

1910.

TREACHER
& Co., LTD.,
v.
MAHOMED-
ALLY ADAMJI
PEERBHOY.

I have considered the question of costs and have come to the conclusion that the defendant must pay to the plaintiffs their whole costs of this suit. Even after the plaintiffs had led their evidence and proved their title, the defendant up to the very last persisted in maintaining that they had no marketable title to their property. I do not think this is a case in which any portion of the plaintiffs' costs should be disallowed.

Attorneys for the plaintiffs: Messrs. *Little & Co.*

Attorneys for the defendant: Messrs. *Bicknell, Merwanji & Romer.*

K. MCI. K.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1910.

August 18.

PURSHOTUMDAS RAMGOPAL, PLAINTIFF AND APPELLANT, v. RAM-
GOPAL HIRALAL AND OTHERS, DEFENDANTS AND RESPONDENTS.*

Arbitration—Statement of special case for opinion of Court—Appeal from order of Court—Civil Procedure Code (Act V of 1908), section 104, and Schedule II, rule 11—Indian Arbitration Act (IX of 1909), section 10.

In a suit filed for partition of joint family property, the parties agreed to refer the matter to arbitration, and a consent order of reference was taken. A similar agreement referred to the same arbitrators questions as to the partition of such immoveable property as was outside the jurisdiction of the Court in the suit.

The arbitrators disagreed on certain points, but, instead of referring their differences (as the agreements of reference authorised them to do) to an umpire, they submitted their own opinions in the form of a special case for the opinion of the Court. In doing so they purported to act under the provisions of the

* Original Suit No. 781 of 1908.
Appeal No. 19 of 1910.

Civil Procedure Code (Act V of 1908), Schedule II, rule 11(1), and of the Indian Arbitration Act (IX of 1899), section 10 (b)(2).

The matter was decided by the Chamber Judge, and an appeal was preferred against the decision.

Held, that no appeal lay.

Inasmuch as the special case was in no sense an award, it did not come within the Civil Procedure Code (Act V of 1908), Schedule II, rule 11(1); but, in so far as it related to the agreement which was not the subject of the Court's order, it fell under the Indian Arbitration Act (IX of 1899), section 10 (b)(2).

SUIT No. 781 of 1903 was filed by the abovenamed plaintiff against his father and brothers for partition of the joint family property, save such as was situate outside the jurisdiction of the High Court. Subsequently, on 9th July 1909, two agreements of reference to arbitration were entered into by the parties. The first related to the matters in dispute in the suit, and the second to the property situate outside the jurisdiction. On 16th July 1909 a consent order was taken in the suit, sanctioning the first agreement as for the benefit of the minor 3rd defendant, and referring the matters to arbitration. All the disputes with regard to the property were thus referred to the arbitration of Messrs. Malvi and Merwanji, two Attorneys of the High Court, with power in case of disagreement to refer to an umpire.

In the course of the arbitration proceedings the question arose as to whether provision should be made for the marriage expenses of the 3rd defendant and for the maintenance and marriage expenses of the 1st defendant's daughter, Ratni, before ascertaining what was joint property for the purposes of partition. The arbitrators were unable to agree on the question,

(1) "Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award."

(2) "The arbitrators or umpire acting under a submission shall, unless a different intention is expressed therein,—

(b) have power to state a special case for the opinion of the Court on any question law involved."

1910.

PURSHOTAM
DAS
RAMGOPAL
c.
RAMGOPAL
HIRALAL.

1910.

PURSHOTUM-
DAS
RAMGOPAL
v.
RAMGOPAL
HIRALAL.

but, instead of referring it to an umpire, they set out the facts and their own opinions thereon and submitted them in the form of a special case for the opinion of the High Court. The case so submitted purported to be a "special case pursuant to the provisions of rule 11, 2nd Schedule of the Code of Civil Procedure, and section 10, clause (b) of the Indian Arbitration Act."

The matter came before Macleod, J., in Chambers, and the learned Judge held that before partitioning the joint family properties a reasonable sum should be set apart for the marriage expenses of the 3rd defendant and a reasonable sum should also be presented to Ratni to be appropriated to her marriage and "Moklava" expenses.

The plaintiff appealed.

Jayakar, with *Selalvad*, for the appellant.

Desai, for the 1st respondent.

Bhandarkar, for the 2nd and 3rd respondents.

SCOTT, C. J. :—The question arises in this case at the outset whether any appeal will lie.

The appeal is preferred against an opinion expressed by the learned Chamber Judge upon a special case stated to him, purporting to be stated in the matter of an arbitration between the plaintiff and the defendants in Suit No. 781 of 1908, pursuant to a Consent Judge's Order of the 16th July 1909 and in the matter of the Indian Arbitration Act, 1899, and an arbitration between Purshotumdas Ramgopal, and Ramgopal Hiralal, Badrinarayan Ramgopal and Keshavdeo Ramgopal, pursuant to an agreement between them, dated the 9th July 1909. The parties to this last-named agreement are the parties to Suit No. 781.

