Bishambhar Vs Radha Kishunji

Court: Allahabad High Court

Date of Decision: Feb. 24, 1931

Hon'ble Judges: Bennet, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Bennet, J.
This is a second appeal by plaintiff against a decree of the lower appellate Court dismissing his appeal and upholding the decree

of the Court of first instance dismissing the suit of the plaintiff. The plaintiff brought a suit for a declaration that a will dated 10th September 1926

executed by his cousin Mathura Prasad was illegal, null and void and ineffectual as against him. In the Court of first instance it was recorded as

follows on 31st August 1927:

The pleaders for the parties state that the parties to this ease agree that Babu Jwala Prasad, pleader, may be appointed referee, that the case may

be decided in accordance with the statement which he may make in Court without any oath being administered to him or send it in writing, that the

parties shall accept and agree to it and that they do not wish to produce any other evidence.

2. On 5th September 1927 Babu Jwala Prasad applied for one day''s further time and on 6th September 1927 the plaintiff made an application to

the Court stating that he no longer desired to abide by the statement of Babu Jwala Prasad as he had found that Babu Jwala Prasad was going to

decide that there was a separation between the plaintiff and his deceased cousin Mathura Prasad effected by the mere fact that Mathura Prasad in

his will had stated that he was separate. The Court came to the following finding on that date 16th September 1927:

The parties have appointed Babu Jwala Prasad vakil as a referee in this case and they have agreed to stand or fall by his statement. Babu Jwala

Prasad has submitted his statement and he states that the plaintiff''s suit should be dismissed and that the parties should bear their own costs. Suit

dismissed.

3. It is apparent therefore that on that date Babu Jwala Prasad made a statement before the Court, not on oath to the effect that the plaintiff''s suit

should be dismissed. Before us in second appeal it has been contended that the plaintiff was entitled to resile from his agreement to abide by the

statement of Babu Jwala Prasad. Dr. Katju for the respondents has contended that the plaintiff should not be allowed to resile from such a

statement.

4. Various rulings have been referred to and these rulings fall firstly under the heading of cases coming under the Oaths Act. These cases are

Deoraj Misra Vs. Mt. Abhai Raji , Salik Ram Vs. Wali Ahmad, and Chiddu v. Kunwar Sen [1906] 29 All. 49. These cases do not apply to the

present case because in the present case statement of Babu Jwala Prasad was not made on oath. Secondly there are some cases in which the

statement was not on oath of a person to whom the parties had made a reference. Such a case is Himanchal Singh Vs. Jatwar Singh and Others, In

that case there had been a very similar reference in the following terms:

It has been settled between the parties that Rai Sahib Pandit Gopal Das Sharma, vakil, shall hear out the whole affair and that we shall accept any

statement that ho may make before the Court.

5. Although therefore this reference did not indicate that the statement should be on oath, nevertheless on p. 711 of the ruling it is stated that the

statement was made on oath. However that ruling is to be differentiated from the present case on another more important ground. In that ruling no

objection was taken by either party before the statement was made and before decree was passed by the Court of first instance in accordance

with that statement. It was only on appeal that the plaintiff made objections to the procedure. Now the procedure in that case may be regarded as

an adjustment or compromise of the suit under Order 23, Rule 3 and accordingly a decree may validly be passed by a Court on such an

adjustment or compromise. It was argued that the agreement to refer in the present case would amount to such an adjustment. But we consider

that the present agreement does not amount to an adjustment but only amounts to agreement on a procedure which might eventuate in an

adjustment and that until the referee had given his statement there could be no question of any adjustment. An objection was taken by the plaintiff

before Babu Jwala Prasad had made his statement and before any decree had been passed by the Court in accordance with that statement.

6. A case which was similar to the present case is reported in Tumman Singh and Others Vs. Sheodarshan Singh and this case was decided by a

Bench of which one of us was a member. In that case it was held that a similar agreement did not come within the purview of Order 23, Rule 3 and

that a party could resile from that agreement before the statement of the person to whom reference has been made has been recorded.

7. Now the Code provides in Schedule 2 for the appointment of an arbitrator who shall decide a case and make an award in writing to a Court

and . on such an award the case allows a period of ten days for objection to be filed. In addition to this procedure of arbitration there is also the

procedure under the Oaths Act by which reference may be made to a person to state on oath certain facts within his knowledge and the parties

may agree to be bound by such a statement. Referenee has also been made to Section 20, Evidence Act, which deals with statements made by

persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute. It is contended that the statement of

Babu Jwala Prasad would be an admission and an admission by which the plaintiff would be bound. In the first place, an admission under the

Evidence Act is not conclusive. Secondly an admission must be a statement of fact and in the present case it is not shown that Babu Jwala Prasad

made any statement of fact. Accordingly we consider that there is no question here of any admission by Babu Jwala Prasad which would have any

binding effect on the plaintiff.

8. Now it is clear that there are two kinds of proceedings which are allowed to parties who do not wish their suit to be tried by a Court in the usual

manner. Firstly, the parties may agree to abide by the statement on oath of some person under the Oaths Act, or secondly, the parties may make a

reference to arbitration under Schedule 2, Civil P.C. For the defendants-respondents it is contended that u/s 151, Civil P. C, this Court by its

inherent jurisdiction should sanction a third method of procedure, that is, the method adopted by the parties in this case, and should further hold

that once a reference has been made to the statement of a person to whom the parties referred, then each party to the case cannot resile from such

an agreement.

9. It is contended that the agreement to make a reference would be a legal agreement under the Contract Act the consideration being in the case of

each party that the opposite party had also made a promise to abide by the result. That may be so, and it is apparently correct that such an

agreement would not be invalid u/s 23, Contract Act. But although the breach of such an agreement might entitle a party to sue for damages, we

do not consider that such an agreement binds the parties to it and prevents them from resiling from such an agreement, and we do not consider that

such an agreement must necessarily be specifically enforced. We do not see that any advantage would accrue from the setting up of a third method

of procedure in addition to the method of Sch.2 and the methods of Oaths Act. If parties desire that the case should abide by the knowledge of

facts possessed by some person, then it is open to the parties to make an agreement under the Oaths Act that the case should abide by the

statement on oath of that person. If on the other hand, the parties desire that the case should be decided by some person instead of being decided

by the Court, then it is open to the parties to have that parson appointed as arbitrator under Schedule 2. But the particular kind of reference in the

present case which is by no means uncommon seems to us to serve no useful purpose.

10. In the present case Babu Jwala Prasad was apparently not stating anything of his own knowledge and at any rate he was not to make a

statement on oath. He was apparently deciding points of law in a manner which would prevent the parties having any appeal on those points of

law. If Babu Jwala Prasad had been an arbitrator then he would have had to proceed in a particular manner determined by the reference to

arbitration and his award would have had to be in writing and to have been filed in Court and a period of ten days would have been allowed for

objections. We consider that the objection of the plaintiff to the procedure in the present case is therefore well founded and that it was open to the

plaintiff to resile from the agreement before the statement had been made by Babu Jwala Prasad and action had been taken by the Court on that

statement. Accordingly we allow the appeal with costs and we restore the case and send it back to the Court of first instance for trial according to

law. Costs incurred here and in the lower Court will abide the result.