

hold that section 15 of the Punjab Pre-emption Act is not *ultra vires* the Constitution.

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The case can now be sent back to the trial Court for disposal according to law.

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In a number of other cases, namely, C.O. No. 182 of 1951, C.O. No. 149 of 1951, C.O. No. 72 of 1951, Civil Reference No. 6 of 1951, C.O. Nos. 4 and 5 of 1952 and Civil References Nos. 1 and 2 of 1952, the same point arose and our decision will operate in these cases also. All the original cases will be sent back to the Courts concerned for disposal according to law.

HARNAM SINGH, J. I agree.

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J.

APPELLATE CIVIL

Before Khosla and Harnam Singh JJ.

M/S CHAMAN LAL LOONA AND CO.,—Appellant

1952

versus

July 17th

DOMINION OF INDIA, NEW DELHI,—Respondent.

First appeal from order No. 9 of 1949.

Indian Independence (Rights, Property and Liabilities) Order, 1947, Clause 8—Construction and meaning of—Relevant date for the examination of the purpose under clause 8 (i), indicated—Date of the performance of contract, whether material—Contract performed before 15th August 1947, but liability undischarged thereunder effect of—The Joint Defence Council Order, 1947—Military Stores, effect of on clause 8—Clause 8, whether applies to executory contracts.

Firm C. L. & Co. supplied fodder to Military Dairy Farm at Lahore under contract entered into in 1945. Partition of India took place on 15th August 1947 and Lahore became part of Pakistan. On 10th August 1948 the firm C. L. & Co. filed an application in the court of Sub-Judge, Ferozepore, under sections 20 and 8 (2) of the Arbitration Act for reference of the dispute to arbitration in pursuance of the arbitration clause in the contract. The Dominion of India opposed the application on the basis of Clause 8 of the Indian Independence (Rights, Property

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and Liabilities) Order, 1947, and claimed that it was not liable under the contract. Trial Court upheld that objection and dismissed the application. The applicant appealed to the High Court.

Held, that under article 8 (i) of the Indian Independence (Rights, Property and Liabilities) Order, 1947, where there is a contract for a certain purpose the nature of that purpose must be examined after the 15th of August 1947, and if on that day the purpose is exclusively the purpose of the Dominion of Pakistan then the liability under that contract will be liability of the Dominion of Pakistan. The date on which the contract is to be performed is immaterial. If any liability under the contract subsists, the contract is alive as a chose in action and, therefore, even if the contract was performed before the 15th of August 1947, the liability under it remains undischarged. In apportioning liability regard must be had to the purpose of the contract and this purpose will be the purpose after 15th August 1947.

Union of India v. Lok Nath (1), dissented from; *Province of West Bengal v. The Midnapore Zemindary Co.* (2), followed.

Held further, that as the fodder was to be supplied to a Military Farm, the fodder, therefore, constituted Military Stores. Military Stores were kept joint and under the exclusive control of the Joint Defence Council who had the power of allocating these stores among the two Dominions and for transferring them from one place to another. Therefore fodder lying in the Military Farms, Lahore, was not on 15th of August 1947, the exclusive property of the Dominion of Pakistan but was under the exclusive control of the Joint Defence Council. This fodder could be transferred to a farm in India and thus could become the property of the Dominion of India. In the circumstances it cannot be said that the contract for supply of fodder to the Military Farm, Lahore, was a contract exclusively for the purposes of the Dominion of Pakistan if the contract were viewed on the 15th of August 1947, and that being so it must be held that the contract was not a contract exclusively for the purposes of the Dominion of Pakistan.

Held also, repelling the contention that clause 8 of the Independence (Rights, Property and Liabilities) Order, 1947, applies to executory contracts and not to executed contracts. Even a cursory examination of the phraseology of clause 8 will show that if any liability under a contract remains undischarged, the question of allocating such liability arises and it necessarily follows that the contract is alive and enforceable. If a contract is completely executed no dispute under it can arise.

