

7. If issue No. 5 is decided in favour of the plaintiff, what is the extent of the mitigation of the damages arising out of the breach of the contract in question ?

8. Relief."

Costs of this hearing shall abide the final result of the appeal.

(8) The appellant shall appear in the Court below on April 14, 1969, when a date for further proceedings shall be fixed by the Court below and notice of the same shall be served on all the other parties to the suit.

SHAMSHER BAHADUR, J.—I agree.

K. S. K.

APPELLATE CIVIL

Before Prem Chand Pandit, and H. R. Sodhi, JJ.

KANSHI RAM,—*Appellant.*

versus

TARLOK SINGH,—*Respondent.*

Regular First Appeal No. 76 of 1958.

March 11, 1969.

Code of Civil Procedure (V of 1908)—Order 26, Rules 11, 12 and 16—Local Commissioner appointed to examine accounts of the parties—Genuineness of the accounts challenged—Such Commissioner—Whether has jurisdiction to record evidence and ascertain the truth of allegations.

Evidence Act (1 of 1872) Section 115 Estoppel—Parties to a suit agreeing to a procedure before the local Commissioner—Whether estopped from challenging the validity of such procedure.

Held, that a reading of Rules 11, 12 and 16 of Order 26 of the Code of Civil Procedure leaves no manner of doubt that the function of a Commissioner appointed to examine accounts is not confined only to making additions, subtractions and multiplications but it is open to him to find out by recording evidence or otherwise whether the entries as they appear in those books do really give the correct picture of accounts, or in other words if the account books are fictitious. It is the truth of the entries that has to be examined by the Commissioner and not whether actually certain entries appear in the books of account

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or not. When an allegation is made before a Commissioner that the entries do not represent the real state of facts and have been falsely made, it will be within his jurisdiction to sift those allegations and arrive at the truth so that the report can be of real assistance to the Court. The parties can raise objections to the report before a civil Court which also will have an opportunity with the assistance of the report of the Commissioner to ascertain the correctness or otherwise of the accounts. There is no abdication of the functions of a civil Court if the Commissioner is allowed to perform such duties. The object of appointing a Local Commissioner is to get help in order to correctly understand the accounts so as to enable a civil Court to come to a decision regarding the liability of the parties. The recommendation of a Commissioner cannot be equated with the findings of a civil Court and even if he describes his recommendation as a finding, it is still open to the parties to prefer objections to the report of the Local Commissioner and the civil Court has to decide finally after taking evidence and examining the Local Commissioner, if necessary, whether the report of the Local Commissioner is correct or not, or what is the true state of accounts.

(Para 13)

Held, that when parties to a suit themselves agree to a procedure to be adopted before a Local Commissioner and not to raise any objection thereto before him, it is not open to them to challenge the validity of that procedure afterwards either in the Court of first instance or in a Court of appeal.

(Para 11)

First Appeal from the decree of the Court of Shri Nathu Ram Sharma, Sub-Judge, 1st Class, Karnal, dated the 28th day of January, 1958, granting the plaintiff a final decree for Rs. 10,517/10/6 with costs.

ROOP CHAND AND R. L. SHARMA, ADVOCATES, for the Appellant.

SHAMBHU LAL PURI AND MUNISHWAR PURI, ADVOCATES, for the Respondent.

JUDGMENT.

SODHI, J.—This regular first appeal is directed against the judgment and final decree of the trial Court, passed on 28th January, 1958, whereby in a suit for dissolution of partnership and rendition of accounts it had decreed the claim of the plaintiff to the extent of Rs. 10,517-10-6 with costs against the defendant appellant. The plaintiff respondent has also filed cross objections praying that a further sum of Rs. 8,000 over and above the amount already decreed in his favour be allowed. Both the appeal and cross objections will be disposed of by this judgment.

