pay and in such contingency the employee is also exempted from making his insurance contribution. To preserve the continuity of the contribution period and to enable an employee to avail of the benefits, it has been made obligatory that his contribution shall be payable under sub-section (5) of section 42 when he is on authrized leave.

It seems to me that the contribution is recoverable from the employee only when something is to be paid to him in respect of the period for which the contribution was made. That is the cardinal point in the scheme of the Act and an employee would be deprived of its benefits if the contribution is made deductible from his wages for a period for which he has not actually been paid. "Week" is used every where in the Act as the unit period of contribution. From the provisions of the Act, it appears that the Legislature was particularly solicitous in providing this privilege to the employee that the deduction would never be made from any source but his wages and that too in respect of the period for which the contribution was made. It seems impossible for me to reconcile either of these two conditions with the claim which has been made on behalf of the company, and in my view the decisions of the Tribunal is correct.

This appeal fails and is dismissed. I would, however, make no order as to costs.

R.S.

APPELLATE CIVIL.

Before Prem Chand Pandit, J.

GIAN CHAND SHARMA,—*Appellant.*

versus

BANSI LAL AND OTHERS.—*Respondents.*

Regular Second Appeal No. 905 of 1956.

1960

August, 18th.

Code of Civil Procedure (V of 1908)—Order 23 Rule 3—Agreement for the appointment of a referee and decision of the suit on his statement—Party to the agreement—Whether can reside before such statement is made—Suit—Whether adjusted by the agreement—Agreement—Whether can be enforced in the same suit—Inherent powers of the Court—Whether can be invoked for the enforcement of such agreement.

—*Held*, that where a party agrees to the appointment of a referee and gives his consent to the case being decided on the statement made by the referee, the party is not debarred from resiling from the agreement before the statement is actually made by the referee. He can insist on the case being decided by the Court instead of in accordance with the statement of the referee. The statement of the referee in such a case, in veiw of the agreement between both the parties, would be binding upon them as an admission under section 20 of the Indian Evidence Act and surely a party cannot be bound to make an admission and can resile from making the same before the said statement is actually made. Breach of such an agreement might entitle a party to sue for damages, but the suit cannot be adjusted in accordance with the same and either party can resile before the referee gives his statement.

Held also, that the agreement for the appointment of a referee in suit, if resiled, cannot be enforced in the same suit, because the Court is not concerned with the enforcement of that agreement, the suit having not been filed for that purpose. The Court can take cognizance of the adjustment of the suit, if in pursuance of that agreement the referee has made the statement and the agreement is perfected into an adjustment of the claim. For the breach of such an agreement the remedy of the aggrieved party may be by way of a separate suit for damages. There canot be specific enforcement of such an agreement which is, by its nature, revocable, because a party canot be bound to make an admission and can resile from making the same before it is actually made.

Held, further, that the inherent powers of the Court cannot be invoked for the enforcement of an agreement

which, under the law, cannot be specifically enforced even in a separate suit. Besides, the enforcement of such an agreement is likely to lead to confusion, because the Court, instead of determining the rights and liabilities of the parties in respect of the subject-matter of the suit, would be compelled to launch an enquiry into extraneous matters.

Second Appeal from the decree of the Court of Shri Bahal Singh, Senior Sub-Judge, with enhanced appellate powers, Gurdaspur, dated the 24 July, 1956, affirming that of Shri Rajinder Lal Garg, Sub-Judge, 1st Class, Pathankot, district Gurdaspur, dated 3rd March, 1956, dismissing the suit.

H. L. SIBAL AND S. C. SIBAL, ADVOCATES, for the Appellants.

D. N. AWASTHY AND MR. V. C. MAHAJAN, ADVOCATES, for the Respondents.

JUDGMENT

PANDIT, J.—Gian Chand filed a suit for the issue of a permanent injunction restraining the defendants from interfering with his water spout on the ground that his water was being discharged from the same for the last twenty years, that three months before the suit the plaintiff had demolished the *chaubara* of his house and wanted to re-build it, and when he was going to build the *chaubara* the defendants stopped him from reconstructing the water spout. Pandit, J.