(1) 55 C. W. N. 195

(2) 54 C.W.N. 677

First Appeal from the order of Shri Raj Inder Singh, Sub-Judge, 1st Class, Ferozepore, dated the 9th February 1949, dismissing the petition with costs.

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v.

TEK CHAND, for Appellant.
S. M. SIKRI, Advocate-General, for Respondent.

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JUDGMENT

Khosla, J.

KHOSLA, J. This appeal is directed against an order of a Subordinate Judge, Ferozepore, dismissing an application under section 20 of the Indian Arbitration Act. The matter has been referred to a Division Bench by Kapur, J., on the ground that it involves a law point of considerable importance which is likely to affect a number of other cases.

The facts of this case are briefly as follows. Fodder was required for the Military Dairy Farm at Lahore, and for the supply of this fodder a contract was entered into in 1945. The contract contained an arbitration clause and in pursuance of this clause an application under section 20 and section 8(2) of the Arbitration Act was filed on the 10th of August 1948, by the firm Chaman Lal Loona and Company in the Court of a Subordinate Judge, Ferozepore. The Dominion of India who was the respondent impleaded took up the objection that the contract was exclusively for the purposes of Pakistan within the meaning of clause 8 of the Indian Independence (Rights, Property and Liabilities) Order, 1947, and that, therefore, the Dominion of India could not be held liable under the contract. As a corollary to this it was contended that the Courts at Ferozepore had no jurisdiction to entertain the matter. The trial Judge held that his Court had jurisdiction to hear the application but that the liability for payment under the contract was exclusively that of the Dominion of Pakistan. On this ground he dismissed the petition and an appeal against the order of dismissal was filed in this Court. The sole question for determination is whether the contract was "for the purposes which as from that day (15th of August 1947) are exclusively purposes of the Dominion of Pakistan."

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The argument of the learned Advocate-General is that this contract must be deemed to be a contract exclusively for the purposes of Pakistan because the Military Farm, Lahore, is situated within the territory of the Dominion of Pakistan and the geographical location of the place where the consignment was to be made determines the purpose within the meaning of Article 8. On the other hand it is argued that fodder intended for the Military Farm was in the nature of Military Stores and as such it was covered by the Joint Defence Council Order, 1947, whereby all Military Stores remained joint even after the 15th of August, 1947. Therefore it could not be said that this contract was exclusively for the purposes of the Dominion of Pakistan. Distinction was sought to be drawn between Military Stores and other stores as only Military Stores remained joint after the 15th of August 1947. Stores and contracts relating to other departments would not be covered by the Joint Defence Council Order, 1947.

In the discussion which follows it will be assumed that fodder constitutes Military Stores. I wish to make this clear at the outset because our decision is likely to affect a number of other cases which were argued before us at the same time and in which the question might arise whether the goods which were to be supplied were or were not Military Stores. If any doubt arises on this question of fact the matter will have to be determined by a proper enquiry. But if it is found upon such enquiry that the goods to be supplied or supplied were covered by the term 'Military Stores' then the decision in this case will cover the case of such goods.

Article 8 of the Indian Independence (Rights, Property and Liabilities) Order is in the following terms :—

“ 8. (1) Any contract made on behalf of the Governor-General in Council before the appointed day shall, as from that day,—

- (a) if the contract is for purposes which as from that day are exclusively purposes of the Dominion of Pakistan, be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council ; and
- (b) in any other case, be deemed to have been made on behalf of the Dominion of India instead of the Governor-General in Council ;

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and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Governor-General in Council be rights or liabilities of the Dominion of Pakistan or the Dominion of India, as the case may be. * * * *”

The meaning of Article 8(1) appears to me to be that where there is a contract for a certain purpose we must examine the nature of that purpose after the 15th of August 1947, and if on that day the purpose is exclusively the purpose of the Dominion of Pakistan then the liability under that contract will be the liability of the Dominion of Pakistan. The date on which the contract is to be performed is, in my view, immaterial. If any liability under the contract subsists the contract is alive as a chose in action and, therefore, even if the contract was performed before the 15th of August 1947, the liability under it remains undischarged. In apportioning liability regard must be had to the purpose of the contract and this purpose will be the purpose after the 15th of August 1947. Our attention was drawn to *Union of India v. Loke Nath Saha* (1), in which it was held that the contract for the carriage of goods between two stations which are now in Pakistan was not a contract exclusively for the purpose of the Dominion of Pakistan because the goods were to be carried in March, 1947, before the Dominion of

