

(1993) 103 PLR 188**High Court Of Punjab And Haryana At Chandigarh****Case No:** Civil Revision No. 2283 of 1991

Keshwa Nand Prop.
Rahul Steel and Agro
Industries

APPELLANT

Vs

Panesar Steel and Agro
Industries and Others

RESPONDENT

Date of Decision: Aug. 7, 1992**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 115
- Evidence Act, 1872 - Section 20

Citation: (1993) 103 PLR 188**Hon'ble Judges:** N.K. Kapoor, J**Bench:** Single Bench**Advocate:** M.L. Sarin, Hemant Sarin and Alka Sarin, for the Appellant; Jaginder Singh Taur, for the Respondent

Judgement

N.K. Kapoor, J.

This judgment will dispose of Civil Revision Nos. 2283, 2284, 2285, 2286 and 2287 of 1991 as common questions of law and fact are involved. However, for the purpose of disposal, the facts are being taken from Civil Revision No. 2283 of 1991.

2. This revision petition is against the order of Sub Judge 1st Class, Amloh, where by the objection petition filed against the decision of Sh. Pawan Kumar Sharda dated 9-10-1990 has been dismissed.

3. Five suits relating to recovery of money due on account of various commercial transactions between the parties were filed in the Court of Sub Judge 1st Class, Amloh, when a joint application was filed by the parties i. e., the plaintiff and defendants in each suit with a prayer that Sh. Pawan Kumar Sharda be appointed a referee to decide the

disputes. Proceedings in this regard were recorded on May 30, 1990. Since the statements of the parties were identical in all the five cases, the proceedings so conducted in case Keshwa Nand v. Panesar Steel & Agro Industries and Ors. are hereby reproduced :-

"Keshwa Nand v. Panesar Steel.
Present : Counsel for the parties.

Parties have moved a joint application desiring to appoint Sh. Pawan Kumar Sharda partner of M/s Saraswati Steel Rolling Mills, Mandi Gobindgarh as referee and they have agreed to be bound by the decision to be given by him and a decree to be passed according to his decision/verdict. Let the statements of the parties be recorded.

Sd/- SJIC
30-5-90

Statement of Sh. Keshwa Nand son of Ram Partap Prop. M/s Rahul Steel and Agro Indus. Jalalpur.

I am prop. of M/s Rahul Steel and Agro Industries, Jalalpur. I hereby appoint Sh. Pawan Kumar Sharda of M/s Sarswati Steel Rolling Mills, Mandi Gobindgarh as referee and hereby authorise him to decide the matter in dispute. Whatever his decision we will be bound by the same and decree be passed as per his verdict.

R. O. & A. C.

Statement of Bhag Singh s/o Inder Singh, 2. Sukhbir Singh s/o Inder Singh, 3. Rajinder Singh son of Inder Singh, 4. Mohinder Kaur w/o Nirmal Singh, and 5. Gurmeet Singh s/o Bhag Singh, all residents of Mandi Gobindgarh.

We are partners of M/s Panesar Steel and Agro Industries Allaur. We have heard the above statement of the plaintiff. It is correct. We also appoint Sh. Pawan Kumar Sharda as referee and shall be bound by his decision/verdict Decree may be passed as per his verdict.

R0&AC .

After recording the statements of the parties, the trial Court passed the following order on May 30, 1990 :-

"Parties have agreed to refer the matter in dispute to Pawan Kumar Sharda, partner of M/s Sarswati Rolling Mills, Gobindgarh and they have further undertook that whatever the decision of the referee may be, the parties shall be bound by the same. Therefore, the

matter is referred to Pawam Kumar Sharda, partner of M/s Sarswati Steel Rolling Mills, Mandi Gobindgarh and he will give his verdict by 17-7-90 under intimation to this Court. A copy of order be sent to him for information and necessary action. File be consigned to record room till then

30-5 90

Sd/- Subordinate Judge

Pawan Kumar Sharda pursuant to his appointment as a referee submitted his decision to the Court in the following terms :-

"I was appointed as a referee in the above mentioned suit. The plaintiff has claimed Rs. 1,99,849.50 as principal and Rs. 35150/- as interest at the rate of 2 per cent per month I have gone through the record and have heard both the parties. I am of the opinion that the defendants are not liable to pay any amount to the plaintiffs.