The suit was contested by the defendants who pleaded that the plaintiff used to discharge his water from a part of his own wall, that when defendants were minors, he changed the position of his water spout and now he wanted to open the same at a place where he had no right to do so.

A number of issues were struck and evidence was led by the parties on the same. On the 23rd

Gian Chand Sharma, *v.* Bansi Lal and others,

Pandit, J.

January, 1956, the parties filed a joint application before the Court in which they admitted that the wall was joint of the parties and that it might be divided into two equal shares. It was further stated in this application that Gian Chand, plaintiff would be the sole owner of the portion of the wall which would fall to his share and similarly, the defendants would be the owners of the other half of the wall, that the plaintiff would remove his encroachments, if any, on the other half of the wall which would fall to the share of the defendants, that the Court might appoint any body to partition the wall and his decision would be binding on the parties, that no party would have any right to file an appeal or revision from the decision of that person who would be in the position of a referee and the parties would bear his expenses half and half, and that after the partition of the wall, the Court might dismiss the suit but the parties would have a right to file a separate suit. On that very date, statements of the parties were recorded on this joint application and they stated that somebody might be appointed by the Court to partition the wall and his decision would be binding on the parties as that of a referee. On the same date the Court, in accordance with the application of the parties, appointed Shri Trilok Chand to partition the intervening wall of the parties. It was further ordered that he should put in his report by the 6th of February, 1956. It seems that the report was not received on the 6th February, 1956, and the case was adjourned to the 27th February, 1956. Since the report was not received even on the 27th February, 1956. the case was fixed for the 29th February, 1956, On the 29th February, 1956, it was found that Shri Trilok Chand was not prepared to act as a referee and therefore the Court appointed Shri Satish Chander, Pleader to partition the wall and he was directed to go to the spot,

partition the wall and send his report by the 3rd March, 1956. It appears that on the same day an application was filed by Gian Chand, plaintiff praying that since the previous arbitrator had refused to decide the matter, the Court itself should decide the same and it might not be referred to a new arbitrator. On this application, the Court issued notice to the other side for the 3rd March, 1956, which was the date fixed in the case for the report of Shri Satish Chander, the newly appointed referee. On the 3rd March, 1956, since Shri Satish Chander's report had been received the Court dismissed the suit as per statements and application of the parties dated the 23rd January, 1956, and ordered the parties to bear their own costs. The Court further ordered that the paries could get the last report, namely, that of Shri Satish Chander, duly enforced and on the same day, the Court passed the following order on the application dated the 29th February, 1956, of Gian Chand, plaintiff :—

> "The plaintiff is present and he states that he co-operated with the referee but had told the referee of this application. In view of the application of the parties and their statements dated 23rd January, 1956, this application is not tenable and is hereby rejected."

Aagainst the decree of the trial Court dated the 3rd March, 1956, the plaintiff went up in appeal to the Senior Subordinate Judge, Gurdaspur, who dismissed the same holding that the plaintiff had got no right of appeal from the order of the Court dated the 3rd March, 1956, by which the suit was dismissed in accordance with the agreement dated the 23rd January, 1956. He further held that the plaintiff had no right to withdraw

Gian Chand Sharma, v. Bansi Lal and others

Pandit, J.

from the agreement dated the 23rd January, 1956, when the plaintiff had specifically agreed not to file any objections or an appeal or revision against the decision of the person appointed by this Court. The plaintiff has come up in second appeal against the decree of the Senior Subordinate Judge.

The first question for decision in this case is whether the application filed by the parties on the 23rd January, 1956, amounts to an adjustment of the suit within the provisions of Order 23, rule 3, of the Code of Civil Procedure. It was strenuously contended by the learned counsel for the respondents that the suit was adjusted by the parties and the case fell within the purview of Order 23, rule 3, of the Code of Civil Procedure, and no appeal was competent against such a decree under the provisions of section 96(3) of the Code of Civil Procedure.

