

REVISIONAL CIVIL

Before Pritam Singh Pattar, J.

Smt. Suraj Kaur,—(Defendant)—Petitioner.

versus

Som Datta,—(Plaintiff)—Respondent.

Civil Revision No. 1429 of 1974.

October 17, 1975.

Indian Evidence Act (1 of 1872)—Section 20—Code of Civil Procedure (V of 1908)—Section 104(1), Order 23 Rule 3 and Order 43, Rule 1(m)—Validity or genuineness of a will—Whether can be referred to arbitration or to a referee under section 20—Reference to arbitration and reference to a referee—Distinction between—Stated—Reference to a referee held invalid—Such order—Whether appealable.

Held, that the question of validity or genuineness or otherwise of a will cannot be referred to arbitration or to a referee under section 20 of the Evidence Act 1872 and it must be decided in accordance with law dealing with probate of wills under the Indian Succession Act. A reference to a third party to decide matters in dispute in a suit and the question of costs is not a reference to that party for information in reference to a matter in dispute within the meaning of section 20 of the Indian Evidence Act but is a reference to arbitration. The word 'information' in section 20 of that Act means a statement on a question of fact and not a decision of any kind. If the parties agree to abide by the statement of a referee than the latter merely makes a statement according to his knowledge or belief on a question of fact and this statement is deemed to be the admission of the party or parties; who made the reference under section 20 of the Evidence Act and the Court decides the case and pronounces the judgment on the basis of such a statement and passes decree thereon. A referee is not entitled to make enquiries and take evidence and then pronounce the decision on the basis of such evidence. However, the essence of arbitration is that the arbitrator decides the case and the parties can file objections and challenge the validity of his award, and the award, if upheld, is in the nature of a judgment which is later on incorporated into a decree of the Court. The arbitrator can either proceed on the basis of his own knowledge or make enquiries and record evidence and then give his decision on such evidence.

(Paras 14 and 15)

Held, that where the trial Court holds that the case could not be referred for decision to a referee and that the reference is invalid and consequently the decision of the referee illegal and void, it cannot be said that the trial Court refused to record the compromise arrived at between the parties and consequently clause (m) of Rule 1 of Order 43 of the Code of Civil Procedure 1908 does not apply. No appeal, therefore, lies against the order of the trial Court holding the reference to be invalid.

(Para 7)

Petition under Section 44 Act IX of 1919 and Section 115 of Civil Procedure Code, for revision of the order of Shri K. L. Wason, Additional District Judge, Ambala Camp at Gurgaon, dated 9th October, 1974, reversing that of Shri Hari Ram, Senior Sub-Judge, Gurgaon, dated 28th November, 1973, and remitting the case to the Court below for further proceedings in accordance with law and directing the parties to appear before the trial court on 22nd October, 1974, and making no order as to costs.

G. C. Mittal, Advocate, for the Petitioner.

S. P. Jain, Advocate, for the respondent.

JUDGMENT

(1) This is a revision petition filed by Smti. Suraj Kaur defendant against the order dated October 9, 1974, of the Additional District Judge, Ambala at Gurgaon, whereby he accepted the appeal of Som Dutt Plaintiff and set aside the order dated November 28, 1973, of the Senior Sub-Judge, Gurgaon, and remitted the case to him for further proceedings in the case in accordance with law.

(2) The facts of this case are that Bahadur Singh, resident of village Baluda, Tehsil and District Gurgaon, was owner of the land in suit situated in village Baluda and Bhondsi, Tehsil and District Gurgaon, the details of which are given in Schedule 'A' attached to the plaint. Suraj Kaur defendant is the wife of Bahadur Singh. Bahadur Singh died on April 15, 1970, leaving no male issue. Bahadur Singh had executed a registered will dated March 15, 1969, in favour of the plaintiff bequeathing the land in suit and also other properties to him. However, the defendant Suraj Kaur had set up a will alleged to have been executed by Bahadur Singh in her favour and was claiming to be entitled to inherit the property. Som Dutt plaintiff filed this suit for a declaration to the effect that he is the owner of this land in suit and is entitled to withdraw the amounts

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from the Court of the Assistant Collector Ist Grade, Gurgaon, as he is the sole heir of these properties of Bahadur Singh, that the will propounded by the defendant is a forged one and she has no right, title or interest in the property. In the alternative it was prayed that if he was not found in possession of the land in suit then decree for possession of the same may be passed in his favour.