(2) The facts of the case are quite simple. Tarlok Singh plaintiff respondent and Kanshi Ram defendant appellant entered into

partnership by virtue of a deed executed on 5th February, 1949. The partnership business included the purchase of wood in jungles, the cutting of wood, sale of wood and running of brick kilns. The parties continued their business together for some time. According to the averments in the plaint, the partnership started business of brick kilns at Mauzas Trawari, Sultanpur, Khawaja Ahmadpur, etc., but the account books were in possession of the defendant appellant in view of the terms as contained in the partnership deed. The allegations are that the defendant started mis-appropriating the entire cash and did not make correct entries in the account books. The plaintiff then served a notice on the defendant on 14th October, 1955, asking him to render the accounts but to no effect. A suit was, therefore, filed on 25th April, 1956, praying for a decree for dissolution of the partnership firm which was working under the name and style of M/s Kanshi Ram Tarlok Singh, and also for rendition of accounts.

(3) The defendant appellant filed his written statement and a preliminary objection was taken that one Ferozi Lal was also a necessary party inasmuch as the brick kilns at Khawaja Ahmadpur and Sultanpur had been started alongwith the said Ferozi Lal as a partner. It was admitted that the parties entered into partnership and continued their business for some time but the plea was that the plaintiff had to make certain recoveries from the customers and, he did not later render the accounts. It was also pleaded by the defendant that some fuel wood left after the closing of the business was taken by the plaintiff under his own control. This wood was alleged to have been sold away by the plaintiff but no accounts thereof rendered to the defendant. A replication was filed by the plaintiff on 16th July, 1956, in which it was denied that Ferozi Lal had any concern with the partnership of the plaintiff and the defendant. Since the existence of partnership was being admitted, counsel for both the parties made a statement on 16th July, 1956, praying that a preliminary decree be passed and a Local Commissioner appointed to go into the accounts. A decree was passed in terms of the statement of the counsel for the parties and Shri Manohar Lal Ghambhir, Advocate of Karnal, was appointed the Local Commissioner.

(4) Defendant appellant produced his account books relating to the partnership and plaintiff respondent was afforded an opportunity to inspect the same. The case of the defendant was that some of the account books like, Khata register commencing from 1st November, 1950, and the Rokar, that is, the cash books, were taken away

by a monkey and many pages had been torn by him. Most of the entries were resurrected with the result that it became necessary for the Local Commissioner to find out what the true state of accounts was. In order to establish various items relating to credit and debit between the parties, evidence was produced both by the plaintiff and the defendant before the Local Commissioner. For the purposes of the present appeal it is not necessary to go into the details of the various depositions made by the witnesses and suffice to mention that after examining the witnesses for the parties, including the parties themselves, the Local Commissioner submitted his report on 31st March, 1957. He was of the view that the plaintiff should be made to pay to the defendant Rs. 7,910-6-6 as principal and Rs. 1,440 as interest, thus the total amount of Rs. 9,350-6-0 on account of fire-wood business and the brick-kiln business at Tarawari. In respect of the other two brick kilns, the finding of the Local Commissioner was that the defendant appellant had deliberately withheld the accounts of those kilns.

(5) The plaintiff and the defendant preferred objection petitions against the report of the Local Commissioner. Shri Manohar Lal Ghambhir was also examined as P.W. 1. Counsel for the plaintiff stated in Court on 15th April, 1957, that the accounts relating to the kiln at Tarawari, which had been produced by the defendant before the Local Commissioner, were fictitious and that the defendant had a third set of accounts which he was not producing. Evidence was recorded on behalf of both the plaintiff and the defendant by the trial Court after filing of the report of the Local Commissioner and objections thereto. Before the Court could take any decision, counsel for both the parties made a joint statement that the report be set aside and Shri Hari Ram, Advocate of Karnal, be appointed as the new Local Commissioner.

(6) The trial Court acting on the statement of counsel for the parties set aside the report submitted by Shri Manohar Lal Ghambhir and appointed Shri Hari Ram as the new Local Commissioner. He was, by the order dated 28th August, 1957, directed to go into the accounts and the evidence which had already been produced before Shri Manohar Lal Ghambhir, Local Commissioner, and the Court. A further direction was given to the new Local Commissioner to prepare a statement of accounts on the basis of the said accounts and the evidence and then submit his report as to whether there had been any profit or loss in the partnership business and what amount, if any, was due, and to which party. It may be stated that these directions were given in terms of the joint statement made by the counsel for the parties. Shri Hari Ram, the new

Local Commissioner, accordingly submitted a very detailed report on 9th October, 1957. Objections were again filed to this report as well by both the plaintiff and the defendant, and Shri Hari Ram appeared as a witness in the trial Court on 25th October, 1957. After the statement of Shri Hari Ram, it transpired that certain matters still remained to be clarified and the Local Commissioner was thus directed to submit another report after complete checking of the accounts. The Local Commissioner again submitted his report on 10th November, 1957, disposing of the objections of the plaintiff and the defendant.

