FULL BENCH

Before Falshaw, Gosain and Harbans Singh, JJ.

FIRM KHETU RAM BASHAMBER DASS,—*Appellants.*

versus

KASHMIRI LAL RATTAN LAL,—*Respondent.*

First Appeal from Order No. 127 of 1954.

1959

May, 29th

Arbitration Act (X of 1940)—Sections 21, 23 and 24—Applicability of—Indian Partnership Act (IX of 1932)—Section 19—One partner of a firm referring dispute to arbitration—Other partners ratifying it subsequently—Reference and Award—Whether legal—Partner referring the dispute—Whether bound—Reference of a dispute to arbitration through court in a pending suit and reference out of court—Difference between.

Held, that, having regard to the provisions of Sections 21 and 23 of the Arbitration Act, before any matter involved in a suit pending in a court can be referred to arbitration, (a) there must be an agreement amongst all the parties interested that any matter in dispute between them in the suit shall be referred to arbitration; (b) if they come to such an agreement, then they have to make an application in writing to the Court concerned; and (c) thereafter, the Court has to pass an order referring the dispute to the arbitrator agreed upon between the parties. Thus if there is no agreement between "all the parties interested" on the date when the Court passes an order, or there is no application made in writing by such parties, the order of the Court is without jurisdiction and consequently null and void. A reference to the arbitrator and the award given by him in pursuance of such a reference, therefore, is altogether invalid if the Court had no jurisdiction on the date on which it passed the order referring the matter to arbitration, and it is obvious that no subsequent act of the parties or ratification can possibly clothe the Court with the jurisdiction retrospectively. As one of the partners of a firm cannot refer a dispute to arbitration through court in a pending suit having regard to the provisions of Section 19(2) of the Partnership Act, 1932, the order of the Court is void *ab-initio* and the award by the

arbitrator is altogether invalid. Subsequently ratification or acquiescence by the other partners cannot validate the order of reference passed by the Court and the award made in pursuance thereof.

Held that, if there is a reference to arbitration without the intervention of the Court, when no suit is pending, the matter is entirely different. In that case, no order of the Court is required and the question of lack of jurisdiction of the Court does not arise. In a case like that it will be mere question of agreement between the parties and if a person acts on behalf of another in the hope that such a person will agree and ratify action, such a contract would become valid and binding as between the parties as soon as the party concerned ratifies the act of his agent. Subsequent ratification by other parties, where intitial reference was by one of the partners only, would certainly validate a reference to arbitration where it is not necessary to have the order of the Court for his purpose.

Held that, a number of conditions must be satisfied before reference can be made at the instance of some of parties, namely, (1) the matter desired to be referred to arbitration can be separated from the rest of the subject-matter of the suit; (2) the suit continues so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference in the same manner as if no such application has been made; and (3) the award made in pursuance of such a reference shall be binding only on the parties who have joined in the application. The test to be applied in a case in which reference to arbitration is made of the whole suit by one of the partners of a firm only would be whether, if a request had been made to the Court to refer the particular matter in dispute to arbitration at the instance of one of the partners, the Court would have exercised the discretion vested in it under section 24 or not. In other words, it would be necessary to see whether the matter referred can be separated and the case can proceed against the other partners and *qua* matters not referred to arbitration. If this can be conveniently done then the reference made may be treated as having been made by the Court under section 24, at the instance of the persons who are, in fact, parties to the application and the award would be binding on all such parties, including the referring partner. On the other hand,

if circumstances are such that the Court would not have referred the matter to arbitration at the instance of some only of parties to the suit either because the subject-matter referred cannot be separated or that the case cannot conveniently proceed with regard to the other partners and with regard to the other matters, the reference would be void altogether and the award given thereupon will not be binding even on the referring partner.

Case referred by Hon'ble Mr. Justice Gurnam Singh to a Division Bench on March, 8, 1957; for decision of some difficult questions involved in the case. The Division Bench, consisting of Hon'ble Mr. Justice Gosain and Hon'ble Mr. Justice Harbans Singh, further referred it to a Full Bench on 20th November, 1958. The case finally decided by the Full Bench consisting of Hon'ble Mr. Justice Falshaw, Hon'ble Mr. Justice Gosain and Hon'ble Mr. Justice Harbans Singh, on 29th May, 1959.

First Appeal from Order of Shri Ishar Singh, Sub-Judge, Ist Class, Muktsar, dated 30th July; 1954. setting aside the award and the reference to arbitration.

D. K. MAHAJAN, K. L. KAPUR & M. S. GUJRAL, for Appellant.

SHAMAIR CHAND and P. C. JAIN, for Respondents.