Sd/- Pawan Kumar Sharda
9-10.90"

4. The main dispute between the parties is as to whether the parties, in fact, intended to appoint Sh. Pawan Kumar Sharda as their referee as stated in the joint application or this expression was used loosely and parties, in fact, referred the dispute to his arbitration. This main point needs close scrutiny as per facts which have come on record. A brief resume made in the plaint would give an insight of the dispute between the parties. Keshwa Nand as proprietor of M/s Rahul Steel and Agro Industries, Jalalpur, is running business of iron and Steel at Jalalpur (Mandi Gobindgarh, District Patiala) whereas Bhag Singh, defendant No. 2, is managing the family business and so was managing the following concerns, namely, (i) M/s Panesar Iron and Steel Trading Co. Mandi Gobindgarh; (2) M/s Panesar Steel & Agro Industries, Allaur (Khanna); (3) M/s I. S. Steel, Allaur (Khanna); (4) M/s Inder Singh & Sons, Amloh Road, Mandi Gobindgarh. All the above mentioned firms are sister or allied concerns and are being managed by Bhag Singh, defendant No. 2. It is further the case set up by the plaintiff that all the transactions are, for the purposes of income tax, clubbed together and taken as an income of a single suit. Since the plaintiff had very cordial relations with the defendants, he agreed to the suggestion of the defendants to the effect that the goods purchased by the plaintiff from Inder Singh, defendant No. 4 were shown in the name of another sister concern of the defendant, Under such arrangement, defendants No. 3 and 4 were to give material to defendant No. 1 by issuing bills of the same in favour of the plaintiff and the plaintiff will in turn waste issue the bill of the same material of the same weight to other sister concerns. This way there was a demand and a counter demand for recovery of amount on the basis of various transactions entered into between the parties which formed subject matter of the suit. Before the Court could examine the matter on the basis of issues and evidence led, the parties mutually agreed to the appointment of Pawan Kumar Sharda, a partner of M/s Sarswati Rolling Mills, Mandi Gobindgarh, for decision of the matter in dispute, who has, as per his decision, come to the conclusion that defendants are not liable to pay any

amount to the plaintiff.

5. Learned counsel for the petitioner has assailed the order of the trial Court on the ground that the Court erred in law in not properly comprehending the real intention of the parties while referring the dispute to the sole decision of Pawan Kumar Sharda. According to the counsel, Sh. Pawan Kumar Sharda was appointed as an arbitrator. Naming him to be a referee in the context of the case was, infact, a misnomer. The Court, in the circumstances of the case ought to have held him to be an arbitrator and thus entertained the various objections raised in this regard by the petitioner and thereafter decided the same. The short cut applied by the Court by taking the decision made by Pawan Kumar Sharda as by the referee thereby declining to examine the various objections raised has, in fact, occasioned failure of justice. The approach of the trial Court is contrary to the judicial pronouncements and is thus illegal and unsustainable. The learned counsel specially high-lighted that so called referee, in fact, had no access to the record of the case and reference made in this regard by him in his statement/ decision is factually wrong. The record, in fact, was lying in the Court and there is no evidence on record that at any given time after his appointment as a referee, he had summoned the record or the same was placed before him by the parties. Not only this, no notice was issued by Mr. Pawan Kumar Sharda to the parties and reference in the statement/decision that parties were heard is wholly wrong. Learned counsel for the respondents, on the other hand, has stressed that both the parties agreed to the appointment of Sh. Sharda as referee. The statement recorded in the Court refer Mr. Sharda as referee i. e. to say there was do ambiguity as to whether Mr. Sharda was to act as an arbitrator or referee. Since the terms of appointment are crystal clear, to construe the word referee to be an arbitrator would be wholly wrong. The counsel further submitted that Mr. Sharda knew the parties well and was also conversant with the various commercial dealings and the ways the same are being conducted in normal business circles and so had assessed the contention of the parties in the light of the prevailing practice/practices in such like commercial transactions and rightly came to the conclusion that the defendants were not liable to pay any amount to the plaintiff in view of those transactions. The counsel, however, did not dwell upon the point raised by the counsel for the petitioner as to whether the record was summoned by the referee or any notice was issued to the parties for any personal hearing. Thus, according to the counsel, since it was a decision by a referee, the trial Court rightly declined to entertain various objections raised by the petitioners on the solitary ground that such objections are not envisaged under the law in respect of the decision/report of a referee.

