AIR 1952 P&H 344

High Court Of Punjab And Haryana At Chandigarh

Case No: First Appeal No. 96 of 1950

Ram Narain and Others		APPELLANT
	Vs	
Santosh Kumar and Others		RESPONDENT

Date of Decision: July 19, 1951

Acts Referred:

- Arbitration Act, 1940 - Section 21
- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3, Order 43 Rule 1
- Evidence Act, 1872 - Section 115, 20

Citation: AIR 1952 P&H 344

Hon'ble Judges: Kapur, J

Bench: Single Bench

Advocate: K.L. Gosain, K.S. Thaper and R.P. Khosla, for the Appellant; I.D. Dua, J.N. Seth and Harnam Dass, for the Respondent

Final Decision: Dismissed

Judgement

Kapur, J.
This is a defendants'' appeal against an order passed by Mr. Des Raj Pahwa. Commercial Subordinate Judge, Delhi, dismissing their objections. The appeal is headed as being under Order XLIII. Rule 1(m), Civil Procedure Code, read with Section 39(1) Sub-clause (vi), Indian Arbitration Act.

2. A preliminary objection has been taken that no appeal lies against the order passed by the Subordinate Judge. Order XLII, Rule 1(m) provides for an appeal against an order under Rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction and Section 39(1)(vi) of the Arbitration Act provides for an appeal against an order setting aside or refusing to set aside an award. It is not possible to give a decision on this point without considering the nature of the proceedings which have been taken in the Court below and the decision given thereon.

3. The plaintiffs, Santosh Kumar and others, brought a suit for, (1) partition of Khanna Talkies in Delhi, (2) dissolution of partnership and accounts and (3) rendition of accounts received of Khanna Talkies. On the 13th December 1949, the differences between the parties were referred to the arbitration of Mr. Ram Kanwar, retired District Judge, but he did not act and on the 20th February 1950 he resigned. On the 21st March 1950, an application was made to the Court which was signed by all the parties. The application was to the following effect:

"It is submitted that in the above case the parties have willingly * * * appointed Seth Jagat Narain, Proprietor of Jagat Talkies, Delhi, as ''referee''. The parties are fully aware that plaintiff No. 1 is the son-in-law of Seth Jagat Narain. It is there fore prayed that the case be referred to him and whatever decision he, without taking into consideration the issues in dispute, gives would be acceptable to the parties and none of the parties will raise any kind of objection".

On the same day, statements of parties were recorded, and firstly of the defendants except defendant No. 3. They stated -- "We have willingly appointed Seth Jagat Narain. proprietor of Jagat Talkies as referee * * * ".

The plaintiffs made the same statement saying that Seth Jagat Narain, Proprietor of Jagat Talkies had been appointed as referee. Defendant No. 3 also made a similar statement.

4. On the 21st March 1950, at the time of the statements of the plaintiffs and defendants their advocates were present and on the 24th March 1950, the following order was made :

"The arbitration agreement has been completed and duly attested. Per arbitration agreement and the statements of the parties recorded thereon Shri Seth Jagat Narain. Proprietor Jagat Talkies, Delhi, is appointed as a referee for the decision of the matter in controversy. His fee is fixed at Rs. 250/-which will be paid half by the plaintiff and half by the defendants. Parties are directed to appear before the referee on the 29th of March 1950, at 12 P.M., in his office for proceedings.

Statement to be put in by the 14th April, 1950.

Process to be put in today and process as requested be given by hand."

5. On the 1st April 1950, the referee asked for the file to be sent and the file was sent. On the 2nd April 1950, he recorded the statements of all the parties and asked for further time from the Court up to the 25th April 1950. On the 25th the following order was passed by the Court.

"The referee has prayed for extension of time on the ground that the negotiations for settlement which were going on between the parties failed. As requested by him I hereby enlarge the time for filing of statement.

As further requested by the referee, the parties are directed to appear before him on Sunday the 30th April 1950, at 10 A.M. at his residence with evidence. If any of the parties defaults to appear, the referee shall be authorised to proceed "ex parte" against the defaulting party.

Statement to be filed on the 25th of May 1950."

