

Saheb Ram vs Ram Newaz And Ors. on 4 August, 1952

Equivalent citations: AIR1952ALL882, AIR 1952 ALLAHABAD 882

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

Agarwala J.

1. The following question has been referred to us by a Bench of this Court for
"Whether a party who offers himself to be bound by
the statement of any of the opposite parties or of a
witness under Section 8, Oaths Act, Act X [10] of 1873, can
resile from such an offer after the other party or the
witness has agreed to make such an oath or affirmation
but before such oath or affirmation had been actually
administered ?"

2. The relevant facts are very few. The parties to this appeal are relations. They refer
"If and whatever Balmakund plaintiff states on special oath of Gangajali, I will remain

3. The counsel for the plaintiffs stated, "We agree to the decision of the case

4. The parties agreed that Balmakund's statement may be recorded on the next day. Balma

5. The Court then proceeded to administer the special oath of Gangajali to Balmakund pla

6. The relevant provisions of the Indian Oaths Act are Sections 8 to 12.

7. Section 8 empowers a Court to administer an oath or solemn affirmation, such as is me

8. Section 9 contemplates a case in which a, party in a judicial proceeding makes an off

9. If, however, the offer is not withdrawn and it is accepted by the party or the witness

10. It is true that the section itself does not provide in express language the answer t

11. The section lays down what is to happen after a party or witness agrees to take the
12. "Discretion", said Lord Mansfield in *R. v. John Wilkes*, (1770) 4 Burr. 2527 at p. 25
"When applied to a Court of Justice, means sound discretion guided by law. It must be g
13. The Court may indeed refuse to proceed with the terras of the offer for sufficient c
14. But if the offerer fails to satisfy the Court that there are good reasons for his re
15. The conclusion to which I arrive upon a bare reading of the provisions of the Oaths
16. The same conclusion is reached if we consider the question upon general principles o
17. If the offerer is to be bound by the statement on special oath of a party and the pa
18. If there be parties to the case other than the offerer and the acceptor, it is clear
19. If all the parties or some of them agree that they would be bound by the statement o
20. But where one party offers to be bound by the statement of a witness and no other pa
21. It is contended that even though an offer to abide by the statement of an opposite p
22. It is urged in the first place that there is no agreement at all because the offer w
23. In *Inder Prasad v. Jagmohan Das*, 54 Ind. App. 301: 26 ALL. L. J. 7 (P.O.), the plain
24. Secondly it was urged that until the special oath was taken the agreement was not co
25. Thirdly it was urged that the agreement is not valid and does not amount to a contra
26. The doctrine of mutuality has two aspects. A contract in general must be mutual in i
27. Again it is said that the Court will not enforce the obligation of the defendant by

28. It is the view of the American Law Institute that :

"The fact that the remedy of specific enforcement is not available to one party is not

29. For instance, if A promises to sing in a theatre on payment of a certain sum of money

30. It appears to me that the agreement in the present case is of a binding character in

31. Fourthly it was urged that there is no consideration for the agreement and that, the

32. The view that I have expressed above is supported by numerous authorities, vide: Ram

33. As against these authorities, learned counsel has relied upon five cases, Lekhraj Si

34. In Lekhraj Singh v. Dulhama Kuar, 4 ALL. 302, the plaintiffs and some of the defendan

35. In Tumman Singh v. Sheodarshan Singh, 1930 ALL. L. J. 397, parties agreed to abide b

36. In Bishambhar v. Badha Kishunji, 1931 ALL. L. J. 393, parties stated that one B. Jw
"although the breach of such an agreement might entitle a party to sue for damages, we

Bennet, J. was of the opinion that the procedure for deciding a case in accordance with

37. With all respect, I see no reason why such an agreement between the parties should n

38. This matter was dealt with by a Full Bench in Akbari Begam v. Rahmat Husain, 1933 AL

39. In my opinion where an agreement is made between the parties to abide by the stateme

40. In Ramdeo Ahir v. Naipal Ahir, 1933 ALL. L. J. 69, a single Judge of this Court, and

41. In my opinion these cases were not rightly decided.

42. My answer to the question referred to us, therefore, is: (1) Where a party offers to

V. Bhargava, J.

43. I have had the benefit of reading the judgment of my brother Agarwala J. The facts have been given by him in his judgment and it is, therefore, unnecessary to repeat them. The question, which has been referred for decision to the Full Bench is :

"Whether a party who offers himself to be bound by the statement of any of the opposite parties or of a witness under Section 8, Indian Oaths Act, Act X of 1873, can resile from such an offer after the other party or the witness has agreed to make such an oath or affirmation but before such oath or affirmation had been actually administered ?"

