REVISIONAL CIVIL

Before Mr. Justice Mulla

1938 *September*, 20

RAMESHWAR NATH (DEFENDANT) *v.* GHULAM RASOOL KHAN (PLAINTIFF)*

Adjustment of suit—Agreement of parties to abide by the statement of a referee—Referee to make his statement after taking the statements of the parties—Referee not an arbitrator—Resiling from agreement before referee makes his statement.

The parties to a suit stated in court, "We appoint Baljit Singh as a referee. Let the case be decided upon any statement which he may make in court after taking the statements of the parties. We shall have no objection." Before any statement was made by the person named one of the parties resiled from the agreement: *Held,* that the person was appointed only as a referee, that the mere fact that power was given to him to take the statements of the parties before making his statement did not alter his character to that of an arbitrator, and therefore a party could resile from the agreement before the referee's statement was actually made.

Mr. *I. B. Banerji,* for the applicant.

Mr. *Shah Jamil Alam,* for the opposite party.

MULLA, J.: This is an application in revision against a decree passed by the learned small cause court Judge of Cawnpore. The applicant here was the defendant in the suit. The date fixed for the hearing of the suit was the 29th of November, 1937. On that date the counsel for the parties made a statement which literally translated runs as follows: "We appoint Daroga Baljit Singh as a referee. Let the case be decided upon any statement which he may make in court after taking the statements of the parties. We shall have no objection." The decision of the application really turns upon the true interpretation to be put upon this statement of the counsel as to the power which it conferred on Daroga Baljit Singh. The question is whether by this statement Baljit Singh was

*Civil Revision No. 54 of 1938.

appointed only as a referee who was to make a statement in court upon which the court was to decide the case, or as an arbitrator who had to make an award finally settling the dispute between the parties. It appears that on the same date, and probably soon after the statement of the counsel was recorded by the court, Daroga Baljit Singh was called and he also made a statement to the following effect: "I have no objection to decide the case." After recording these statements of the counsel and Baljit Singh the court passed an order as follows: "He should put in his statement by the 15th of December, 1937." On the 13th of December, 1937, the present applicant made an application in the court below, purporting to be under section 151 of the Civil Procedure Code, in which he said that he did not want to have the case decided by the *Munhasar-ilah,* and prayed that the order appointing Baljit Singh as *Munhasar-ilah* should be cancelled and the case be decided by the court. This application was rejected by the court below with the following order: "No reason is given why the applicant wants to back out. I see no reason to set aside the order of reference at the applicant's sweet will. The parties were definitely told that they must consider all the facts freely before applying for having the case referred. File." It may be added here that on the 14th of December the referee made an application praying for further time and upon that application the court passed the following order: "It is an old case. The referee must put in his statement by the 31st of December, 1937." Daroga Baljit Singh put in a written statement on the 20th of December, 1937. This statement is clearly an award imposing upon the applicant the liability to pay Rs.50 to the plaintiff in the suit. In the body of the statement the referee says that he had made a thorough inquiry on the spot and had heard the parties. When the case was taken up for hearing on the 23rd December, 1937, the

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present applicant made another application in which he prayed that the statement filed by the referee should not be accepted and the court should proceed to decide the case. In this application a reference was made to the previous application dated the 13th December, 1937. Upon this application the court passed the following order: "The referee sent in his written statement on the 20th December, 1937. This application is put in today. Before this the applicant filed an application on the 13th December, 1937, and in that application he gave no reason why he wanted to resile from the reference. That application was therefore rejected. In my opinion it is not now open to the applicant to attribute motives to the referee and have his decision set aside because the decision has gone against him. I cannot allow this application. Rejected." Having thus rejected the application, the court proceeded to pass a decree in terms of the statement put in by the referee. Hence the present application.