(7) The matter did not rest there and the parties filed objections to the second report as well. No reference need be made to the various objections raised by the parties but it must be mentioned that one of the main items of dispute was regarding the claim of the defendant that he should have been given credit for the price of 2,000 maunds of woods which had been transferred in the books of accounts to Harnam Singh Tarlok Singh and for the stock of bricks lying at Tarawari which had been distributed equally between the partners. The Local Commissioner was of the opinion that regarding both these objections of the defendant, there was no documentary proof or other reliable evidence available on the record which could satisfy him that the assertions made by the defendant were correct.

(8) When the matter came to Court after the second report, and objections and replies to the same had been filed by both the parties, Shri Hari Ram, Local Commissioner, appeared as a witness. It is to be found in the order of the trial Court passed on 31st December, 1957, that the parties were afforded sufficient opportunity to produce their evidence in regard to all the facts but the plaintiff did not produce any further evidence. He, however, raised new objections which were never raised before the Local Commissioner nor was any evidence led relating thereto. The trial Court, in our opinion, was perfectly justified in not allowing the plaintiff to raise new objections and to adduce evidence with respect to them when these objections were not the subject-matter of dispute before the Local Commissioner.

(9) As already stated, the defendant was mainly agitating that the price of 2,000 maunds of wood should have been debited to Tarlok Singh since the same had been transferred to Harnam Singh Tarlok Singh. It is a common ground before us that Harnam Singh is the father of Tarlok Singh. The Local Commissioner in his

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statement in Court stated that the entries were such which could be made at any time at the end of the accounts. We have also seen the entries and find no reason to differ from the opinion formed by the Local Commissioner. It is just a statement in the form of a note given at the close of the accounts suggesting the transfer of 2,000 maunds of wood to Harnam Singh Tarlok Singh. The account books were with the defendant and such a note could have been made at any time. He led no evidence to show that the brick-kiln at Trawari had been divided amongst the partners in equal shares. The trial Court by its judgment under appeal passed on 28th January, 1958, dismissed the objections of the defendant except for a little modification. The objections of the plaintiff were also dismissed. A decree for a sum of Rs. 10,517-10-6 with costs of the suit was thus passed in favour of the plaintiff against the defendant.

(10) Mr. Roop Chand, learned counsel for the appellant, has not pointed out any piece of evidence to show that the assessment of the accounts as made by the Local Commissioner and accepted by the trial Court after proper scrutiny of the evidence and the report of the Local Commissioner, was wrong. He has simply repeated the objections as filed by his client in the trial Court. Objections (1) and (2) of the defendant related to the alleged transfer of 2,000 maunds of wood to Tarlok Singh Harnam Singh and the distribution of bricks at Trawari equally between the parties. Both the Local Commissioner and the trial Court have observed in their report and judgment, respectively, that there was no evidence in support of this averment made by the defendant. When Ch. Roop Chand was again asked here in this Court to point out any evidence, he could not do so. He rather conceded that he could not do so. These were the two main objections with regard to which he vehemently argued.

(11) The main contention of the learned counsel for the appellant is that the Local Commissioner had no power under the law to examine evidence and give his findings fixing liability on the parties. The contention is that jurisdiction of the Local Commissioner is confined to his going through the books and preparing a statement of accounts and not that he can examine oral and documentary evidence to find out if the entries made in the books of accounts give the correct position or not. It is submitted that once a challenge is made to the genuineness of the books of accounts, the Local Commissioner must stay his hands and it is the Civil Court alone which can decide as to the genuineness or otherwise of such books. Our attention, in this connection, has been invited by the learned counsel