The Indian Oaths Act, 1873, as its provisions show, is designed to confer on Courts and certain other authorities the power to administer oath and prescribes the procedure thereof. Sections 4 to 7 of the Act lay down the form and the manner of administration of an ordinary oath. Sections 8 to 12 provide for administration of special oaths. An examination of these provisions of the Indian Oaths Act shows that, apart from making provision for the administration of an oath, this Act does not purport to lay down the procedure to be adopted in the decision of the case in which the oath under the Act is administered nor to regulate the rights of the parties which might arise due to their own actions in connection with the proceedings in Court including the administration of the oath. While the power under the Act is specifically granted to the Court to administer an ordinary oath to witnesses, interpreters or jurors, there is no provision made by this Act itself for action to be taken by the Court in case any of them refuses to take the oath. For such a purpose, resort has to be taken to other laws, such as the Indian Penal Code. Similarly, this Act, in no way, affects the procedure to be adopted by the Court in a civil proceeding which is governed by the Code of Civil Procedure or other similar laws. It is clear that the provisions of this Act have not been designed to affect the rights of the parties that may have been prescribed by other statutes or the procedure which they are required to follow.

In the case of a special oath, the power of the Court is of a more limited character. Under Section 8 Oaths Act, a party or a witness can be given special oath if he offers to give evidence on such oath. The Court cannot, of its own accord, compel a party or a witness to take such special oath.

Under Section 9 of the Act, any party to a judicial proceeding can offer to be bound by any such oath if such oath is made by the other party to or by any witness in the proceeding. Thereupon the Court may ask such party or witness whether or not he will make the oath. If the party or witness agrees to make the oath, the Court is empowered to administer that special oath and to take the statement on it. Section 11, Oaths Act merely makes applicable the general principle of estoppel and lays down that a party, who offers to be bound by the evidence given by the opposite party or a witness on special oath, shall not have the right to challenge the evidence so given and the evidence so given shall be conclusive proof of the matter stated.

Section 12 enjoins the Court, in case of refusal by the opposite party or witness to make the special oath, to record the nature of the oath, the facts that he was asked whether he would make it and that he refused it, together with any reason which he may assign for his refusal. It is significant that though Section 12 lays down what the Court is to do in the case of refusal by a party or a witness to make special oath, it does not anywhere lay down the consequences of such refusal. In order to draw any presumption from the refusal, the provisions of the Indian Evidence Act would have to be looked into. It will thus be seen that even in the case of special oath to be administered under this Act, the provisions of other general laws have been kept in view and it has been intended that they should be made applicable. Consequently, in considering the question as to whether a party, who has offered to be bound by the statement of any of the opposite parties or a witness, can resile from such offer, we cannot be confined to the provisions of the Indian Oaths Act only and the right of the party to resile from the offer must, therefore, be determined with reference to other laws, such as the Code of Civil Procedure and the Indian Contract Act.

44. I may first consider the case of an offer by one party to be bound by the special oath of the opposite party. In such a case, it is clear that the offer made under Section 9, Oaths Act is a proposal as defined in the Indian Contract Act and the party, who makes the offer, is the promisor. The offer is accepted by the opposite party who clearly becomes the promisee. In such a case, there clearly comes into existence an agreement in which the promise by the person to be bound by the Special oath of the opposite party is the consideration for the act of taking special oath by the opposite party. A contract of this nature, of course, remains a contingent contract because the law vests in the Court the discretion either to enforce or not to enforce it. As has been pointed out by my brother Agarwala J. the discretion of the Court is not to be exercised arbitrarily but must be sound discretion guided by law. It must be governed by rule; not by humour; and it must not be vague and fanciful, but legal and regular. Even such a contingent contract cannot be revoked by either party to it, once, the offer has been made by one party and accepted by the other.