On the 6th May 1950, a letter was sent by the referee to the Court with an annexure. The letter said as follows :

"In the above-noted case I was appointed sole referee. The parties have compromised the case. I am enclosing herewith the settlement duly signed by all the parties and this should be regarded my statement in the case. I am also returning herewith the Court file." The annexure was in the nature of a compromise and it provided :

"1. That the business known as "Khanna Talkies" shall remain joint for a period of three years from the 1st May 1950;

2. That the business known as Khanna talkies shall be exclusively managed and controlled by Lala Ram Narain and his sons for the said period;

3. That the shares of the parties in the property and business known as Khanna Talkies shall be one-third each; and

4. That as consideration for the exclusive running of the business known as Khanna Talkies and exclusively realising the rents etc. from the above mentioned property Lala Ram Narain and Sons shall pay Rs. 3,400/-per mensem to the order two parties in equal shares for the full period of three years commencing from the 1st May 1950, and mode of payment was provided for and it was also stated that Lala Ram Narain and his sons shall have unfettered and complete control of the business. No party had a right to claim dissolution of partnership or accounts within the term of three years."

6. In paragraphs 16, 17, 18 and 19 it had been stated as under:

"16. That the parties have mutually settled and understood their accounts up to the 30th April 1950. and Lala Ram Narain and his sons have agreed to pay to the other parties their consolidated share of rupees thirty-seven thousand and seven hundred and fifty only.

17. That provided always that this compromise shall remain binding and enforceable for the full terms of years only and on payment of the sum of Rs. 3,400/- only per mensem mentioned above the payment of which sum shall be the condition precedent to this compromise and agreement.

18. That the parties shall be left to bear their own costs of this litigation.

19. It is. therefore, prayed that your honour may decide this matter as stated herein." All the three sheets of this statement are signed by all the parties to the suit. Along with this were signed all the proceedings which were taken before the referee. This compromise is not dated, but it has a stamp of Re. 1/-dated the 2nd May, 1950.

7. On the 25th May, 1950, statements of parties were recorded by the Court. Mr. Chattar Behari Lal for the plaintiffs accepted the statement of the referee and admitted the compromise and stated that it was signed by all the parties including the plaintiffs. For defts. 1 to 4, Mr. Gurbachan Singh Advocate made a statement that the matter in suit had been compromised which had been signed by all the parties & was binding on them & that the referee had made a statement which was binding on the parties including his client. Mr. Iqbal Krishan Advocate who appeared for defendant No. 5, Lala Ram Narain, made the following statement:

"I admit that the document accompanying the statement is signed by my client. I pray for a short adjournment to understand its implication and to make a formal statement." Shambhu Nath and Vishwa Nath sons of Ram Narain made the following statements: "We adopt the statement made by counsel for defendant No. 5 and admit our signatures on the document."

The case was then adjourned to the 7th June 1950.

8. On the 24th June 1950, Mr. Darbari Lal, Advocate, filed an application on behalf of defendants Nos. 5 and 7 under Sections 30 and 33 of the Indian Arbitration Act alleging that the agreement dated the 21/24th March 1950, was invalid, it was conditional and qualified, that Seth Jagat Narain had favoured the plaintiffs, that he did not give any opportunity to the petitioners to produce evidence nor did he make any enquiry, that the alleged settlement and the statement were incomplete, uncertain and vague, that Seth Jagat Narain was acting in collusion and he got the blanks filled up which existed in the compromise without the consent of the petitioners and that he misconducted himself.

9. An undated application was also filed by defendants Nos. 5 and 7. The stamp bears the date the 7th June 1950, stating that Seth Jagat Narain was never appointed a referee which was quite clear from the record, that the agreement was not an adjustment of the suit, that Jagat Narain had not made any statement nor was his statement recorded by the Court, that no compromise was entered into by the parties but only negotiations for compromise were going on and a document was typed leaving several "gaps and blanks", it being agreed that they will be filled in later, that negotiations fell through and afterwards blanks were filled in without the consent of the petitioners (5, 6 and 7), that Seth Jagat Narain had no right to fill in the blanks, that no compromise could be entered into when the matter had been referred to the decision of Seth Jagat Narain and Order XXIII, Rule 3 did not apply and finally that the alleged compromise did not amount to adjustment of the suit nor was it a completed agreement. The prayer was that the suit be decided on merits. Defendants Nos. 1 to 4 denied the allegations made and supported

the statement and the compromise. The plaintiffs also denied the allegations and supported the statement of the referee and the compromise. The trial Court examined each one of these objections and held:

" 1. that Seth Jagat Narain was a referee and not an arbitrator;

2. that he showed no partiality to any party;

3. that the referee has made a statement in the letter and no further statement is necessary;

4. that after the statement the defendants 5 to 7 could not resile;

5. that there was a compromise which amounted to adjustment of the suit;

6. that blank spaces in the compromise were filled up before the signatures of the parties were obtained;

7. that there was no defect in paragraph 17 of the compromise as in the previous paragraphs the period of three years had been mentioned; and

8. that the compromise is capable of being enforced by either of the two contending parties."

