

2012 C L D 827

[Lahore]

Before Muhammad Ameer Bhatti, J

SAEED AHMAD---Petitioner

versus

NIAZ AHMAD and 3 others---Respondents

Civil Revisions Nos. 1880 and 1832 of 2011, heard on 20th September, 2011.

(a) Arbitration Act (X of 1940)---

---Ss. 8, 21 & 23---Specific Relief Act (I of 1877), Ss. 9, 42 & 54--- Suit for possession, declaration and permanent injunction---Appointment of referee---Rival parties had filed suits against each other---Plaintiffs had filed a suit for possession against the defendant and during pendency of said suit, the defendant had filed a suit for declaration and permanent injunction--- Both rival suits were consolidated---On the appeal of the defendant, two persons were nominated for appointment as referees; and the Trial Court appointed a referee, who submitted his report in compliance of the order of the Trial Court---Trial Court, on the basis of said report, decreed the suit of plaintiffs and dismissed the suit of the defendant---Said judgment and decree was affected and Appellate Court, having dismissed the appeal, the defendant had assailed the said order--- Grounds taken in the revision petition by the defendant could not be considered as the referee had been appointed with the consent of the parties; and High Court not only had approved the appointment of said referee, but had also issued the direction to decide the fate of the suit on the basis of the statement of the referee---Question arising during pendency of the suit which stood decided and settled under order of a Revisional Court, could not be allowed to be reagitated in appeal filed against the decree---Courts below had rightly passed the judgment and decree in accordance with the report of referee available on record--- Revision was dismissed, in circumstances.

Baqa Muhammad v. Muhammad Nawaz and others PLD 1985 Lah. 476 and Shamshad Khan and others v. Arif Ashraf Khan and 2 others 2008 SCMR 269 rel.

(b) Arbitration Act (X of 1940)---

---Ss. 8, 21, 22 & 23---"Arbitrator" and "Referee"---Distinction---Referee was the one who would make statement according to his own knowledge, but the arbitrator, after obtaining the material and recording the statement of the parties, would draw his conclusion and on the basis of that material, he got his statement recorded; and he was also liable to cross-examination.

PLD 1988 Lah. 25 and PLD 1977 Lah. 672 rel.

Nemo for Petitioner.

Moiz Tariq for the Respondents.

Date of hearing: 20th September, 2011.

JUDGMENT

MUHAMMAD AMEER BHATTI, J.---Through this single judgment, I propose to decide both the Civil Revisions Nos.1880 of 2011 and 1832 of 2011 which are outcome of the impugned judgment through which the suit of the petitioner against the respondents has been dismissed and the suit filed by the respondents against the petitioner was decreed.

2. Brief facts of the case are that respondents filed a suit for possession against the present petitioner and during the pendency of this suit, the petitioner filed a suit for declaration and permanent injunction. Both suits were consolidated on 9-2-2001. On the petitioner's application, two persons were nominated for appointment as referee and the learned trial Court vide order dated 2-12-2000 proceeded to appoint Mr. Riaz ul Hassan Alvi as referee and the said referee submitted his report dated 19-3-2001 in compliance of the order of the learned trial Court. On the basis of this report, the learned trial Court vide judgment dated 26-3-2001 decreed the suit of the respondents and dismissed the suit of the present petitioner. Against this judgment,