The contract may become void if the Court decides not to exercise its power to administer the oath for sufficient reasons in exercise of its discretion but unless the Court does so, the contract remains binding and no party can be allowed to resile from it.

It is also clear that if the party, offering to be bound by the special oath, were to be allowed to resile from the offer even after it had been accepted by the opposite party, the former would be placed in a position where he could take unfair advantage of the provisions of the Indian Oaths Act. Every party, in a judicial proceeding, may, knowing that he has the right to resile from the oath after its acceptance by the opposite party, make the offer without hesitation though never really intending to abide by the offer. If the opposite party refuses to make the oath, he can take advantage of the note made by the Court under Section 12, Oaths Act and request the Court to take presumptions against the opposite party. On the other hand, if the opposite party agrees to make the oath and accepts the offer, he can then safely resile from the offer without any presumption being taken against him. It is obvious that such could not have been the intention of the law. The provisions of the Act cannot be so interpreted as to give such an unfair advantage to one party over the other. In the case of an offer to be bound by the oath of the opposite party, it must, therefore, be held that the party making the offer has no right to resile from it after the offer has been accepted though, in exercise of its

discretion, the Court may refuse to administer the special oath.

45. In the case of an offer to be bound by the oath of a witness, two different situations can arise. There may, firstly, be a case where after one party has offered to be bound by the special oath of a witness, the other party may give a similar undertaking in which case there is a mutuality of the offers by both parties and an agreement in the form of a contingent contract would clearly come into existence. In such a case, gain neither of the two parties can subsequently be permitted to resile from his offer to be bound by the oath of the witness though the contract may never be fulfilled either because the witness may refuse to take the oath, or, because the Court may, in its discretion, refuse to administer it. In any case, neither of the two contracting parties can be permitted to resile from the contract.

Secondly, there may be a case where the offer made by the party to be bound by special oath may never be conveyed to the opposite party by the Court, or there may not be a counter offer by the opposite party to bind himself also with that statement on special oath. In such a case, it appears to me that no contract would come into existence. The witness, who is to make the oath, cannot be treated -as a party to any contract and his acceptance to take the oath without reference to the opposite party to the judicial proceeding in which the offer has been made cannot bring into existence any contract of a binding nature. In such a case, there would only be a promise on behalf of the party making the offer but no agree ment would come into existence and consequently, there would be no bar to the revocation of the offer by the party making it. Such revocation would be permissible under Section 5, Contract Act.

The Court cannot, in any circumstances, be considered to be a party to the contract arising out of an offer made by a party under Section 9, Oaths Act to be bound by the oath of the other party or a witness. There can be no agreement between the Court and a party to a judicial proceeding pending before it and further, there can be no question of the passing of any consideration between the Court and such a party. A contract can come into existence in the course of a judicial proceeding only if the parties to the agreement are also parties to the judicial proceeding and there is mutuality of promises between them.

46. The case law on this subject has been fully discussed by my brother Agarwala, J. in his judgment and I do not think that any useful purpose will be served by my reviewing it afresh. I would, therefore, answer the question referred to the Full Bench as follows :

(1) Where a party offers to be bound by the statement of any of the opposite parties under Section 9, Oaths Act, he cannot resile from such an offer after the other party has agreed to make such oath, unless there be sufficient cause to the satisfaction of the Court for allowing the offerer to resile, and (2) Where a party offers to be bound by the statement of a witness, he cannot resile from such offer if any of the opposite parties has accepted that offer or has made a similar counter offer, unless there be sufficient cause to the satisfaction of the Court for allowing the offerer to resile, but he can resile from it if there has been no such acceptance or counter offer by any other party to the judicial proceeding.

Malik C. J.

47. The question referred to the Full Bench for decision has already been quoted in the judgment of brother Agarwala who has discussed the rulings that were cited at the Bar. It is not necessary, therefore, for me to refer to those cases again.