JUDGMENT

Harbans Singh, J.

HARBANS SINGH, J.—The facts giving rise to this reference to the Full Bench have been stated in the referring order of the learned Single Judge and Division Bench and may briefly be stated as follows : On 9th of July, 1953, plaintiff-firm Khetu Ram-Bashamber Das filed a suit against firm Kashmiri Lal-Rattan Lal for the recovery of Rs. 6,000 being the price of snuff supplied by the plaintiff-firm to the defendant-firm. The defendant-firm, which was admittedly a contractual partnership, consisted of five partners, namely, Rattan Lal and his four sons. The defendant-firm was sued through Rattan Lal as one of the owners

and *Karkun* of the aforesaid firm. Rattan Lal filed a written statement on behalf of the firm on 13th of October, 1953, and also engaged a lawyer. On 25th of November, 1953, an application was made jointly on behalf of the plaintiff-firm and defendant-firm for the subject-matter of the suit being referred to the sole arbitration of Bawa Niranjan Singh, a retired Sub-Judge. This application was signed on behalf of the defendant-firm by Rattan Lal and the counsel who had already been engaged by him on behalf of the firm. The arbitrator gave an award on 25th of January, 1954, granting a decree to the plaintiff-firm for Rs. 4,209-6-9, with proportionate costs. On the award being filed in Court, objections were put in on behalf of the four sons of Rattan Lal challenging the validity of the award on the ground that the application for referring the dispute to arbitration was signed only by Rattan Lal who had no express authority on behalf of the other partners. The learned trial Court set aside the award on the grounds urged and the plaintiff-firm filed an appeal against this order which came up for hearing before Kapur, J., who remanded the case for certain evidence to be brought on the record as to whether there had been any acquiescence or ratification by the other partners in the reference made on behalf of the firm by Rattan Lal. Thereafter, the appeal was heard by Gurnam Singh, J., who, in view of the conflict of authorities, referred the following two questions for determination by a larger Bench :—

(1) Whether a reference to arbitration by one partner alone can be legalised by subsequent acquiescence and ratification by other partners ?

(2) Whether the award is binding on the person who is party to a reference in

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spite of section 19(2) of the Indian Partnership Act and section 21 of the Arbitration Act ?

The matter then came up before a Division Bench who, in turn, referred these two questions to a Full Bench in view of the conflict of authorities.

So far as the first question is concerned, the relevant sections of the Arbitration Act, which require consideration, are sections 21 and 23, which run as follows :—

"21. Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference.

23(1). The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall in the order specify such time as it thinks reasonable for the making of the award.

(2) * * * * *".

Thus, before any matter involved in a suit pending in a Court can be referred to arbitration (a) there must be an agreement amongst all the parties interested that any matter in dispute between them in the suit shall be referred to arbitration ; (b) if they come to such an agreement, then they have to make an application in writing to the Court concerned ; and (c) thereafter, the Court has to pass an order referring the dispute to the arbitrator agreed upon between the parties.

There can be no manner of doubt that if there is no agreement between all the parties who are interested in the case and if the application is not made on behalf of them all, the reference made by the Court is bad and the award based on such a reference is invalid in law. This view has been consistently taken by all the High Courts. In *Negi Puran Singh* v. *Hira Singh and others* (1), while dealing with provisions of Civil Procedure Code, 1882, similar to sections 21 and 23 of the Arbitration Act, Stanley, C.J., and Banerji, J., of the Allahabad High Court held that if there was no application signed by all the parties who were interested in the settlement of the suit, the reference and the award given, thereafter, would be invalid. The same view was taken in *Haswa* v. *Mahbub and another* (2), by another Division Bench of the same Court. In *Gopal Das* v. *Baij Nath* (3), Sulaiman, J., (as he then was), referred to a number of decisions of Allahabad and Calcutta High Courts, and observed as follows :—

> "* * * it is necessary that all persons who are interested in the matter which is in difference between the parties and which is going to be referred to arbitration, should join. Although it is not absolutely necessary that they should all sign the application made to the Court, it is necessary that they should agree to the reference."