After hearing the parties, I am of the view that the application dated the 23rd January, 1956, cannot be called an adjustment of the suit within the meaning of Order 23, rule 3, of the Code of Civil Procedure. It can at the most be called an agreement to adjust the suit. No decree could have been passed on the basis of this application on that date. It was agreed between the parties that a referee should be appointed by the Court to partition the wall and it is only after the referee had made his report that the adjustment would have taken place and the suit could be dismissed. But in my view it cannot be said that on the 23rd January, 1956, the suit was adjusted as contemplated by Order 23, rule 3, of the Code of Civil Procedure.

Reference in this connection may be made to the observations of Sulaiman, C.J., in *Mt. Akbari Begam* v. *Rehmat Husain* (1) :—

> "In my opinion the true basis of the binding character of such an agreement is that the

(1) A.I.R. 1933 All. 861 (880) (Special Bench).

original contract to abide by the statement of a third person is perfected into an adjustment of the claim in terms of the statement made, as soon as the referee makes the statement. After that stage, neither party can resile from the agreement because the claim has been duly adjusted and it has become the duty of the Court not only to record it, but also to pass a decree in terms of it. It is true that under Order 23, rule 3, before a Court can order an agreement or compromise to be recorded, and pass a decree in accordance therewith, it has to be satisfied that the suit has been adjusted wholly or in part by such agreement or compromise. Where the parties agree to abide by the statement of a third person their agreement is still in the nature of a contract, and it may well be said that so long as that third party has not made his statement, and the contract has not been carried out, there is yet no adjustment of the suit. Matters have not proceeded beyond the domain of an agreement, and the stage of the adjustment of the claim has not yet been reached. Strictly speaking an agreement is not identical with a compromise of the suit, and may amount to a mere contract. But as no decree can be passed forthwith in terms of a mere contract to abide by the statement of a third person, I am prepared to hold that there can be no adjustment of the suit by such a contract until the statement has been made. But as soon as the agreement has been fully carried out by the Court and the referee

Gian Chand Sharma.
v.
Bansi Lal and others.

Pandit, J.

has made his statement in favour of one party or the other, it is also too late for either party to go back upon the agreement ; and at this stage the agreement must be deemed to have eventuated into an adjustment of the claim in accordance with the statement already made. A party cannot be allowed to retract his solemn promise for consideration made before that Court after he has come to know the nature of the statement by which he had agreed to abide. It is no longer a question of the carrying out of a promise or the specific performance of a contract. The compromise must be deemed to have been carried out and accordingly the claim already adjusted. The Court cannot therefore entertain an application to withdraw from the previous agreement and to resile from it unless fraud, misrepresentation, coercion, influence or mutual mistake were established."

Apart from the ruling mentioned above, there is good deal of authority for the view that it is only after the referee had made his statement in accordance with the agreement of the parties that the suit is said to have been adjusted, and before the statement is made by the referee it is merely an agreement, e.g., *Bishambhar* v. *Radha Kishunji* (1).

Where a party agrees to the appointment of a referee and gives his consent to the case being decided on the statement made by the referee, the party is not debarred from resiling from the agreement before the statement is actually made by the

(1) A.I.R. 1931 All. 557.

referee. He can insist on the case being decided by the Court instead of in accordance with the statement of the referee. The statement of the referee in such a case, in view of the agreement between both the parties, would be bindng upon them as an admission under section 20 of the Indian Evidence Act and surely a party cannot be bound to make an admission and can resile from making the same before the said statement is actually made. Breach of such an agreement might entitle a party to sue for damages, but the suit cannot be adjusted in accordance with the same and either party can resile before the referee gives his statement.

It was observed by Kapur, J., in *Moni Ram* v. *Hari Chand* (1), as follows :—

> "A party agreeing to the appointment of a referee and consenting to the case being decided on the statement made by the referee, is not debarred from resiling from the agreement before the referee makes the statement."

In this connection, I may also notice the following observations of Agarwala, J., in the Full Bench decision reported as *Saheb Ram* v. *Ram Newaz and others* (2) :—

> "With all respect, I see no reason why such an agreement between the parties should not be given effect to. The Civil Procedure Code is not exhaustive of the modes in which a proceeding may be decided. When two parties agree that the decision of a case may be reached in a particular manner, e.g., according to the statement of a particular person,

(1) 1955 P.L.R. 327.
(2) A.I.R. 1952 All. 882 (886).