10. The defendants have come up in appeal to this court.

11. It was submitted, firstly, that Seth Jagat Narain was appointed an arbitrator and not a referee, and reliance is placed on the application which was filed by the parties and on the statements made by them. If anything, this circumstance goes against the appellant and not in his favour. In the application which was made for the appointment of Mr. Ram Kanwar as arbitrator he was definitely described as salis (arbitrator). Statements which were made on the 15th December 1949, after the application was filed clearly show that the parties were referring their differences to Mr. Ram Kanwar as arbitrator. The order of Mr. Pahwa of that date also shows that he had appointed Mr. Ram Kanwar as the sole arbitrator for determining the matters in controversy. On the 21st March 1950, however, when the application for the appointment of referee was made the word "referee" was specifically used in the application as also in the statements which were subsequently made by the parties in court. It is true that the order of Mr. Pahwa appointing Seth Jagat Narain as the referee is rather indifferent. He has called it an "arbitration agreement" but he appointed Seth Jagat Narain as the "referee for decision of the matter in controversy". He had fixed a fee for him and asked the parties to appear before the referee and ends up his order by saying "statement to be put in by the 14th of April 1950". Reference was then made by Mr. Gosain to the subsequent proceedings. The referee had asked for enlargement of time and for the file. He also took down the statements of the plaintiffs and defendants. Subsequently, he sent another letter wherein he called himself a referee

and also stated that a compromise had been arrived at between the parties which should be regarded as his statement. I am therefore of the opinion that the appointment of Seth Jagat Narain was as a referee and not as an arbitrator.

12. It wag submitted that the referee had not made a statement but had sent a letter. The trial Court had taken this to be a sufficient compliance with law and nothing has been shown to me which would prove that the learned Judge has erred on this point. There was nothing in the agreement itself which required the referee to make a statement on oath or a statement in court.

13. Mr. Gosain then submitted that in law it is not possible to make a reference to a referee in a case like the present and he relied on a judgment of their Lordships of the Privy Council ''Chhabba Lal v. Kallu Lal'', ILR (5946) All 193 . The question there decided was whether the reference made to an arbitrator was valid or invalid. A suit for partition was brought in which the defence was that the family was still joint and not divided. The Guru of the family was appointed as referee ''for decision'' u/s 20 of the Indian Evidence Act. He made a statement giving to the parties equal shares. There were some minor defendants and they objected that without sanction of the Court under Order XXXII, Civil Procedure Code, no such reference could be made and that the referee could only make a statement and not divide the property. Their Lordships treated the matter as one of arbitration and not u/s 20 of the Indian Evidence Act.

14. No doubt it was observed there that u/s 20 of Indian Evidence Act it would be a bad reference but the attention of their Lordships was not drawn to the several Allahabad cases where this question had been discussed at great length and it appears to me that the question whether such a reference was valid or invalid was not before their Lordships because in both the Court''s below the question had been treated as being- one of reference to arbitration.

15. In several Allahabad cases the question of reference to a referee and his statement has been the subject-matter of decision. In ''Mt. Akbari Begum v. Rahmat Husain'', 56 All 39, a Mohammadan lady brought a suit for the recovery of her share and the matter was left to the statement of one Rehmat Hussain who made a statement on oath and certain observations of the learned Chief Justice made in that case are very relevant to the present case. At p. 83 Sulaiman, C. J., observed: "There is considerable difficulty in basing the binding character of the agreement only on the hypothesis that they are mere admissions u/s 20 of the Indian Evidence Act. Such admissions primarily are unilateral. u/s 31 of the Indian Evidence Act they are not conclusive. It would therefore follow that if there were other evidence on the record it may be open to the parties to argue and it may be quite proper for the court to accept such other evidence and give a go-by to the admissions.

* * * * *

If any party be allowed to go behind the admission on the ground that it is not conclusive the whole object of the agreement would be frustrated. It is therefore unsafe to rest the finality of the agreement on the basis of a mere admission under. Section 20 of the Indian Evidence Act. Nor can one base it solely on the ground of estoppel by admission. The estoppel will only arise by the circumstance that the other party has been prevented from producing evidence in view of the agreement to abide by the statement of the third person. But if the trial court or, for the matter of that, an appellate court is prepared to allow the opposite party also full opportunity to produce additional evidence, it may well be said that there is no prejudice and that accordingly there is no estoppel u/s 115 of the Indian Evidence Act. In such a view the agreement is utterly nullified. I do not think that such a course can be allowed."