6. I have heard learned counsel for the parties at a considerable length, perused various judgments cited especially, Sadhu Ram and Ors. v. Ude Ram, A. I. R. 1967 Punj. 179, Chhabba Lal v. Kallu Ram, A. I. R. 1946 P. C. 72, Ramji Lal v. Ram Sanehi Lal Pandey, A. I. R. 1978 All. 351, Bishamber Dayal v. Kishan Chand, (1983) 85 P. L. R. 300 and Mr. Akbari Begem v. Rahmat Husain, A. I. R. 1933 All. 861. Referee is a person to whom dispute is referred for decision. His statement is taken to be an admission made by the

party and thus considered conclusive section 20 of the Indian Evidence Act deals with the admission made by the persons expressly referred to the parties to the suit. section 20 of the Indian Evidence Act read as under : -

"20. Admissions by persons expressly referred to by party to suit:-Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration. The question is, whether a horse sold by A to B is sound.

A says to B-"Go and ask C, C Knows all about it". C's statement is an admission."

7. If there was dispute between the parties as to whether the matter was referred to the statement of the third person, statement made by such person would be deemed to be conclusive in terms of section 20 of the Indian Evidence Act. But all the same, merely terming the person to be a referee would itself be no reason to conclude that such person was, in fact, appointed as a referee. It is in the context of case that one has to gauge the real intention of the parties. In Chhabba Lal's case (supra), the Court came to the conclusion that a reference to an outside party to decide matters in dispute in a suit and the question of costs is not a reference to that party for information in reference to a matter in dispute, and if the reference is to be regarded as made only u/s 20 of the Evidence Act it is a bad reference. Some facts of the case would be essential to understand the real importance of the decision of the Privy Council referred to above. "On 1st September, 1933, an application was made to the Subordinate Judge by Kallu Lal, Sewak Lal and the plaintiff stating that the parties had appointed Shri Swami Ramanandji who was the Guru of the parties, a referee for the decision of all the facts in dispute in the suit and also for the decision in respect of the costs of the suit and they asked that the Swami might be appointed a referee u/s 20, Evidence Act...On 4th October, 1933, the learned Judge made an order that according to the application of the parties, Shri Swami Ramanandji was appointed a referee u/s 20, Evidence Act, for deciding this case and directed him, after deciding the case, to present himself in Court or send in writing, his statement in respect thereof. On 7th October, 1933 the referee made his report dividing the family property into two parts allotting one part to the plaintiff and the other to the defendants. Objections. to the report on behalf of the minors were lodged on 17th October, 1933, the two principal objections being first that the guardian of the Minors did not purport to act as a guardian entering into the agreement for reference and that as to previous sanction of the Court had been obtained the agreement was not binding on the minors, and secondly that the alleged agreement in terms only constituted Swami Ramanandji a referee u/s 20, Evidence Act, and that as such he could only make statements and had no authority so make a division of property." On examination of the matter, the learned Subordinate Judge held that the reference was an arbitration and the award was valid, passed a decree in terms of the award Before the High Court of Allahabad, the appeal was allowed, judgment and decree of the trial Court were set aside. However, neither the Subordinate Judge nor the High Court dealt with the

objection that the reference was not justified by section 20, Evidence Act and so in the context of this the Court observed that reference to Swamiji could not be deemed to be a referee but as an arbitrator. Similar question came up for consideration of the Division Bench in Sadhu Ram's case (supra) and the Court held that reference to a referee by consent of parties to hear the dispute and give a decision, in fact, should be construed that the parties intended to refer him as an arbitrator and so his decision is an award and not a reference u/s 20 of the Indian Evidence Act. In the above mentioned case, the Court considered the effect of statements made by the parties which reads :-

"Let L. Laxmi Chand be appointed as a sole referee for the disputes between the parties. Whatever decision he arrives at will be wholly or solely acceptable to us. He may hear the parties, record evidence or may not do so. The defendants do not know the fact that L. Laxmi Chand is counsel for the plaintiff."