See also *Tej Singh and another* v. *Ghase Ram and others* (4), In *Ram Harakh Singh* v. *Mumtaz Hasain* (5), the question of acquiescence

(1) 1 I.C. 146
(2) 10 I.C. 559
(3) I.L.R. 46, All. 239
(4) I.L.R. 49, All, 812
(5) A.I.R. 1949 All. 679

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and ratification was also considered. Following *Gopal Das* v. *Baij Nath* (1), and *Subba Rao* v. *Appadurai* (2), Ghulam Hasan, J., held that the foundation of the jurisdiction of the Court is the consent of the parties and the subsequent ratification does not validate the reference which was void *ab initio*. Calcutta and Madras High Courts have also taken a similar view. The question was considered by a Full Bench of the Calcutta High Court in *Laduram* v. *Nandlal* (3), Mookerjee, J., at page 114 of the report observed as follows :—

> "The foundation of jurisdiction here is the agreement amongst all the parties interested that the matters in difference between them shall be referred to arbitration. If all the parties interested do not apply and yet an order of reference is made, the order is illegal because made without jurisdiction. If an award follows on the basis of that reference, it is equally illegal, because it is founded upon a reference made without jurisdiction."

See also *Seth Dooly Chand* v. *Munuji and others* (4), and *Khan Mohmed* v. *Chella Ram and another* (5), and *Subha Rao* v. *Appadurai* (6), In *Subha Rao* v. *Appadurai* (6), Devadoss, J., while considering the provisions of para 1 of Schedule II, Civil Procedure Code,—which in substance is the same as section 21 of the Arbitration Act—observed as follows :—

> "What gives the Court jurisdiction to refer the matter to arbitration is consent of all

(1) I.L.R. 48 All. 239
(2) I.L.R. 1925 Mad. 621
(3) A.I.R. 1920 Cal. 113(2)
(4) C.W.N. 387
(5) 43 I.C. 165
(6) A.I.R. 1925 Mad. 621

the parties. Consent subsequently given cannot give jurisdiction to the Court which it did not possess at the time when it referred the matter to arbitration."

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In the present case, it was not disputed that there was no specific agreement between all the partners of the defendant-firm to refer the matter to arbitration and in view of sub-section (2) of section 19 of the Indian Partnership Act, no partner can be treated to have any implied authority to act on behalf of the firm in this matter. Thus, even if Rattan Lal agreed and made an application on behalf of the firm for referring the matter to arbitration, such an agreement or application cannot be treated to be on behalf of all the partners. The argument however, was that in as much as Rattan Lal purported to act for and on behalf of the firm, if subsequently the other partners of the firm ratified this act of his, he would be clothed with the authority to act on their behalf retrospectively and that, in the eye of law, he shall be deemed to have authority at the time when he entered into the agreement and made the application for referring the matter to arbitration. Reference in this connection was made to section 196 of the Contract Act which provides that where an act is done by one person on behalf of another without that other's knowledge or authority, the latter can ratify that act and on such ratification, the same effects will follow as if the act had been performed by his authority. Article 25 of Bowstead on Agency (eleventh edition), at page 33, runs as follows :—

"Where an act is done in the name or prefessedly on behalf of a person without his authority by another person purporting to act as his agent, the person

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in whose name or on whose behalf that act is done may, by ratifying the act, make it as valid and effectual * * * as it if had been originally done by his authority, whether the person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all."

From the above, it was argued that by subsequent ratification by the other partners of the firm, the partner, who had purported to act on behalf of the other partners of the firm earlier, should be treated to be clothed with the authority at that time and that consequently on the date on which Rattan Lal made an application—25th of November, 1953—he should be treated as if he had express authority from his partners to refer the matter to arbitration. The argument is certainly plausible. It, however, does not take note of the fact that, in the present case, for a proper reference to arbitration, an order of the Court is necessary and, as has been observed in the various rulings referred to above, the foundation of the jurisdiction of the Court to make such an order is an agreement between and an application made by the parties interested. If, in fact, there is no agreement between "all the parties interested" on the date when the Court passes an order, or there is no application made in writing by such parties, the order of the Court is without jurisdiction and consequently null and void. A reference to the arbitrator and the award given by him in pursuance of such a reference, therefore, is altoghether invalid if the Court had no jurisdiction on the date on which it passed the order referring the matter to arbitration, and it is obvious that no subsequent act of the parties or ratification can possibly clothe the Court with the jurisdiction retrospectively.

However, if there is a reference to arbitration without the intervention of the Court when no suit is pending, the matter is entirely different. In that case, no order of the Court is required and the question of lack of jurisdiction of the Court does not arise. In a case like that it will be a mere question of agreement between the parties and if a person acts on behalf of another in the hope that such a person will agree and ratify action, such a contract would become valid and binding as between the parties as soon as the party concerned ratifies the act of his agent. For this reason, the cases, where ratification has been held to validate the reference made when no case is pending, will have no bearing on the question before us. *Shankar Das Rup Lal* v. *G. G. in Council* (1), is an illustration of such a case where the reference was without the intervention of the Court. The case of *Hanuman Chamber of Commerce* v. *Jassa Ram* (2), was, however, a case of reference to arbitration through the intervention of the Court. Achhru Ram, J., while dealing with the case, referred to section 196 of the Contract Act, and observed as follows :—

> "Assuming that the initial reference of the dispute in the present case was made by the referring partner without any express or implied authority from his other partners, there was nothing to prevent such partners from ratifying his act which was unauthorised at its inception."