The learned Chief Justice treated such admissions made by the parties to be an offer and acceptance and therefore valid, between them, the consideration being reciprocity and the statement of the referee, he considered, would be admission of both parties binding upon them.

"No doubt" he said "admissions are not conclusive, but where there has been mutuality of this kind and they have matured into an agreement, their collusiveness follows from the principle of estoppel". At p. 85, the learned Chief Justice continued: "But as no decree can be passed forthwith in terms of a mere contract to abide by the statement of a third person, I am prepared to hold that there can be adjustment of the suit by such a contract until the statement has been made. But as soon as the agreement has been fully carried out by the Court and the referee has made his statement in favour of the Court and the party or the other, it is too late for either party to go back upon the agreement, and at this stage the agreement must be deemed to have eventuated into an adjustment of the claim in accordance with the statement already made. A party cannot be allowed to retract his solemn promise for consideration made before the court after he has come to know the nature of the statement by which he had agreed to abide." And at p. 86 he observed:

"In the present case there can be no doubt that there was a valid agreement between the parties to accept the statement of Rahmat Hussain if made in Court, and not to produce any other evidence. Such an agreement is not contrary to any provisions of the Contract Act. An agreement not to produce further evidence can, in no sense, be against public policy, or in any way illegal. Even an agreement to accept the statement of a named person as final is not necessarily repugnant to any of the provisions of the Code of Civil Procedure, nor does it defeat the provisions of the Code, nor is it forbidden by any law. Indeed, inasmuch as such a course may save the parties considerable expense, and also save the time of the Court which would otherwise be taken up in examining witnesses, it may be considered to be salutary and not at all opposed to public policy. It is therefore impossible to hold that the agreement ab initio was illegal and was void in law".

And he continued at p. 87 where he said: "My answer to the first question referred to us is that the parties to a suit can validly agree, even apart from the Indian Oaths Act, that they

will abide by the statement of a witness, including one who is a party to the suit; and that they can leave the decision of all points, including costs, arising in the case to be made according to the statement."

16. In "Bishambar v. Shri Thakurji Maharaj", 53 All 673, a certain pleader was a referee with an agreement that the case may be decided according to the statement that he makes. The statement was considered to be in the nature of pronouncement in the case, but before the statement was made one of the parties resiled and it was held that he could do so. It was also held that the agreement was a valid contract and that it did not amount to adjustment of the suit but only amounted to an agreement on a procedure which might eventuate in an adjustment and until the referee had given his statement there could be no question of any adjustment.

17. In "Himanchal Singh v. Jatwar Singh", 46 All 710, the parties agreed that matter be heard by a pleader and that he should make a statement. He did make a sworn statement and after the statement was made one of the parties resiled and it was held that he could not. Sulaiman J., as he then was, was a party to this decision. At p. 712 he observed as follows:

"It may also be said that the parties really compromised their dispute in this manner that they agreed that the decree of the Court shall be in accordance with the statement to be made by their nominee hereafter. There is nothing to prevent the parties from compromising the suit and agreeing to a decree being passed in terms to be stated by a person named. Such an agreement, therefore, would be an adjustment of the suit, and it is difficult to see how any party could be allowed to go back on it. The Madras High Court has treated such an agreement as an adjustment of the claim: vide "Chinna Venkatasami v. Venkatasami Naicken", 42 Mad 625, and the earlier cases referred to therein. In the case of "Muhammad Asghar Ali v. Muhammad Imtiaz Ali" 1898 All WN 200, it was held that an agreement by a defendant to a civil suit, to be bound by whatever statement might be made by the plaintiff upon oath was binding on him even though it did not fall under the Oaths Act. A similar view has been expressed by Walsh, J. in the case of "Kesho Ram v. Peare Lal 21 ALJ 209."

18. In Basdeo Singh Vs. Ram Raj Singh and Others it was held that an agreement to abide by the statement of a certain individual nominated by the parties to a suit amounts to an agreement to accept an adjustment of the case, the said statement furnishing the agreed data on which the adjustment is to be founded. Here "Himanchal Singh"s Case", 46 All 710, was relied upon.