The argument on behalf of the applicant is that there is nothing in the law to prevent a party who agrees to refer the dispute to a referee from resiling from that agreement and insisting on the case being decided by the court instead of in accordance with the statement of the referee. Reliance is placed in support of this contention on two decisions of this Court, one in the case of *Tumman Singh* v. *Sheodarshan Singh* (1) and the other in the case of *Bishambhar* v. *Shri Thakurji Maharaj* (2). In the former case the parties to a suit agreed to abide by the statement of a particular person, who was accordingly summoned by the court for recording his statement. But the very next day one of the parties made an application to the court stating that he would not like to be bound by the referee's statement because he had reasons to believe that the referee was related to the other party. The court

(1) (1929) I.L.R. 52 All. 235. (2) (1931) I.L.R. 53 All. 673.

made an inquiry into the matter, and coming to the conclusion that the allegation regarding the relationship between the referee and the other party was false, proceeded to take down the referee's statement and ultimately passed a decree in the terms of that statement. In these circumstances it was held by a Bench of this Court that the party who had refused to be bound by the referee's statement after entering into an agreement at first that he shall be so bound could resile from that agreement before the referee made any statement in accordance with it. In the other case the parties to a suit agreed to abide by the statement of a pleader without an oath being administered to him; but before the pleader had made any statement and before any decree had been passed by the court in accordance with that statement the plaintiff resiled from the agreement on the ground that the pleader was going to decide that there was a separation between the plaintiff and his deceased cousin effected by the mere fact that in his will he had stated that he was separate. It was again held by a Bench of this Court that it was open to the plaintiff to resile from the agreement. If the statement made by the counsel for the parties in the present case on the 29th November, 1937, is interpreted in the sense that Daroga Baljit Singh was appointed only as a referee and he had to make a statement upon which the court had to decide the case, the two cases cited above would clearly govern the present case, because it is clear that the applicant had put in an objection on the 13th December before Daroga Baljit Singh had made any statement in court. The learned small cause court Judge seems to be of the opinion that if the parties agree to abide by the statement of a referee, they cannot resile from that agreement even before the referee makes his statement. This position is clearly repelled by the two cases cited above.

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It has, however, been argued on behalf of the opposite party that the counsel's statement dated the 29th November, 1937, really amounted to a reference to arbitration and hence the parties could not resile from that agreement. It is therefore necessary to analyse the statement in question in order to decide whether it was in effect an agreement to appoint Daroga Baljit Singh as an arbitrator who was to make a final award in the case, or only as a referee who had to make a statement in court upon which the court had to pass its own decision. On behalf of the opposite party great stress has been laid upon the fact that in the body of the statement in question there is a provision authorising Daroga Baljit Singh to take the statements of the parties, and it is contended that the conferment of this power upon him made him an arbitrator and not merely a referee. In support of this contention reliance has been placed upon certain observations made by SULAIMAN, C.J., in the Full Bench case of *Akbari Begam* v. *Rahmat Husain* (1). The relevant passage of the judgment of the learned CHIEF JUSTICE in that case runs as follows (page 82):

> "In occurrence with the opinions of the learned Judges who have made this reference, I hold that 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 inquiries and take evidence and then give his decision on such evidence. But where parties agree to abide by the statement of a third person or a referee, the referee merely makes a statement according to his knowledge or belief and the court then decides the case and pronounces its judgment on the basis of such statement and passes a decree thereon. The referee is not authorised to make inquiries and take evidence, and then announce his decision on the basis of such evidence He

(1) (1933) I.L.R. 56 All. 39.

is called upon to make a statement according to his knowledge or belief. In the case of an arbitration, as the arbitrator's award is an expression of an opinion and his procedure resembles that of a court, the party is entitled to file objections and challenge the validity of the award. The making of a statement by a referee or a third person has no resemblance to a proceeding conducted by him as if he were a court of law, and accordingly there can be no procedure for filing objections as to the validity."