There is no further discussion of this point and the learned Judge then dealt with the question whether the ratification must necessarily be express or can the same be implied from the conduct of the

(1) A.I.R. 1952 Punj. 234

(2) A.I.R. 1949 E.P. 46

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parties. Similarly, in *Parmeshwar Lal and Co.* v. *Jai Narain* (1), which was also a case of reference through the intervention of the Court, there is no discussion of the question as to how by the subsequent act of ratification of the partners the order of the Court, passed earlier which was void at the time when it was passed for lack of jurisdiction, would be legalised. The matter may become clear by taking an illustration. Supposing there are four parties interested in a suit; three come to an agreement and the fourth, who is not really available, cannot be consulted. If an application is made by these three persons and the Court is informed that they are sanguine that the fourth person will agree to the action taken by them, it is obvious that the Court will certainly not have jurisdiction to refer the matter to arbitration simply because of such an undertaking. The Court will immediately refuse the request to refer the matter to arbitration on the ground that there must be in existence an agreement between all the parties interested who must all apply to the Court before the matter can validly be referred to arbitration. The mere fact that the Court is not informed about this matter and is kept in ignorance, and passes an order, not realising that there is no existing agreement between all the parties, and that the application is not on behalf of them all, would not make any difference. If the Court passes an order at the instance of only three out of four, who are intersted in the suit, merely on the assurance that the fourth person is likely to ratify their act, such an order will certainly be without jurisdiction and therefore, void. Reference in this connection may be made to *Notified Area Committee* v. *Kidar Nath* (2), There, the Secretary of a notified area committee brought suits against

(1) A.I.R. 1952, Punj. 373
(2) A.I.R. 1932 Lah. 388

certain persons for recovery of the rent due to the committee, without there being any specific authority of the committee. Later, the action of the Secretary was ratified by resolutions passed by the Committee after the suits had actually been filed. It was held by Dalip Singh, J., that though the action of the Secretary might have been ratified by resolutions passed by the committee, such ratification was of no avail as suit must be decided to be good or bad on the day when it was instituted and it could not be ratified subsequently. Reliance was, however, placed by the learned counsel for appellant on *Alla Bakhsh* v. *Rohtak Municipality* (1), The relevant portion of the head-note (b) runs as follows :—

> "(b) When the person on whose behalf an appeal is filed, has accepted or ratified the action of the person who filed the appeal on his behalf, the person filing the appeal has authority to file the appeal."

This is a judgment of Dalip Singh, J., who later delivered judgment in *Notified Area Committee* v. *Kidar Nath* (2), referred to above. In this case, there was some sort of misunderstanding with regard to the *vekalatnama* which was filed by the counsel who had been asked to file the appeal. After discussing certain rulings which had taken a rather strict view in such cases, Dalip Singh, J., at page 224 of the report observed as follows :—

> "* * * it seems to me that the general principles of the other rulings lay down that in these matters a Court should not be too meticulous, especially

(1) A.I.R. 1926 Lah, 223
(2) A.I.R. 1932 Lah. 388

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when the person, on whose behalf the appeal was filed, has accepted or ratified the action of the person who filed the appeal on his behalf. I think our own Court in *Khaira* v. *Nath* (1), also seems to lean to the view that in these matters the more lenient view should be taken and as the Municipal Committee or its President has undoubtedly endorsed the action of the Secretary and as the plaintiff did not object to the vakalatnama originally filed in the suit, I think it should be held that the Secretary was empowered by the Municipal Committee or by its President to instruct the pleader and, therefore, had authority to sign the *vakalatnama* of the pleader on behalf of the Municipal Committee. Further, having regard to all the circumstances of the case, I should be inclined to extend the time under the provisions of Section 5 of the Indian Limitation Act if I considered it necessary to do so."