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Pakistan was ever thought of. With great respect this decision does not appear to me to lay down correct law. The purpose in that case was the carriage of goods on the railway and that purpose after the 15th of August 1947, would be exclusively a purpose of Pakistan. Therefore, where there has been a complete transfer of a certain department, or of assets and liabilities of a certain type after the partition, the purpose which was originally the purpose of India will be treated as the purpose of Pakistan. For instance the supply of goods to a hospital or educational institution now situated in Pakistan would be deemed to be the exclusive purpose of the Dominion of Pakistan within the meaning of Article 8(1). Reference may be made to the *Province of West Bengal v. The Midnapore Zemindary Co.* (1), in which the lease of a house which was used as a hospital was considered to be entirely for purposes of West Bengal because the house was situated in West Bengal. In the present case the Lahore Military Farm is situated at Lahore and whether the fodder was supplied in 1945 or after the 15th of August 1947, the purpose will be deemed to be a purpose of the Dominion of Pakistan on account of the territorial situation of Lahore. But in the present case the fodder was to be supplied to a Military Farm and the fodder, therefore, constituted Military Stores. Military Stores were kept joint and under the exclusive control of the Joint Defence Council who had the power of allocating these stores among the two Dominions and for transferring them from one place to another. Therefore fodder lying in the Military Farm, Lahore, was not on 15th of August 1947, the exclusive property of the Dominion of Pakistan but was under the exclusive control of the Joint Defence Council. This fodder could be transferred to a farm in India and thus could become the property of the Dominion of India. In the circumstances it cannot be said that the contract for supply of fodder to the Military Farm, Lahore, was a contract exclusively for the purposes of the Dominion of Pakistan if the contract were viewed

(1) 54 C. W. N. 677

on the 15th of August 1947, and that being so it must be held that the contract was not a contract exclusively for the purposes of the Dominion of Pakistan. The decision of the learned trial Judge on this point must, therefore, be set aside.

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An argument urged at the Bar was that clause 8(1) applies to executory contracts and not executed contracts. This contention, however, is without any force as even a cursory examination of the phraseology of clause 8 will show that if any liability under a contract remains undischarged the question of allocating this liability arises and it necessarily follows that the contract is alive and enforceable. If a contract is completely executed, no dispute under it can arise. For determining which of the two Dominions must undertake the liability under the contract the contract must be deemed to have been made on the 15th of August 1947. The purpose of the contract must then be determined and if that purpose is the purpose of Pakistan then the liability will be that of the Dominion of Pakistan, otherwise the liability will be of the Dominion of India. In the present case the fodder must be considered to have been joint on the 15th of August 1947, and, therefore, the purpose was not exclusively the purpose of the Dominion of Pakistan.

With regard to the question of jurisdiction the decision must depend on whether the plaintiff is a displaced person. If he is, he is entitled to file a suit in a Court within whose jurisdiction he resides, otherwise the suit must be filed at a place where the cause of action arose in part or in whole. In the present case the security deposit which the appellant claims was to be paid to him at Muktsar and so the Courts of Ferozepore could entertain the suit.

Similarly in Civil Revision No. 344 of 1949, the goods were to be delivered F.O.R., Jullundur Cantonment and so it is clear that the Courts at Jullundur have jurisdiction to hear the case This petition is allowed.

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In Civil Revisions Nos. 63, 64 and 70 of 1949 there is a dispute as to whether the goods were military goods or not. The goods in these cases were to be delivered F. O. R., Jullundur City as is shown by the acceptance form and so the Courts of Jullundur have jurisdiction to hear these cases. For the reasons given above I would allow F.A.O. No. 9 and Civil Revisions Nos. 63, 64 and 70 of 1949. I hold that in all these cases the purpose of the contract was not exclusively a purpose of the Dominion of Pakistan unless it can be shown that the goods which were to be supplied were not in the nature of Military Stores. The trial Courts concerned will proceed to adjudicate upon the matters and decide them according to law. In the circumstances I make no order as to costs.