to cases reported as *Assarmal and another v. Hundomal and another* (1); *Tulsi Ram v. Dina Nath and others* (2); *Ram Krishna Muraji v. Ratan Chand and another* (3); *Bharat Chandra Chakrabarty v. Kiran Chandra Rai* (4). None of these cases can help the appellant. Before dealing with the legal proposition advanced by the learned counsel, it may be pointed out that the defendant appellant is estopped from challenging the procedure adopted by the Local Commissioner when it was done so at his instance and that of the plaintiff respondent. Both of them agreed to lead evidence before the Local Commissioner taking their chance for a favourable decision. No objection as to the jurisdiction of the Local Commissioner to record evidence for examining the truth of the entries in the books of account was raised before him and not even before the trial Court. It is for the first time in the present appeal that an objection as to the validity of the procedure adopted by the Local Commissioner is being taken. It must be held that when parties to a suit themselves agree to a procedure to be adopted before a Local Commissioner and do not raise any objection thereto before him, it is not open to them to challenge the validity of that procedure afterwards either in the Court of first instance or in a Court of appeal.

(12) The learned counsel for the appellant is also in error in submitting that a Local Commissioner cannot record evidence while examining accounts. The relevant provisions of law relating to 'Commissions to examine accounts' are contained in Order 26, Rules 11 and 12 of the Code of Civil Procedure. These provisions read as under:—

"11. In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

12. (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry or also to report his own opinion on the point referred for his examination.

(1) A.I.R. 1925 Sind 265.

(2) A.I.R. 1926 Lah. 145.

(3) A.I.R. 1931 P.C. 136.

(4) A.I.R. 1925 Cal. 1069.

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- (2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit."

There is another rule 16 which is general in nature and is in the following terms:—

"16. Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,—

- (a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;
- (b) call for and examine documents and other things relevant to the subject of inquiry;
- (c) at any reasonable time enter upon or into any land or building mentioned in the above."

(13) A reading of these three rules of Order 26 leaves no manner of doubt that the function of a Commissioner appointed to examine accounts is not confined only to making additions, subtractions and multiplications as the learned counsel for the appellant would like us to hold, but, in our opinion, it is open to him to find out by recording evidence or otherwise whether the entries as they appear in those books do really give the correct picture of accounts, or in other words if the account books are fictitious. It is the truth of the entries that has to be examined by the Commissioner and not whether actually certain entries appear in the books of account or not. When an allegation is made before a Commissioner that the entries do not represent the real state of facts and have been falsely made, it will be within his jurisdiction to sift those allegations and arrive at the truth so that the report can be of real assistance to the Court. The parties can raise objections to the report before a civil Court which also will have an opportunity with the assistance of the report of the Commissioner to ascertain the correctness or otherwise of the accounts. The contention of the learned counsel for the appellant, that if the Commissioner is allowed to perform such duties, he will be usurping the functions of a civil Court which the latter cannot abdicate, is without substance. There is no question of any abdication and the object of appointing a Local Commissioner is to get help in order to correctly understand and modify the accounts

so as to enable a civil Court to come to a decision regarding the liability of the parties. The recommendation of a Commissioner cannot be equated with the findings of a civil Court and even if he describes his recommendation as a finding, it is still open to the parties to prefer objections to the report of the Local Commissioner and the civil Court has to decide finally after taking evidence and examining the Local Commissioner, if necessary, whether the report of the Local Commissioner is correct or not, or what is the true state of accounts.

(14) The cases relied upon by the learned counsel for the appellant are clearly distinguishable on facts and do not lay down the proposition advanced by him. In *Assarmal's case* (1), it could not be known to the Sind Court as to what were the terms of reference to the Commissioner when even the existence of the accounts was not certain. In these circumstances, the learned judicial Commissioner made the observations that it was always better for the Court itself to settle the terms of reference to the Commissioner and generally it was for the Court to ascertain which books were true or false. No absolute rule was laid down. In the peculiar facts of that case it appeared that some sort of vague and indefinite power had been given to the Commissioner who discharged almost the same functions what the Court had to do. In the case before us, a preliminary decree on the basis of the statements of the parties was made and specific directions as enjoined by Order 26, rule 12 were given.

