
(1877) 12 AHC CK 0002

Allahabad High Court

Case No: None

Wali-ul-la

APPELLANT

Vs

Ghulam Ali

RESPONDENT

Date of Decision: Dec. 19, 1877

Citation: (1875) ILR (All) 535

Hon'ble Judges: Spankie, J; Pearson, J

Bench: Division Bench

Judgement

Pearson, J.

(After disposing of the pleas set forth in the memorandum of appeal continued): A far more serious objection to the procedure of the arbitrators has been here orally urged by the learned Counsel for the appellants, viz., that the arbitrators were; not legally competent to administer the oath to the respondent u/s 10^{*} of Act X of 1873, which only empowers a Court to administer such an oath as is mentioned in Section 8 thereof. The arbitrators were persons authorised by law to take evidence, and for that purpose to put witnesses upon oath or affirmation according to the provisions of the law for the examination of witnesses, but they do not constitute a Court, and are not empowered to administer an oath of the nature mentioned in Section 8 of the Oaths Act. Their proceeding in administering such an oath to the respondent in this case was therefore invalid, as being without warrant of law, and consequently his statement, made on an oath so illegally administered, cannot form a valid basis of an award. I am constrained to admit the strength of this objection, which being one vitally affecting the arbitrators' procedure cannot, I think, be ignored by us, although it was not preferred in the lower Courts, and is not to be found in the memorandum of special appeal. I would decree the appeal, set aside the decree of the lower Courts and the award in conformity with which it has been passed, and remand the case to the Court of First Instance for fresh disposal, u/s 351 of Act VIII of 1859, with an instruction that the costs of the litigation up to this time should follow the event.

Spankie, J.

2. The objection which my honourable colleague would admit was never urged in the first Court, nor in appeal. It is not even one of the pleas in the memorandum of special appeal in this Court. It was raised for the first time at the hearing of the appeal. I am doubtful whether we should entertain the objection. The lower Appellate Court disposed of all the pleas taken by the appellant, and its judgment and that of the first Court was in accordance with the award. Assuming that the learned Counsel was at liberty to take the plea, I would reject it because there is no question that the appellant offered to abide by the defendant's oath on the Koran, that his offer was contained in a written petition to the arbitrators and accepted by the defendant. He was bound by his agreement, made with the free consent of both parties, competent to make it, and for a lawful object, viz., the ascertainment of the truth by means which the petitioner, plaintiff, considered most likely to be successful, and which the defendant accepted. The plaintiff, in my opinion, should be held bound by the evidence of the defendant, given under an obligation imposed upon him, and fulfilled in the manner required by the plaintiff himself. But going beyond this, I would say that I do not find that there is any section in Act X of 1873 which would make it unlawful for the arbitrators to administer an oath on the Koran to a party willing to be sworn upon it. It is conceded that arbitrators are authorised to administer an oath; they are also persons, if the Oaths Act applies to them, who by that Act are "persons having by consent of parties authority to receive evidence." They, however, are not a Court within the meaning of Section 8^{*} of the Act. A Court of Justice includes a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body, when the Judge or body of Judges is acting judicially--Section 20 of the Indian Penal Code. Moreover, the Indian Evidence Act thus defines the meaning of the Court which receives the evidence in the judicial proceeding referred to in Section 8 of the Oaths Act. "Court" includes all Judges, Magistrates and all persons, except arbitrators, legally authorised to take evidence--Section 3. I am therefore disposed to conclude that Section 8 refers to parties and witnesses in every judicial proceeding actually before the Court for the purpose of giving evidence, or who may offer through their representatives actually before the Court to give evidence in any form held binding by them. But I am not prepared to extend the section to arbitrators, who do not appear to be fettered by the Act or bound to communicate the offer of a party or witness to be sworn in any particular form to the referring Court for sanction. It seems to me that if arbitrators are not lawfully empowered by the Oaths Act to do what a Court is empowered to do by Section 8, their act in administering an oath or affirmation to any witness in any form "common amongst or held binding by persons of the same race or persuasion to what he belongs and not repugnant to justice or decency, or not purporting to affect a third person" is covered by Section 13, in which there is not only no exclusive mention of the term Court, but in fact the word is not to be found there at all. The section which is in a different chapter from Section 8 runs thus: "No

omission to take any oath, or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding, or render inadmissible any evidence whatever, in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of the witness to state the truth." if the arbitrators in this case were authorised to affirm witnesses in the manner now in force in our Courts, and they substituted an oath on the Koran by request of one of the parties assented to by the other party, the substitution, u/s 13 of the Act, does not invalidate the evidence, and therefore does not render void the award founded on that evidence. I therefore would affirm the judgment of the lower Appellate Court, and dismiss the appeal with costs.

-----Foot Note-----

*[Administration of oath if accepted.

Section 10: If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be moreconveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.]

*[Power of Court to tender certain oaths.

Section 8: If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.]