1925 November, 24.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

RADHA KISHEN AND OTHERS (PLAINTIFFS) *v.* KASHI NATH (DEFENDANT).*

Act No. X of 1873 (*Indian Oaths Act*), *sections* 10 *and* 11—*Agreement to abide by statement made by referee—Statement of referee not sufficient to decide the case—Re-examination of referee.*

There is nothing to prevent a person who has been appointed a referee under the provisions of the Indian Oaths Act, 1873, being recalled and re-examined, if it turns out that his statement as originally recorded does not contain information sufficient for the disposal of the case. *Thoyi Ammal* v. *Subbaroya Mudali* (1), and *Mahabir Prasad Misr* v. *Mahadeo Dat Misr* (2), referred to.

THIS was an appeal from an order of remand in a suit the object of which was the closing of certain windows and other reliefs. When the case came on for hearing, the parties agreed that it should be decided according to the evidence of one Babu Anand Prasad. Babu Anand Prasad was accordingly examined as a referee with the consent of the parties and he made certain statements. The learned Munsif was of opinion that the evidence given by Babu Anand Prasad covered the whole controversy between the parties and would justify a disposal of all the issues raised. He accordingly partially decreed the suit and partially dismissed it. The parties appealed and both the appeals were disposed of by a single judgement of the learned Subordinate Judge. The learned Judge was of opinion that the statement of Babu Anand Prasad was not sufficient for the disposal of the case and he remanded the suit to the court of first instance for disposal. He directed that the referee should be re-called and should be re-examined on all

* First Appeal No. 14 of 1925, from an order of Raj Behari Lal, Subordinate Judge of Ghazipur, dated the 5th of December, 1924.

(1) (1899) I.L.R., 22 Mad., 234. (2) (1891) I.L.R., 13 All 386.

the matters that were left in darkness owing to the referee not being questioned. He further said that if there were any points on which the referee could not throw any light, those points must be decided on evidence adduced by the parties.

The plaintiffs appealed.

Munshi *Kamla Kant Verma* and Pandit *Ambika Prasad Pandey*, for the appellants.

The respondent was not represented.

The judgement of MUKERJI, J., after setting forth the facts as above, thus continued :—

It has been argued before us that the statement of Babu Anand Prasad was enough for the disposal of the entire suit. It is not necessary for us to examine that statement in detail. It is sufficient to say that we agree with the court below that further light was necessary on the controversy between the parties. That being so, the question is whether the referee could be called again and examined.

The parties are agreed that if there be any point which cannot be disposed of according to the statement of the referee, evidence may be led on those points by the parties. The main question for disposal in these cases is whether the referee can, as a matter of law, be re-called and re-questioned.

It appears to me that there is nothing in the Indian Oaths Act, 1873, which declares that a referee cannot be re-examined if all the points which would be necessary to be established are not put to him. It was argued on behalf of the plaintiffs that they had agreed to the examination of Babu Anand Prasad only at that particular moment when he was before the court and their agreement to abide by his statement came to an end the moment the referee was examined

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The learned counsel for the appellants has relied on the case of *Thoyi Ammal* v. *Subbaroya Mudali* (1). As I read that case, I find therein no authority for the proposition which the learned counsel for the plaintiffs would have established. In that case it was said that the statement of the referee was not sufficient for the disposal of the case and the court simply said that the facts which remained unproved must be proved in the ordinary way, by way of evidence. It is not clear from the judgement whether the referee was unable to throw further light on the case or whether he was not at all available or whether it was possible to re-examine him and to obtain more information from him, if he could give it. That being the case, it cannot be inferred from what was stated by the Judges that the Court held that the referee could not be examined again. On the other hand, the dictum of the learned Judges of this Court who decided the case of *Mahabir Prasad Misr* v. *Mahadeo Dat Misr* (2), would go to show that they were of opinion that if the referee was still alive and available he could be examined again in the case of there arising a further necessity for elucidation of the matters in dispute.

There is nothing in the Indian Oaths Act which says that the reference to the referee comes to an end as soon as the referee has been once examined. In the case of reference to arbitration we know that an award may be referred back to the arbitrator for his decision if he leaves anything undecided. The same rule ought to be followed. For, as already stated, there is nothing in the Indian Oaths Act to prevent the application of this rule. In the circumstances I would dismiss both the appeals and uphold the order of remand.

SULAIMAN, J.—I agree. The question whether a referee by whose statement the parties have agreed to

(1) (1899) I.L.R., 22 Mad., 284. (2) (1891) I.L.R., 18 All., 386.

abide can be re-examined if certain points were omitted in his statement, is apparently not covered by any direct authority. The appellants' learned vakil relies on the case of *Thoyi Ammal* v. *Subbaroya Mudali* (1), where it was remarked :—" If the matter stated affords sufficient material for the decision of the suit, a decree may be passed on the facts thus conclusively proved. If the facts so proved are not sufficient for the decision of the case, *such further facts as are necessary must be proved in the ordinary way, by evidence adduced on both sides.* The facts proved by the special oath are, however, conclusively proved, and the further evidence must, in our opinion, be limited to matters not proved by the oath." On the other hand, the respondent's vakil relies on a remark in the judgement in *Mahabir Prasad Misr* v. *Mahadeo Dat Misr* (2) :—" Although I should always be strongly disinclined to assist a party to an agreement under the Oaths Act in getting out of it, yet I am bound to see that the object of the parties when they entered into it has been satisfactorily accomplished by the deposition of the referee, and, if that object has not been accomplished, then that *a further deposition should be obtained or*, if that is impossible, as is the case here, owing to the Raja's death, that the question should be tried in the ordinary way by the court."

The examination of both these cases, however, shows that both these remarks were *obiter dicta* and it was not necessary to decide the point. In the Madras case the referee was the plaintiff himself and he might have been expected to be in a position to fill up the gaps. The learned District Judge, however, had remanded the case for a trial *de novo* and the Madras High Court merely decided that the statement of the plaintiff as the referee must be regarded as conclusively

(1) (1899) I.L.R., 22 Mad., 235 (237). (2) (1891) I.L.R., 13 All., 386.

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proving the facts deposed to by him and that the further evidence should be confined to other matters. Neither party apparently asked for a re-examination of the referee and the point accordingly was not expressly decided.

In the Allahabad case the referee was dead, and no question of his re-examination arose.

It has been contended before us that once the oath was taken by the referee, the agreement was fully carried out and if either party is unwilling to accept as conclusive any further statement of the referee, such further statement should not be forced on him. But if this contention were to be accepted, the result would be that as soon as the referee has left the witness-box he cannot be recalled even by the trial court though some material statement has been accidentally omitted. It is impossible to accept this as the correct position under the Indian Oaths Act. If the trial court has power to recall a referee, there seems to be no good ground on principle why the same power should not be exercised by the appellate court if it comes to the conclusion that his statement is not complete and exhaustive.

Of course if a party were to show good ground why the referee should not be examined again, the court may under special circumstances refuse to recall him in order to fill up gaps in his statement, as it is the duty of both parties to see that his statement completely covers all the points in dispute. In this case, however, I see no good ground why the referee should not be asked to clear up certain points left vague by him.

BY THE COURT.—Both these appeals are dismissed and the order of remand is upheld with costs.

Appeals dismissed.