munsif was bound to enquire into the genuineness of the signatures impugned.

For these reasons I am of opinion that the decision of the Lower Appellate Court is correct, and I would dismiss this second appeal preferred by the plaintiff with costs.

S. C. B.

Before Mr. Justice Rampini and Mr. Justice Gupta.

RAMESWAR PROSAD SINGH v. RAI SHAM KISHEN.*

1901
May 28, 29.

Interest—Enhanced rate of interest on failure to pay on due date—Penalty—Contract Act (IX of 1872), s. 74—Mortgage—Compound interest at a rate higher than that of simple interest—Interest at contract rate up to the date fixed by Court for payment of mortgage money—Subsequent interest at rate to be fixed by Court.

A provision in a bond to the effect that the principal should be repaid with interest on the due date, and that on failure thereof interest should be paid at an increased rate from the date of the bond, amounts to a provision for a penalty, and under the terms of s. 74 of the Contract Act, reasonable compensation should be allowed.

Kalachand Kyal v. *Shib Chunder Roy* (1) followed; *Chajmal* v. *Brij Bhukan* (2) referred to.

Stipulation for the payment of compound interest at a rate higher than that of simple interest is a penalty which should not be allowed.

* Appeal from Original Decree No. 328 of 1900, against the decree of Moulvie Abdool Barry, Subordinate Judge of Patna, dated the 31st of May 1900.

(1) (1892) I. L. R. 19 Calc. 392. (2) (1895) I. L. R. 17 All. 511.