The special case states that the suit was instituted for partition of the properties other than the immoveable properties situate outside the jurisdiction of the Court belonging to the joint family consisting of the plaintiff and the defendants. On the 9th of July 1909 two agreements were entered into between the parties.

Clause 3 of the special case states :—

“By the first agreement the parties agreed *inter alia* to refer to the award, determination and final arbitration of Messrs. Tribhuwandas Narotamdas Malvi and Merwanji Kaikhusro Alpaiwalla, Attorneys of this Honourable Court, to ascertain and determine the moveable properties and assets specified in the said agreement belonging to the said joint family in which the said arbitrators might hold the said Purshotum Ramgopal entitled to the reliefs claimed in the above suit and to effect a partition of the said properties between the parties on the footing that each of them was entitled to an equal one-fourth share therein.”

Clause 4 says :—

“By the second agreement the parties agreed to refer to the award, determination and final arbitration of the said Messrs. Tribhuwandas Narotamdas Malvi and Merwanji Kaikhusro Alpaiwalla to ascertain the properties other than those that may be held by the said arbitrators to be covered by the aforesaid suit and to take necessary accounts in respect thereof, and to effect a partition thereof between the parties on the footing aforesaid.”

Clause 5 states :—

“By a Consent Judge's Order, dated the 16th July 1909, made in the said suit, the said first agreement of reference was declared to be for the benefit of the 3rd defendant and sanctioned, and it was ordered that the matters mentioned in the said agreement of reference be referred to the arbitration of the said arbitrators.”

Then the case proceeds to state certain questions which have arisen as to whether moneys should be set apart for the marriage expenses of certain male and female members of the family and for the maintenance of a girl named Ratni. Clauses 12, 13 and 14 are as follows :—

“12. The arbitrator Tribhuwandas Narotamdas Malvi awards that no sum should be set apart for the expenses of marriage of Keshavdeo, or for the expenses of marriage and ‘Moklava’ and maintenance of Ratni; nor, in the alternative, any sum presented to her which may be appropriated for her marriage expenses.

“13. The arbitrator Merwanji Kaikhusro awards that a reasonable sum should be set apart for the expenses of marriage of Keshavdeo and for the expenses of marriage, ‘Moklava’ and maintenance of Ratni; or, in the alternative, a reasonable sum may be presented to her out of the joint family property which may be appropriated for her marriage expenses.

1910.

FURSHOTUM-
DAS
RAMGOPAL
v.
RAMGOPAL
HIRALAL.

1910.

PURSHOTUM-
DAS
RAMGOPAL
v.
RAMGOPAL
HIRALAL.

"14. The questions of law for the opinion of the Court are whether before partitioning the said joint family properties a reasonable sum should be set apart by the arbitrators out of the said properties :

"(1) To provide for the marriage expenses of the 3rd defendant Keshavdeo, the unmarried son of Ramgopal Hiralal, the 1st defendant, and

"(2) To provide for the maintenance, marriage and 'Moklava' expenses of Bai Ratni, the unmarried daughter of the 1st defendant,

"(3) Or, in the alternative, a reasonable sum may be presented to her which may be appropriated for her marriage and 'Moklava' expenses."

It was necessary to provide for the reference to the arbitrators by the two agreements because owing to want of jurisdiction all the questions between the parties could not be raised in the suit in which the Consent Order was made.

Now, where there is a reference with the intervention of a Court of justice, the provisions of the Indian Arbitration Act do not apply, and the powers of the arbitrators are governed by the 2nd Schedule of the Civil Procedure Code. (See the preamble to the Indian Arbitration Act and section 89 of the Civil Procedure Code.) Therefore, with regard to the arbitration so far as it affects the subject of the suit, the arbitrators could only take the opinion of the Court under rule 11 of Schedule II of the Civil Procedure Code, which provides that upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon and shall order such opinion to be added to and form part of the award. With regard to the other agreement of the 9th of July the provisions of the Indian Arbitration Act apply. The only section of that Act, which gives the arbitrators power to take the opinion of the Court, is section 10 (b), which provides that they shall have power to state a special case for the opinion of the Court on any question of law involved.

It is conceded that if the arbitrators are merely stating a case for the opinion of the Court before they have made an award no appeal lies, as has been decided, in England with reference to section 19 of the Indian Arbitration Act of 1889,

in *In re Knight and Tabernacle Permanent Building Society*⁽¹⁾ and *In re Holland Steamship Company and Bristol Steam Navigation Company*⁽²⁾. It is, however, contended that this special case is an award in the form of a special case which the arbitrators were competent to submit either under rule 11 of the 2nd Schedule of the Civil Procedure Code or section 10 of the Indian Arbitration Act, and that an appeal is expressly provided for by section 104 of the Civil Procedure Code.