(3) The defendant contested this suit. The allegations made in the plaint were denied. The factum and the validity of the will alleged to have been executed by the deceased in favour of the plaintiff was denied. It was pleaded that the alleged will, if any, in favour of the plaintiff had been cancelled and Bahadur Singh executed his last will dated December 28, 1969, in her favour and she is entitled to the property in dispute. On these pleadings of the parties, the following issues were framed by the trial Court on April 25, 1972:—

- (1) Whether Bahadur Singh had executed any valid will on 15th March, 1969 in favour of the plaintiff ?
- (2) If issue No. 1 is proved whether Bahadur Singh made any subsequent valid unregistered will in favour of the defendant on 28th December, 1969 ? If so, to what effect.
- (3) Whether the suit is not maintainable as alleged in the written statement ?
- (4) Whether the plaintiff has no cause of action as alleged ?
- (5) Whether the suit is bad for misjoinder of causes of action ?
- (6) Relief.

(4) Thereafter, the evidence of the plaintiff was recorded and he closed his affirmative evidence on February 12, 1973, and the case was adjourned for the evidence of the defendant to March 21, 1973. On the same date i.e. on February 12, 1973, the parties made a joint application stating that for the decision of this case they have appointed Ganga Ram Sarpanch, Lakhmi Chand, Tek Chand, Sher Singh, Mangtu, Ranjit and Mam Chand as referees and they shall be entitled to record evidence and to make enquiries in the presence or in the absence of the parties and the decision given by the referees

will be binding on the parties. It was further mentioned that if any of the Referees dies or refuses to act as such, then the remaining six Referees will decide the matter and Ganga Ram Sarpanch will have a casting vote. However, if two of the Referees refuse to act as such or they died, then the remaining Referees will give decision by majority vote. The statement of Som Dutt plaintiff was also recorded on the same date i.e. February 12, 1973, by the Court, wherein he mentioned that this application Exhibit P.X. had been read over to him and he admitted the same to be correct and that he agreed to the reference to the Referees and would be bound by the decision given by them and he shall not file any appeal or revision against that decision. Similarly, statement of Shrimati Suraj Kaur defendant was also recorded by the Senior Sub-Judge. The Senior Sub-Judge then passed the following order on February 12, 1973:—

“In view of the statements made by the parties, the persons as mentioned in the application Exhibit P.X. are hereby appointed as Referees to give their decision by February 26, 1973, in respect of the claims of respective parties. Intimation of this order be sent to the Referees at once.”

(5) Sher Singh and Mangtu Referees refused to act as such. The remaining five Referees filed their decision on March 2, 1973, in Court, wherein it was simply mentioned that the suit of Som Dutt plaintiff be decreed against Suraj Kaur defendant and the parties may be left to bear their own costs.

Against this decision Suraj Kaur defendant filed objections on March 28, 1973, alleging that the intention of the parties was to appoint arbitrators and not referees, that the decision given by the referees is an award and that this award is liable to be set aside for the reasons given in the objection petition. It was stated that Ganga Ram, Lakhmi Chand, Tek Chand, Mam Chand and Ranjit arbitrators were in collusion with Som Dutt and they gave the award without hearing her, that they did not give her any notice nor she was asked to produced any evidence. Som Dutt plaintiff in his reply controverted these allegations and stated that Suraj Kaur defendant was estopped from filling the objections against the decision of the referees. The necessary issues arising out of these objections were framed by the trial Court on April 27, 1973, and the case was adjourned for the evidence of Smti. Suraj Kaur defendant-objector to August 28, 1973.