Mr. Laxmi Chand who was present in the Court gave his consent to act as referee and the Court passed the order that Laxmi Chand may decide the dispute. Subsequently, the referee filed statement in the Court to which the defendants treating the same to be award of the arbitrator filed objections and consequently the Court framed the following issues :-

- "1 Whether L. Laxmi Chand was not appointed as a referee ?
2. Whether he could not be appointed as a referee ?
3. Whether the appointment is otherwise invalid ?
4. Whether the referee is guilty of misconduct ? 5 Whether this question can be raised ?"

The trial Court, however, came to the conclusion that Laxmi Chand was appointed as a referee and his appointment was valid and the question that referee has been guilty of misconduct did not arise since he was not an arbitrator. In appeal, the learned Single Judge referred the matter in dispute to a larger Bench. The court after examining the statement recorded on behalf of all the parties and provision of section 20 of the Indian Evidence Act, came to the conclusion that such a statement does not come within the purview of section 20 of the Indian Evidence Act and so for all intents and purpose, the reference to Laxmi Chand to decide the dispute between the parties was held to be as an arbitrator. Similarly, in Ramji Lal's case (supra), the Court on perusal of the relevant material on record came to the conclusion, "that it was hard to describe it a case to which section 20 of the Evidence Act could be said to be applicable. But on a true construction of the application it had to be held that "S" was appointed the sole arbitrator by the parties. The so called statement was really in the nature of an award " The Court cited with approval a Division Bench judgment of this Court reported as Sadhu Ram and others (supra) and Chhabha Lal's case (supra) In Mt. Akbari Begam's case (supra), the Court dilated upon the difference between an arbitrator and a referee. According to the judgment, an agreement to abide by the statement of a particular witness is in substance

not a reference to arbitration. The essence of arbitration is that the arbitrator decides the case and his award is in the nature of a judgment which is later on incorporated into a decree of the Court. The arbitrator can either proceed on the basis of his own knowledge or make enquiries and take evidence and then give his decision on such evidence, whereas a referee merely makes a statement according to his knowledge or belief and thereafter the Court pronounces the judgment on such a statement. The referee is not authorised to make inquiries and take evidence, and then announce his decision on the basis of such evidence. He is called upon to make a statement according to his knowledge or belief. Strangely, both the parties have relied upon this judgment in support of their respective contentions, the petitioner for the view that since Mr. Sharda is stated to have perused the record of the case and heard the parties (though he did not), the inquiry so conducted would, in fact, come within the purview of an arbitrator. Counsel for the respondents, however, relied upon the observation of the Court to the effect that an agreement to abide by the statement of a particular person is in substance not a reference to arbitration but as a referee. So facts of the present case have to be viewed before arriving at a conclusion as to whether Mr. Sharda was appointed as a referee, in fact, or as an arbitrator as now contended by the petitioner. Thus, much depends upon the intention of the parties which, of course, has to be gathered by reference to the nature of the dispute, statement of the parties before finally arriving at a just conclusion. This way, if the statement of parties is closely scrutinised, it reveals that they intended to get the matter in dispute settled through the intervention of Pawan Kumar Sharda, who could decide by hearing the parties and perusing the relevant record i. e., the documents of the parties. In the present case, the petitioner has strenuously challenged the reference made by Shri Pawan Kumar Sharda in his decision that, "I have gone through the record and I have heard both the parties". For both these contentions, counsel for the respondents has not asserted anything positively i. e. as to whether, in fact, the record was placed before Shri Sharda and he heard the parties before deciding the dispute. There is also no proof on record that the record was summoned from the court by Mr. Sharda either. This way, I have no hesitation to hold that Shri Pawan Kumar Sharda did not peruse the record-the documents of the parties. In the absence of record before him, even if it be held that he heard both the parties before deciding the matter would merely be an apology in view of what has been stated above, I am of the view that parties intended to refer the dispute to the arbitration of Shri Pawan Kumar Sharda and referring to him as a referee is, in fact, a misnomer. Since I am of the view that the decision of Mr. Sharda was an award, the submission of the learned counsel that the same was not submitted within the stipulated period and so is not valid, has some merit. In view of what has been stated above, I set aside the order of the Sub Judge 1st Class, Amloh, and remand the case to the trial Court for fresh decision. The trial Court shall hear the parties with regard to the objections raised, allow them such evidence, as may be permissible, and thereafter decide the objections, in accordance with law. The parties to appear before the trial Court on 28.8.1992. The trial Court is, however, directed to decide the dispute as quickly as possible, preferably within a year.