I may in this order deal with E.F.A. No. 259 of 1950 also as the points involved are somewhat similar. In this case a suit was brought for recovery of damages on account of an accident as the result of which a Railway Guard serving in the North-Western Railway, Rawalpindi, was killed. The suit was decreed and the decree-holder Shakuntala Devi sought execution in the Court of the Senior Sub-Judge, Delhi. Objection was taken that the liability under the decree was not the liability of the Dominion of India but that of the Dominion of Pakistan. The learned Senior Sub-Judge, however, held that the East Punjab Railway being the successor of the North-Western Railway was liable under the decree. Against this decision the Union of India has filed an appeal to this Court.

The claim was based on a non-contractual obligation and, therefore, the case falls under clause 10 of the Indian Independence (Rights, Property and Liabilities) Order, 1947. This clause provides that where the cause of action arose wholly within the territories which, as from the 15th August 1947, are the territories of the Dominion of India, the liability shall be the liability of the Pakistan Dominion. The accident took place at Rawalpindi and the claim is not based on a con-

tract. Therefore the liability for damages is that of the Dominion of Pakistan and the decree-holder's application is liable to be dismissed. The learned Senior Sub-Judge of Delhi erred in holding that the East Punjab Railway was liable. Mr Shamair Chand contended that the case fell under Article 9, but it is clear that Article 9 relates to liabilities under the contracts referred to in Article 8 for it speaks—

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“ All liabilities in respect of *such* loans, guarantees and other financial obligations.”

The respondents' claim arose out of an actionable wrong other than the breach of contract and it clearly fell under clause 10. This appeal must, therefore, be allowed and allowing it I would dismiss the respondents' application for execution. I would however make no order as to costs.

HARNAM SINGH, J. In concurring in the foregoing judgment, I state reasons for my opinion on the main point arising under Article 8(1) of the Indian Independence (Rights, Property and Liabilities) Order, 1947, hereinafter referred to as the Order. Article 8(1) of the Order provides—

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“ 8 (1) Any contract made on behalf of the Governor-General in Council before the appointed day shall, as from that day,—

- (a) if the contract is for purposes which as from that day are exclusively purposes of the Dominion of Pakistan, be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council ; and
- (b) in any other case, be deemed to have been made on behalf of the Dominion of India instead of the Governor-General in Council ;

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and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Governor-General in Council, be rights or liabilities of the Dominion of Pakistan or the Dominion of India, as the case may be."

In these proceedings it is not disputed that the contracts in suit were made on behalf of the Governor-General in Council before the 15th day of August 1947. The question that, therefore, arises for decision is whether the contracts in suit from the 15th day of August 1947, are exclusively for the purposes of the Dominion of Pakistan.

In order to appreciate the question that arises for decision the provisions of sections 177(1) and 150 of the Government of India Act, 1935, hereinafter referred to as the Act, may be borne in mind.

In enacting Article 8 of the Order the language used in section 177(1) of the Act has been closely followed. Section 177(1) of the Act reads :

"177. *Existing contracts of Secretary of State in Council—*

(1) Without prejudice to the special provisions of the next succeeding section relating to loans, guarantees and other financial obligations, any contracts made before the commencement of Part III of this Act by, or on behalf of, the Secretary of State in Council shall, as from that date—

(a) if it was made for purposes which will after the commencement of Part III of this Act be purposes of the Government of a Province, have effect as if it had been made on behalf of that Province ; and

(b) in any other case have effect as if it had been made on behalf of the Federation ;

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and reference in any such contract to the Secretary of State in Council shall be construed accordingly, and any such contract may be enforced in accordance with the provisions of the next but one succeeding section.