(15) *Tulsi Ram's case* (2), is also of no assistance to the learned counsel. The Subordinate Judge, in that case, framed certain issues and appointed a Commissioner to take evidence and submit a report on all the issues. Later, different persons were appointed as Commissioners at different times and they all gave divergent reports. It was in such a situation when no report was clear, that the Subordinate Judge instead of recording the evidence himself disposed of the case on evidence recorded by different Commissioners. It was in these circumstances that the learned Judges observed that there were various points in controversy which required to be determined by the Court on evidence adduced before it and that the Subordinate Judge was in error in making over the whole case to the Commissioner. In *Bharat Chandra Chakrabarty's case* (4), decided by the Calcutta High Court, the dispute was between a principal and his agent. The trial Court appointed a Commissioner not only to

(3) A.I.R. 1953 S.C. 148.

(4) A.I.R. 1952 S.C. 319.

examine the quantum of amount due from either of the parties but also to decide whether the agent was liable. This was certainly not a matter which the Commissioner could be called up to settle. In *Ram Krishna Muraji's case* (3), there were mixed questions of law and fact involved. It had to be determined as to whether certain contracts were genuine trading transactions or were speculative in character. The determination of such an issue by the Local Commissioner was held by the Privy Council to be irregular. No such question arises before us.

(16) The other two objections which have half-heartedly been pressed by the learned counsel for the appellant are objections Nos. (3) and (4) in the trial Court. It is contended that the defendant appellant should have been given credit for the amounts advanced by his relations. He had himself stated before the Local Commissioner that the amounts advanced to the firm belonged to his relations and that he had nothing to do with them. In view of this statement, the Local Commissioner and the trial Court had no option but to reject his plea that he should be given credit for that amount which did not belong to him. Another objection was that Ferozi Lal was a partner of the firm and thus liable to render accounts. The statement of Ferozi Lal is self-contradictory and both the Local Commissioner and the trial Court placed no reliance on the same. The learned counsel for the appellant has not been able to point out anything in that evidence which could persuade us to believe him.

(17) For the foregoing reasons, there is no merit in the appeal.

(18) Mr. Shambhu Lal Puri, learned counsel for the plaintiff, has filed cross-objections. The main contention urged before us by the learned counsel is that the plaintiff should have been given more credit on account of wagons of coal in regard where to he had paid freight, which according to defendant's own showing, came to Rs. 550 to Rs. 700, for each wagon. There is no evidence produced by the plaintiff in support of his contention and the trial Court taking an overall picture gave the plaintiff a credit of Rs. 600 more, in addition to what the Local Commissioner had allowed. No cogent reasons have been advanced on the basis of which we could interfere with the finding of the lower Court.

(19) No other point has been urged before us.

(20) The result is that both the appeal and the cross-objections be dismissed and the parties left to bear their own costs.

PANDIT, J.—(21) I agree with my learned brother that both the appeal and the cross-objections be dismissed and the parties left to bear their own costs.

(22) However, as regards the contention of the learned counsel for the appellant that the Local Commissioner had no power under the law to examine evidence and give his findings fixing liability on the parties, I am of the view that it is unnecessary to decide this question in this case, because my learned brother has, if I may say so with respect, rightly observed : “— — the defendant appellant is estopped from challenging the procedure adopted by the Local Commissioner when it was done so at his instance and that of the plaintiff respondent. Both of them agreed to lead evidence before the Local Commissioner taking their chance for a favourable decision. No objection as to the jurisdiction of the Local Commissioner to record evidence for examining the truth of the entries in the books of account was raised before him and not even before the trial Court. It is for the first time in the present appeal that an objection as to the validity of the procedure adopted by the Local Commissioner is being taken.”

K.S.K.

CIVIL MISCELLANEOUS

Before Bal Raj Tuli, J.

GOPAL KAPILA,—*Petitioner.*

versus

THE PUNJABI UNIVERSITY, PATIALA,—*Respondent.*

Civil Writ No. 3530 of 1968

March 11, 1969..

Punjabi University Calendar (1966-67)—Volume II—Ordinance relating to Master of Arts Examination—Rule 6—Word ‘examination’—Whether means examination of each part and not the M.A. Examination as a whole—Candidate at such examination—Whether entitled to grace marks on the total aggregate marks of the entire examination.

Held, that the word “examination” in rule 6 of the Ordinance relating to the Master of Arts examination of the Punjabi University in the Calendar for the year 1966-67, Volume II, means the examination of each part and not M.A. examination as a whole.. If a candidate has passed Part I examination but has