Thereafter, the learned Judge held that the discretion could have been properly exercised by the appellate Court because the Court below did not exercise any discretion in this respect. Thus, this case is no authority for the general proposition that if a person who had no authority at all, files a suit or makes an application, such a suit or application can be treated to have been properly filed if later on his act is ratified by his principal on whose behalf he had brought the suit or had made the application. The case of *Ancona* v. *Marks* (2), is also of no help because that seems to have been

(1) 55 I.C. 990
(2) 126 Revised Reports 646

decided on the peculiar facts of, and the procedure applicable to, that case. The observations made in Lindley on Partnership (eleventh edition), at page 193 to the effect that "the partner actually referring the dispute is, however, himself bound by the award, and the other partners may become bound by ratification", are based on *Thomas* v. *Atherton* (1), We are, however, not concerned with the general principles of ratification, but are concerned with the interpretation of section 21 of the Arbitration Act, corresponding to which there is no provision in the English law. The English authorities cannot, therefore, be of much help in this case. As already stated, ratification would certainly validate a reference to arbitration where it is not necessary to have an order of the Court for this purpose.

No decided case, directly dealing with the question of ratification in the matter of reference to arbitration by one person on behalf of another without authority vis-a-vis the provisions of section 21, has been brought to our notice by the counsel for the parties, nor have we been able to find out any such case. On gerenal principles, therefore, as discussed above, I am of the view that subsequent ratification cannot validate the order of reference passed by a Court at a time when there was, in fact, no agreement between all the parties interested, and the application made to the Court was not by all such parties, and such an order must be treated as void *ab-initio*. I, therefore, would answer the first question in the negative.

This brings me to the second question. In view of section 24 of the Arbitration Act, which

(1) 10 Ch. D. 185

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has been added for the first time in the Arbitration Act, 1940, it is not necessary to refer to the cases which were decided on the basis of the provisions of schedule II of C.P.C. 1908, (earlier provisions) which did not contain any provision corresponding to section 24. Section 24 of the Arbitration Act runs as follows :—

> "24. Where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by, section 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section, but the suit shall continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application."

This section, therefore, specifically provides for certain matters being referred to arbitration at the instance of only some of the parties. However, a number of conditions must be satisfied before reference can be made at the instance of some of the parties, namely, (1) the matter desired to be referred to arbitration can be separated from the rest of the subject-matter of the suit ; (2) the suit continues so far as it relates to the parties who

have not joined in the said application and to matters not contained in the said reference in the same manner as if no such application has been made ; and (3) the award made in pursuance of such a reference shall be binding only on the parties who have joined in the application. In the present case, it is obvious that the reference made by the Court was not in respect of any specific matter but was in respect of the entire matter in dispute. In fact, the Court purported to act not under this section but under section 21. The argument of the learned counsel for the appellant-firm was that all the partners are jointly and severally liable to pay the debt of the firm and consequently a reference, made by the Court at the instance of one of the partners of the firm, if invalid so as to bind all the partners of the firm, can, at least, be treated as valid *qua* the partner who made the reference. The test to be applied in a case like this would be whether, if a request had been made to the Court to refer the particular matter in dispute to arbitration at the instance of one of the partners, the Court would have exercised the discretion vested in it under section 24 or not. In other words, it would be necessary to see whether the matter referred can be separated and the case can proceed against the other partners and *qua* matters not referred to arbitration. If this can be conveniently done then the reference made may be treated as having been made by the Court under section 24, at the instance of the persons who are, in fact, parties to the application and the award would be binding on all such parties, including the referring partner. On the other hand, if circumstances are such that the Court would not have referred the matter to arbitration at the instance of some only of parties to the suit either because the subject-matter referred cannot be separated or that the case cannot conveniently proceed with

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regard to the other partners and with regard to the other matters, the reference would be void altogether and the award given thereupon will not be binding even on the referring partner. Thus, no categorical answer can be given to second question. Whether or not the award would be binding on the referring partner will depned on the application of section 24 to the circumstances of each case.

In the present case, it is obvious that the subject matter of the suit could not be separated. The claim of the plaintiff-firm was for the recovery of certain specific sum jointly and severally from all the partners of the firm. The Court would not have allowed the claim as against one of the partners to be referred to arbitration and proceeded with the claim against the other partners. If this had been allowed, there would have been likelihood of two contradictory findings being given both with regard to the factum as well as the money claimed as due. I am, therefore, of the view that in the present case the referring partner cannot be held bound by the award.

In view of the answers returned by this Bench to the questions referred, we feel that it is not necessary to send back the case to the learned Single Judge. We consequently uphold the order of the Court below setting aside the award and dismiss this appeal. In view of the difficult questions of law involved in this case, the parties will bear their own costs in this Court.

Gosain, J.

GOSAIN, J.—I agree.

Falshaw, J.

FALSHAW, J.—I agree.

B.R.T.