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But this statement only raises the question as to the meaning of the word 'purposes' occurring in section 177(1) of the Act and Article 8 of the Order.

Section 150 of the Act provides :—

"150. *Expenditure defrayable out of Indian revenues—*

- (1) No burden shall be imposed on the revenues of the Federation or the Province except for the purposes of India or some part of India.
- (2) Subject as aforesaid, the Federation or a Province may make grants for any purpose, notwithstanding that the purpose is not one with respect to which the Federal or the Provincial Legislature, as the case may be, may make laws."

From a perusal of the provisions of section 150 of the Act it is plain that the purposes of the Dominions of India and Pakistan plainly *include* purposes in respect of which the Dominions of India and Pakistan, as the case may be, may make laws with effect from the 15th day of August 1947. In this connection Article 295 of the Constitution of India may also be seen.

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In the opinion that I have expressed in the preceding paragraph, I receive support from what was said by Latham, C.J. in *Attorney-General Victoria v. The Commonwealth of Australia and others* (1). In that case Latham, C.J., in construing the words "purposes of the Commonwealth" occurring in section 81 of the Commonwealth of Australia Constitution Act said :—

" I approach the consideration of this question with the *prima facie* opinion that the words 'purposes of the Commonwealth' (which plainly include purposes 'in respect of which the Parliament has power to make Laws') are not identical in meaning with the latter words. I have already stated my opinion that each such power includes a power to authorize the expenditure of money."

Admittedly, the contracts in question were made under section 175 of the Act read with entry I Federal Legislative List, in so far as that entry relates to His Majesty's armed forces. As was said by Latham, C.J., in 71 C.L.R. 237, each power to make laws with respect to a particular subject-matter includes a power to make a law providing for the expenditure of money in relation to that subject matter.

In these circumstances, the question for decision is whether the matters covered by entry I, List I of the Act became exclusively the purposes of Pakistan with effect from the 15th day of August, 1947.

Section 6(1) of the Indian Independence Act, 1947, hereinafter referred to as the Independence Act, provides that the Legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territorial operations. That being so, the Legislature of the Dominion of Pakistan had full power

(1) 71 C. L. R. 237

to make laws for that Dominion as from the 15th day of August 1947, on matters covered by entry I, List I, Seventh Schedule of the Act.

Section 9(1) of the Independence Act authorized the Governor-General of India to make such provisions as appeared to him to be necessary or expedient for making agreements to be entered into and other acts done, on behalf of either of the new Dominions before the 15th day of August 1947, and section 11 of the Independence Act authorized the Governor-General of India to make provisions for the division of the Indian armed forces of His Majesty between the new Dominions and for the command and governance of those forces *until the division was completed.*

In exercise of the powers conferred by subsection (1) of section 9 of the Independence Act, and in pursuance of subsection (1) of section 11 thereof, the Governor-General made the Joint Defence Council Order, 1947, on the 11th day of August 1947, hereinafter referred to as the Defence Order. The Defence Order was to remain in force till the 1st day of April 1948, but it was provided in that Order itself that Governor-General of India and Governor-General of Pakistan acting jointly may direct that the Order shall remain in force for such further period as may be specified in the direction.

Article 8 of the Defence Order provides *inter alia* that the Joint Defence Council shall be in exclusive control of—

- (a) the division of the Indian forces between the Dominions and their reconstitution as two separate Dominion forces ;
- (b) the allocation, transfer and movement of officers and men belonging to the Indian forces for the purposes of such reconstitution ;
- (c) the allocation, transfer and movement for the purposes of such reconstitution

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of plant, machinery, equipment and stores held by the Governor-General in Council immediately before the 15th day of August 1947, for the purposes of the Indian forces ;

* * *

(f) the general arrangements for the payment, food, clothing, medical attendance and equipment of the armed forces of each of the two Dominions ;

* * *

Article 9 of the Defence Order provides that the executive authority of each of the two Dominions shall be so exercised as to give full effect to any orders or directions that may be made or given by the Joint Defence Council in exercise of the powers conferred on them by the Order and Article 15 of that Order then provides that all expenses incurred by or under authority derived from the Joint Defence Council or the Supreme Commander for carrying into effect the *purposes* of that Order shall be borne by the Dominions of India and Pakistan in such proportion as may be determined by the Joint Defence Council.