It is further argued that the statement made by Daroga Baljit Singh on the same date, as recorded by the court, shows that he accepted the position of an arbitrator who had the power to decide the case and not merely that of a referee. Lastly, considerable stress is laid upon the application made by the present applicant on the 13th December, 1937, in which he described Daroga Baljit Singh as *Munhasar-ilah* and stated that the parties intended at first that they shall abide by his decision of the case. Upon a careful consideration of all the circumstances of the case I find that the argument on behalf of the opposite party, though very plausible, cannot be allowed to prevail. The question in issue has really to be decided upon the basis of the counsel's statement dated the 29th November, 1937. The subsequent application made by the present applicant on the 13th December is not, in my opinion, of much use because any statement contained therein might have been due to a misapprehension on his part of the agreement into which his counsel had entered. The power conferred on Daroga Baljit Singh has really to be determined upon the interpretation of the counsel's statement. Now it has to be borne in mind that the counsel must be presumed to have fully realised the difference between a referee and an arbitrator, and the distinction between an award and a statement. The counsel's statement under consideration clearly states that Daroga Baljit Singh was being appointed as a referee and he was to make a statement in court. It is true that it was

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further provided that he might make his statement after taking the statements of the parties to the suit. But I do not think that the addition of this provision can have the legal effect of altering the character of Daroga Baljit Singh as determined by the statement. In the Full Bench case referred to by the learned counsel for the opposite party there was no question in issue as to whether a certain person to whom the dispute had been referred by the parties was to be deemed to be an arbitrator or a referee. The observations made in the judgment of the learned CHIEF JUSTICE upon which the learned counsel has relied do not warrant the proposition that a referee can never be authorised by the parties to examine the parties before making his statement in court. I find further that the learned small cause court Judge always referred to Baljit Singh as a referee and directed him to put in his statement and not his award. It must be presumed that the learned Judge realised the difference between a referee and his statement on the one hand and an arbitrator and his award on the other. I am, therefore, of the opinion that the statement made by the counsel in this case on the 29th November, 1937, had the effect of appointing Daroga Baljit Singh only as a referee who had to make a statement in court, and not as an arbitrator who could finally decide the case by his award. In that view of the statement it must be held, in the light of the cases referred to above, that the present applicant was not barred by anything in the law from resiling from the agreement to appoint Daroga Baljit Singh as a referee. The learned small cause court Judge was, therefore, clearly wrong in rejecting the application made by the present applicant on the 13th December, 1937, and in proceeding to accept the written statement filed by Daroga Baljit Singh on the 20th December, 1937, and proceeding to pass his decree thereon. The result, therefore, is that I allow this application and setting aside the decree

passed by the court below, direct that the suit shall be restored and decided in accordance with law. The applicant shall have the costs of this Court from the opposite party.

REVISIONAL CRIMINAL

Before Mr. Justice Bennet, Acting Chief Justice, and Mr. Justice Verma

EMPEROR *v.* MAHTAB SINGH*

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Criminal Procedure Code, sections 257(2), 544—*Expenses of defence witnesses—When to be borne by Government and when by accused—Rules by Government on this subject—Discretion of court—Very large number of defence witnesses from all over India, purpose being annoyance and inconvenience—Order to deposit reasonable expenses before issue of process.*

Where in a case under section 110 of the Criminal Procedure Code the accused gave a list of 288 witnesses for the defence, to be summoned from various provinces of British India and even beyond, many of whom were Government servants in various departments, and the Magistrate passed an order under section 257(2) of the Criminal Procedure Code requiring the accused to deposit a sum of Rs.500, to begin with, towards the expenses of the witnesses, failing which no summonses would be issued: *Held,* that the order was justified by sections 257(2) and 544 of the Criminal Procedure Code, that in view of those sections and the rules passed by the Local Government under the latter section the Magistrate had exercised a correct discretion in not making the Government bear the expenses of this huge number of witnesses who were obviously being called for no other reason than to cause public inconvenience and expense and annoyance to Government. The criminal courts should not lend themselves to such an abuse of the process of the court or such a waste of public money and time both of the court and of the persons summoned, as the accused desired in the present case.

Sub-sections (1) and (2) of section 257 of the Criminal Procedure Code deal with different cases, and it is not correct to say that an order under sub-section (2) should not be passed except where the conditions of sub-section (1) exist.

Mr. *S. N. Misra,* for the applicant.

The Deputy Government Advocate (Mr. *Sankar Saran*), for the Crown.

*Criminal Reference No. 197 of 1938.