48. In dealing with this matter we must first remember that the Indian Oaths Act mainly concerns itself with the form of judicial oaths, how they are to be administered and the effect thereof. The question of the procedure to be followed by Courts in decision of cases cannot legitimately be expected to form part of this Act.

49. After having dealt with the question as to the persons by whom oaths or affirmations can be made and the authority to administer them we come to the part of the Act dealing with the forms of oaths and affirmations. Sections 9 to 12 in that part deal with special oaths by which a party agrees to be bound Section 9 is as follows :

"If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in Section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation. Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question."

50. It will be noticed here that the offer is made by one party to be bound by special oath to be taken by the other party or by any witness. If there are only two parties to a case and one party accepts to be bound by the special oath of the other, that other by agreeing to take special oath has also impliedly agreed to be bound by his own statement. If, on the other hand, there are other parties, before they can be bound by such a statement their consent will have to be taken. In the case of an offer to abide by the statement of a witness, unless parties agree to be bound by the statement made by him, the mere fact that one party has agreed would not in most cases enable the Court to dispose of the case finally. The section, however, does not deal with this aspect and only the party or witness required to take the oath has to be asked under this section.

51. Section 10 is as follows :

"If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or, if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorise him to take the evidence of the person to be sworn or affirmed and return it to the Court."

This section only deals with the question how such special oath is to be administered.

52. Section 11 deals with the effect of such oath and provides that :

"The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated."

53. Section 12 provides that :

"If the party or witness refuses to make the oath or solemn affirmation referred to in Section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal."

The section makes it clear that the Court may draw such inferences as may be reasonable from the conduct of the party or witness in refusing to make the oath or solemn affirmation and the reasons which he may give for such refusal.

54. There is no section in the Indian Oaths Act dealing with the question whether a party making an offer to abide by a statement on oath, or special oath, by another party or witness can resile from such an offer and, if so, at what stage and under what conditions. This matter must, therefore, be decided on general principles of law.

When an offer is made to a party or a witness direct the ordinary rules governing a contract might be applicable, but, in case of an offer made in Court, it appears to be difficult to apply the ordinary rules of contract. Proceedings in Courts are solemn proceedings where every statement made must be deemed to have been made with due regard to the rights and obligations of the party making it. Whether, therefore, a party or a witness has agreed to make the oath or has not yet given his consent should not be the sole determining factor in deciding the question whether the offer made should be allowed to be resiled from. I am, therefore, reluctant to say that a party has an absolute right to resile from an offer before it is accepted. The Court should have complete control over the proceedings before it and it should not be possible for a party to trifle with it. At the same time an application to abide by the oath of a party or a witness must be treated like any other application in Court, e.g., an application to add a party or to withdraw a part of the claim.

In all such cases Courts have readily agreed to give a right of *locus paenitentiae* if the prayer to withdraw the application is made at the earliest stage before it has been acted upon. After the other party or a witness has accepted the offer, the Court would no doubt require very strong reasons to permit a party to resile from the offer, but before such acceptance, unless there are special reasons, the Court would certainly allow the party making the offer to resile from it. After the oath has been taken there can of course be no question of resiling from it, as Section 11 provides that the evidence so given shall be conclusive proof of the matter stated against the person who offered to be bound by it.

55. My answer to the question, therefore, is that a party who offers himself to be bound by the statement of any of the opposite parties or of a witness has no right to resile from such an offer after the other party or the witness has agreed to make such an oath or affirmation.

The Court

56. The answer to the question referred to the Full Bench is as below :

(1) Where a party offers to be bound by the statement of any of the opposite parties under Section 9, Oaths Act, he cannot resile from such an offer after the other party has agreed to make such oath, unless there be sufficient cause to the satisfaction of the Court for allowing the offerer to resile, and (2) where a party offers to be bound by the statement of a witness, he cannot resile from such offer if any of the opposite parties has accepted that offer or has made a similar counter offer, unless there be sufficient cause to the satisfaction of the Court for allowing the offerer to resile, but he can resile from it if there has been no such acceptance or counter offer by any other party of the judicial proceeding.