an appeal was preferred by the petitioner and the learned 1st appellate Court while accepting the appeal, set aside the judgment and decree of the learned trial Court and remanded the case to the learned trial Court for recording the statement of the referee as per Article 33 of the Qanun-e-Shahadat. Against this order of the learned Ist appellate Court, the petitioner filed a Civil Revision No.2199 of 2001 which was dismissed by this Court vide judgment dated 24-10-2001. Thereafter, the petitioner filed an application for the cancellation of the appointment of the referee. This application was dismissed by the learned trial Court vide order dated 9-4-2002. Thereafter, revision was filed by the petitioner which was also dismissed by the learned Revisional Court vide order dated 11-11-2002. Then this order was assailed through Writ Petition No.7363 of 2003 but the same was also dismissed. After that, the learned trial Court vide order dated 7-12-2009 appointed local commission for the recording of the statement of referee as he stood posted as OSD in Lahore High Court, Lahore. Complying with the order of the learned trial Court, the local commission on 16-1-2010 recorded the statement of the referee and produced the same before the learned trial Court on 18-1-2010. However, the petitioner filed an objection against the appointment of the local commission, which was dismissed by the learned trial Court vide order dated 5-1-2010 with cost of Rs.3,000. This order dated 5-1-2010 was challenged through a civil revision which was also dismissed on 23-2-2010 by the learned Additional District Judge albeit setting aside the order of the learned trial Court to the extent of cost. Subsequently, the learned trial Court vide order dated 2-3-2010 summoned the referee in person for recording of his statement while endorsing the copy of this order to the Registrar, Lahore High Court, Lahore to give effect to this order. This order was assailed by the present respondents before learned Revisional Court, who set aside the same vide order dated 12-10-2010 and directed to the learned trial Court to proceed with the case accordingly. Finally, the learned trial Court vide judgment dated 5-11-2010, decreed the suit of the respondents with the result that suit of the petitioner was dismissed. The said judgment and decree was appealed and the learned District Judge vide judgment dated 28-2-2011 dismissed the same, which has been assailed through this revision petition.

3. Since morning, the case file has been kept in waiting and called repeatedly. Even then, no one has entered appearance on behalf of the petitioner. The learned counsel for the respondents while referring to the order of this Court passed in Writ Petition No.7363 of 2003 (filed by the petitioner) contends that petitioner is in the habit of absenting himself in the case after obtaining the stay order and this court in the said writ petition passed the remarks as under:--

"I have an inescapable impression that the learned counsel is deliberately avoiding appearance in this case, because even on the last two days, nobody has appeared for the petitioner."

So, the given situation reinforces the impression that the petitioner is avoiding his appearance on purpose, hence this Court has no option but to decide the matter on its own (albeit on merits) on the basis of the available record and with the assistance of the learned counsel for the

respondents.

4. Learned counsel for the respondents submits that the proceedings have been completed and no illegality and irregularity have been committed by both the Courts below while decreeing the suit of the respondents. Learned counsel for the respondents further submits that the petitioner has got no arguable case.

5. Learned counsel further relied on an unreported judgment passed in R.S.A. No.80 of 2008 by his lordship Mr. Justice Mian Saqib Nisar, (then he was), wherein it has been held:--

"Heard. From the statements of the parties it is crystal clear that Ibad Ali, their real brother, was appointed as a referee and not as an arbitrator, because he was neither required to inquire/probe into the matter or to record any evidence, no to render any award. The parties simply sought the decision of the matter on the basis of his statement, thus after the referee had made a categorical statement, the learned trial Court in line thereto, rightly passed the judgment and decree dated 6-9-2006."

6. The grounds taken in this revision petition at this stage cannot be considered as the referee had been appointed with the consent of the parties and this Court has not only approved the appointment of said referee but has also issued the direction to decide the fate of the suits on the basis of the statement of the referee. It is settled law that the question arising during pendency of the suit which stood decided and settled under order of a Revisional Court, could not be allowed to be re-agitated in appeal filed against the decree. Reliance is placed on Baqa Muhammad v. Muhammad Nawaz and others (PLD 1985 Lahore 476) and Shamshad Khan and others v. Arif Ashraf Khan and 2 others (2008 SCMR 269).

Since the statement and report of the Referee is available on the record, the learned courts below in accord thereto rightly passed the judgment and decree. Hence, the revision petition is dismissed accordingly.

7. Before parting with the judgment, I would like to draw distinction between the arbitrator and the referee. Referee is the one who makes statements according to his own knowledge but the arbitrator, after obtaining the material and recording the statements of the parties, draws his conclusion and on the basis of that material, he gets his statement recorded and he is also liable

to cross-examination. Reliance is placed on (PLD 1988 Lahore 250 and PLD 1977 Lahore 672).

H.B.T./S-159/L

Petition dismissed.