With reference to the scope of section 10 (b) of the Indian Arbitration Act, it is material to note that in the English Arbitration Act, upon which the Indian Arbitration Act was based, there are two sections providing for references to the Court by arbitrators, namely section 7 (b), which permits the arbitrators to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court, and section 19, which permits them to state, in the form of a special case for the opinion of the Court, any question of law arising in the course of the reference. It appears to us that the legislature in framing section 10 (b) of the Indian Arbitration Act has deliberately followed the wording of section 19 of the English Act and in framing rule 11 of the 2nd Schedule of the Civil Procedure Code has followed the wording of section 7 (b) of the English Act.

According to the decisions of the Court of Appeal in England in *In re Knight and Tabernacle Permanent Building Society*⁽¹⁾ and *In re Kirkleatham Local Board and Stockton & Middlesborough Water Board*⁽²⁾, an appeal lies from the opinion of the Court expressed upon an award stated in the form of a special case, and that is provided for by section 104 of the Civil Procedure Code.

It has, therefore, been necessary for counsel on behalf of the appellant to argue that the special case with which we are concerned is an award stated in the form of a special case. This argument is only material with reference to the arbitration proceeding under the Consent Judge's Order of the 16th of

(1) [1292] 2 Q. B. 613.

(2) (1906) 95 L. T. 769.

(3) [1893] 1 Q. B. 375.

1910.

PURSHOTUM-
DAS
RANGOPAL
v.
RANGOPAL
HIRALAL.

1910.

PURSHOTUN-
DAS
RAMGOPAL
vs
RAMGOPAL
HIRALAL.

July. The agreement which was adopted by that order provides that "the arbitrators are authorised from time to time to make an *interim* award or awards or make or direct partial distribution or distributions of the said property and in case the said arbitrators shall by reason of disagreement or any other cause fail to make an award or determine any matter or matters hereby referred to them, the matter or matters as to which there shall be such failure be and they are hereby referred to the umpirage and decision of such person as the said arbitrators shall before entering upon this reference appoint to act as umpire who shall likewise have authority to make an *interim* award or awards." The agreement, therefore, provides that in the case of disagreement between the arbitrators which prevents them from making an award such as is contemplated in the agreement, the matter in difference is to be referred to an umpire who shall make the award.

Now, the special case discloses a difference of opinion between the arbitrators, and there has been no reference to any umpire; and we are unable to hold that the mere use (in our opinion, a mistaken use) of the word "award" in clauses 12 and 13 of the special case, converts a reference to the Court for its opinion upon a difference between arbitrators into an award in the form of a special case. The special case is in no sense an award. The award would have to provide, if any provision is in law necessary for the expenses of the marriage of Keshavdeo or of Ratni, what sum should be set aside; but no sum is mentioned in the case as having been agreed upon between the arbitrators as a reasonable and proper sum. Again, the special case leaves it open to the Court to take a view which is not the view of either of the arbitrators upon the questions submitted.

There is, therefore, no award which can be adopted by the Court by the mere expression of its opinion, and the case can only be, as it is expressed to be in clause 14, a statement of a question of law for the opinion of the Court.

We are of opinion that this is not a case which falls under rule 11 of the 2nd Schedule of the Civil Procedure Code; but that it falls under section 10 of the Indian Arbitration

Act in so far as it relates to the agreement which was not the subject of the Court's order of the 16th July 1909; and that, therefore, no appeal lies.

We dismiss the appeal with costs.

Appeal dismissed.

Attorneys for the appellant: Messrs. Malvi, Hiratal, Mody and Ranchhoddas.

Attorneys for the respondent: Messrs. Bicknell, Merwanji and Romer.

K. McI. K.

1910.
PURSHOTUM-
DAS
RAMGOPAL
v.
RAMGOPAL
HIRATAL.

CRIMINAL REVIEW.

Before Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR v. FULJI DITYA.*

1910.
September 9.

Criminal Procedure Code (Act V of 1898), section 565—Indian Penal Code (Act XLV of 1860), section 75—Whipping Act (IV of 1909), section 3—Sentence of whipping only passed on accused—Order to accused to notify his residence—Validity of the order.

Section 565 of the Criminal Procedure Code (Act V of 1898) must be strictly construed. The order contemplated by the section can only be made at the time of passing sentence of transportation or imprisonment upon a convict. It cannot be made where the Court, instead of passing that sentence, passes a sentence of whipping.

THE High Court sent for the papers of this case on review of statement of criminal work.

The facts of the case are stated in the judgment.

L. A. Shah, acting Government Pleader, for the Crown.

There was no appearance for the accused.

BATCHELOR, J.:—In this case one Fulji valad Ditya has been convicted of house-breaking under section 454 and of having suffered certain previous convictions which bring his case within

* Criminal Review No. 232 of 1910.