Gian Chand Sharma, *v.* Bansi Lal and others

Pandit, J.

common sense and natural justice point to the conclusion that the case may be decided in that particular manner. There is nothing in the Code of Civil Procedure or any other law which prevents the Court from following the procedure suggested by the parties.

"This matter was dealt with by a Full Bench in *Akbari Begum* v. *Rahmat Husain* (1). and it was held that an agreement like the one under discussion is binding on the parties, that the case can be decided according to it and that the Court has a power to follow the procedure indicated by the parties in deciding the case. It was further held that the agreement was not opposed to public policy nor repugnant to the provisions of the Contract Act or any other law and was binding on the parties.

"In my opinion where an agreement is made between the parties to abide by the statement of a person, it is a valid agreement enforceable by the Court except when there are sufficient reasons for resiling from it in which case the Court may allow one of the parties to resile from the agreement. In the absence of any such sufficient cause the Court is bound to enforce the agreement, to take down the statement of the party concerned and to decide the case accordingly. The true basis of the power of the Court to decide a case in accordance with the agreement between the parties is neither section 20, Evidence Act, nor

(1) 1933 All. L.J. 1127.

O. 23, R. 3, Civil P.C., nor the Arbitration Act but the agreement of the parties themselves. If the agreement is valid, the Court has a power under its inherent jurisdiction to give effect to it."

With great respect to the learned Judge, I cannot persuade myself to subscribe to the above-mentioned proposition enunciated by him.

Apart from the fact that the case dealt with by the Full Bench, was one under the Indian Oaths Act, I am of the view that such an agreement cannot be enforced in the same suit, because the Court is not concerned with the enforcement of that agreement, the suit having not been filed for that purpose. The Court can take cognizance of the adjustment of the suit, if in pursuance of that agreement the referee has made the statement and the agreement is perfected into an adjustment of the claim. For the breach of such an agreement the remedy of the aggrieved party may be by way of a separate suit for damages. There cannot be specific enforcement of such an agreement which is, by its nature, revocable because a party cannot be bound to make an admission and can resile from making the same before it is actually made (*see* section 21(d) of the Specific Relief Act). The inherent powers of the Court cannot be invoked for the enforcement of an agreement which, under the law, cannot be specifically enforced even in a separate suit. Besides, the enforcement of such an agreement is likely to lead to confusion, because the Court, instead of determining the rights and liabilities of the parties in respect of the subject-matter of the suit, would be compelled to launch an enquiry into extraneous matters. It is also significant to mention that the Full Bench decision

Gian Chand Sharma, *v.* Bansi Lal and others,

Pandit, J.

did not disagree with the Special Bench decision in *Mt. Akbari Begum* v. *Rahmat Husain* (1), wherein it was held by Sulaiman, C.J., that a party could resile from the agreement, before the referee made his statement.

In the present case, it has not been found whether the application of Gian Chand resiling from the agreement was filed previous to the order of the Court appointing Shri Satish Chander as a new referee or afterwards, but it is common ground that the plaintiff had resiled from this agreement before the newly appointed referee had made his report. He could, therefore, under the law, resile from the agreement and ask the Court to decide the case on merits.

In view of what I have said above, this appeal is accepted, the judgment and decree of the lower appellate Court are set aside and the case is sent back to the trial Court for decision on merits. The parties will, however, bear their own costs in this Court. Parties have been directed to appear in the trial Court on 10th October, 1960.

K.S.K.

APPELLATE CRIMINAL.

Before D. Falshaw and Gurdev Singh, JJ.

THE STATE,—*Appellant.*

versus

GURDIAL SINGH GILL AND OTHERS,—*Respondents.*

Criminal Appeal No. 10 of 1960.

1960

August, 18th.

Code of Criminal Procedure (V of 1898)—Section 247—Object and meaning of—Complaint filed by the Registrar of Companies—Complainant absent but the accused pleading guilty—Conviction of the accused—Whether legal—

(1) A.I.R. 1933 All. 861.