19. In Suraj Narain Chaube Vs. Beni Madho Chaube and Others "Akbari Begum"s Case 56 ALL. 39, and "Bishambar"s Case", 53 ALL. 673 were followed. It was held that there is nothing in law to prevent the parties to a suit from agreeing apart from the Oaths Act. to abide by the statement of a third person, and after such agreement is acted upon, a party thereto cannot be allowed to retract his solemn promise after he has come to know the

nature of the statement by which he has agreed to abide. In this case, the agreement was that the parties agreed to abide by the statement of the referee made in Court after making the necessary inquiry. The referee was even authorised to take oral evidence and inspect documents. After such an inquiry, the referee made a statement, but not on oath. It was held that it was not a reference to arbitration, that the intention of the parties was to be bound by the statements that their nominees would make after inquiry, that the agreement and the statement made by the referee by which the parties had agreed to be bound was in effect an adjustment of the dispute and not a reference to arbitration and the parties were estopped from impugning it and from challenging the statement of the referee.

20. In " Umrai Ali Khan and Others Vs. Intizami Begam and Others, the parties to the suit agreed (o the appointment of a referee and decision of the case according to whatever statement the referee made. The agreement was not a reference to arbitration and it was held that a statement made by the referee operates as an estoppel against the parties.

21. Mulla, J., in Rameshwar Nath Vs. Ghulam Rasool Khan, held in a case where reference had been made to a referee that a party can resile before a statement is made.

22. Following these judgments, I am of the opinion that the agreement which was made for reference to Seth Jagat Narain was not in the nature of a reference to arbitration but a reference to a referee and that if a statement is made in pursuance of the agreement, it is binding on the parties. The real basis of the binding character of such an agreement is that the original contract to abide by the statement of a third person is perfected into an adjustment of the claim in terms of the statement made as soon as the referee makes the statement. There is, as was said by Suleman, C. J., an offer by one party and acceptance by the other for which the consideration is reciprocity. The statement of the referee really becomes an admission of both parties which is binding upon them. It is true that admissions are not conclusive, but in cases such as these where there is mutuality, their conclusiveness follows from the principle of estoppel.

I hold therefore :

1. That the procedure followed in the trial Court was not one of reference to arbitration but a reference to a referee.

2. That the letter sent by the referee amount ed to a statement.

3. That there was consideration for the contract which was entered into between the parties and which was reciprocity.

23. The present statement is based on agreement between the parties which is termed as compromise. The agreement is signed by all the parties. After the letter of the referee along with the original compromise was received in court, the parties appeared and statements were recorded of advocates of the parties as also of the defendants Nos. 5 to

7. None of the defendants Nos. 5 to 7 found any fault with the agreement which accompanied the statement of the referee. All that they wanted was "to find out the implication of the document." No defect of any kind was pointed out in court to the document itself. No complaint was made at that time that there were any blanks which had been filled up by the referee after they had signed and it is very improbable that businessmen of the kind that the parties are would have put down their signatures to a document which had blanks in it and blanks which were material. The only place where there is a blank left is in paragraph 17 of this agreement, which has been called compromise in the document itself, and that is in regard to the term of years, but the term is quite clear from paragraph No. 4 of the compromise which was accompanying the statement of Seth Jagat Narain. In this case there is not only the statement of Seth Jagat Narain the referee, but it is based on an agreement which had been arrived at between the parties and which is embodied in a document dated the 2nd of May 1950, and has the signatures of all the parties on each of the three pages. People who were anxious to sign all the three pages of the compromise were not going to sign a document with blanks.

24. It was submitted that if this amounted to an adjustment of the claims of the parties, then the parties had a right to show that it was not a lawful agreement as contemplated by Order XXIII, Rule 3 of the Code of Civil Procedure. With this submission, I am unable to agree. The adjustment is based really on the statement of the referee and it is supported by the settlement which was arrived at between the parties and which is embodied in the document referred to above and forms part of the statement. In regard to these agreements, the observations of Sulaiman, C. J., in ''AKBARI BEGUM''S CASE 56 ALL. 39 at p. 85 are very apt.

"It is true that under Order XXIII, Rule 3. before a Court can order an agreement or compromise to be recorded, and pass a decree in accordance therewith, it has to be satisfied that the suit has been adjusted wholly or in part by such agreement or compromise. Where the parties agree to abide by the statement of a third person their agreement is still in the nature of a contract, and it may well be said that so long as that third party has not made his statement and the contract has not been carried out, there is yet no adjustment of the suit." I am therefore of the opinion that on the merits this appeal must fail.

25. The preliminary objection that was taken does not seem to have much force because if the statement of the referee is an adjustment, then an appeal would lie under Order XLIII, Rule 1(m) of the Civil Procedure Code. (26) In the result, this appeal fails and is dismissed with costs.