Clearly, the Joint Defence Council was put in exclusive control of the division of the Indian forces between the Dominions and their reconstitution as two separate Dominion forces and the allocation, transfer and movement of officers and men belonging to the Indian forces for the purposes of such reconstitution. The Joint Defence Council was empowered to incur expenditure for carrying into effect the *purposes* of the Order as distinguished from the purposes of the Act. If so, the contracts in question were not for purposes which as from the 15th day of August 1947, are exclusively purposes of the Dominion of Pakistan.

Article 3(2) of the Order provides that nothing in that Order shall affect the powers of control over military plant, machinery, equipment and stores conferred on the Joint Defence Council by the Defence Order.

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Again, the stores in question were held by the Governor-General in Council immediately before the 15th day of August 1947, for the purposes of the Indian forces and on the partition of the country under section 2 of the Independence Act, the Defence Order gave exclusive control over those stores to the Joint Defence Council. As stated above, section 11(1) of the Independence Act authorized the Governor-General to make provisions for the division of the Indian armed forces of His Majesty between the new Dominions and for the command and governance of those forces until the division was completed. In these circumstances it cannot be maintained that the purposes for which the contracts were made on behalf of the Governor-General in Council immediately before the 15th day of August 1947, became the exclusive purposes of the Dominion of Pakistan with effect from that date.

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J.

Basing himself on the report of the Expert Committee No. IV set up by the Government of India (Partition Office) memorandum No. 14/P.O./1054, dated the 18th June 1947, counsel appearing for the Union of India urges that rights and obligations under contracts made up to the 15th day of August 1947, shall be deemed to have been made by the Dominion in whose territories the stores are on the 15th day of August 1947. In my judgment the Report of the Expert Committee may be read not to control the meaning of Article 8, but may be seen in case of ambiguity. For authority on this point *A. K. Gopalan v. State of Madras* (1) may be seen. In that case Kania, C.J. said at p. 38 :—

“ Our attention was drawn to the debates and report of the drafting committee of the Constituent Assembly in respect of the wording of this clause. The report

(1) A. I. R. 1950 S. C. 27

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may be read not to control the meaning of the Article, but may be seen in case of ambiguity."

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Clearly, the argument raised on the basis of the report of the Expert Committee No. IV cannot be accepted. No ambiguity arises from reading Article 8(1) of the Order with Article 8 of the Defence Order.

In arguments it was said that Article 8(1) of the Order does not apply to executed contracts. For the reasons given by Khosla, J. I think that there is no substance in the argument raised.

For the foregoing reasons, I think, that the defendant has failed to establish that the contracts in question were exclusively for the purposes of the Dominion of Pakistan.

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APPELLATE CIVIL

July 19th

Before Kapur J.

L. RAM NARAIN AND OTHERS—*Defendants-Appellants,*

versus

SHRI SANTOSH KUMAR AND OTHERS (*Plaintiffs*),
L. JUGAL KISHORE AND OTHERS—*Defendants-Respon-*
dents.

First Appeal from Order No. 96 of 1950

*Indian Evidence Act (Act No. I of 1872) Section 20—
Referee—appointment of—Whether valid and binding—
Statement of the referee—Whether referee bound to
make statement in Court—Civil Procedure Code (Act No.
V of 1908—Order XXIII Rule 3 and Order XLIII Rule I (m)
—Compromise by the parties before the referee—Whether
amounts to adjustment of the suit—Suit is decided in
accordance with the statement of the referee—Appeal—
Whether lies.*

A suit for dissolution of partnership and rendition of accounts etc. was referred to J.N. for decision as referee and the parties agreed to be bound by his statement. The parties compromised the matter before the referee who forwarded the same to the court with a letter requesting that the same be taken as his statement of the case. Objection was taken that J.N. was never appointed a referee