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(6) However, before that date Suraj Kaur filed an application on August 6, 1973, in the Court of the Senior Sub-Judge alleging that the points involved in the suit pertained to the factum and validity of the two wills and that the reference to the referees to give decision regarding these matters was illegal and the referees were not competent either to make any statement or to give any decision and, therefore, the reference to the referees and their decision being illegal may be set aside and the case may be decided on merits. This petition was contested by the plaintiff as being frivolous. It was alleged that it was made with a view to prolong the trial of the case. The Senior Sub-Judge after hearing the arguments of the counsel for the parties came to the conclusion that the question of genuineness or otherwise of a will or wills could not be referred to arbitrators or referees and it must be decided in accordance with law and that the reference to referees was invalid and he, therefore, set aside the reference to the referees and their decision being invalid by his order dated November 28, 1973. Feeling aggrieved, Som Dutt plaintiff filed an appeal against this order in the Court of the District Judge, Gurgaon, which was finally heard by the Additional District Judge, Ambala at Gurgaon. The learned Additional District Judge in his judgment dated October 9, 1974, held that the reference to the referees for decision of the case was valid and the decision of the referees was a statement within the meaning of section 20 of the Evidence Act and it was binding on the parties as admission and the defendant was estopped from filing any objections. As a result he set aside the order of the Senior Sub-Judge and remitted the case to it for further proceedings in accordance with law. Surjit Kaur defendant thereafter filed the present revision petition against this order of the Additional District Judge

(7) The first contention of Mr. G. C. Mittal, the learned counsel for the petitioner, is that the order dated November 28, 1973, of the Senior Sub-Judge, Gurgaon, whereby he accepted the application of the defendant-petitioner was not appealable and, therefore, the impugned decision dated October 9, 1974, of the Additional District Judge, Gurgaon, is without jurisdiction and is liable to be quashed, on this short ground. This objection was also raised on behalf of the petitioner Suraj Kaur before the Additional District Judge, but it was repelled by him. In dealing with this objection he observed as follows in para No. 6 of his judgment dated October 9, 1974:—

“Where a reference has been made to a referee, the statement made by the referee in pursuance of the agreement is

binding on the parties. The real basis of the binding character of such an agreement is that the 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. There is an offer by one party and acceptance by the other for which the consideration is reciprocity. Thus, the statement of the referee amounts to an adjustment of the claim of the parties as provided under Order 23, rule 3, Civil Procedure Code, and an appeal lies under Order 43, Rule 1(m) of the Code of Civil Procedure from an order of the Court refusing to record the statement. The first objection of the respondent regarding the maintainability of the appeal is, therefore, ruled out for the foregoing reasons. If any authority is needed on this point, we may straight-away refer to a decision of our own High Court in *Ram Narain and others v. Santosh Kumar and others*, (1)."

In *Ram Narain's case* (supra) relied upon by the lower appellate Court, it was held as under:—

"Where in a suit for partition and dissolution of partnership and accounts the parties referred the case to a referee and the referee sent a letter to the Court stating "The parties have compromised the case. I am enclosing herewith the settlement duly signed by all the parties and this should be regarded my statement in the case":

Held that (1) the procedure adopted by the trial Court was not one of reference to arbitration but a reference to a referee, (2) that the letter sent by the referee amounted to a statement, (3) that there was consideration of the contract which was entered into between the parties and which was reciprocity, and (4) that it amounted to an adjustment of the claims of the parties.

A statement of the referee amounts to an adjustment of the claims of the parties under Order XXIII, rule 3, Civil Procedure Code, and an appeal lies under Order XLIII rule 1(m), Civil Procedure Code, from an order of the Court recording the statement."

(1) 1952 P.L.R. Page 182.

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This decision is distinguishable and has got no application to the facts of this case. In the instant case the trial Court did not refuse to record the decision of the referees in its order dated November 28, 1973, but simply held that this case could not be referred for decision to the referees and that the reference is invalid and consequently the decision of the referees is illegal and void. Admittedly, the trial Court has not yet given any decision pertaining to the statement/decision of the referees and it is still pending. Therefore, it cannot be said that the trial Court refused to record the compromise arrived at between the parties and consequently clause (m) of rule 1 of Order 43, Civil Procedure Code, did not apply and, therefore, no appeal against the order of the Senior Sub-Judge was competent. Section 104(1), Civil Procedure Code, lays down that an appeal shall lie from the following orders and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, and from no other orders: —

- (ff) an order under section 35A;
- (g) an order under section 95;
- (h) an order under any of the provisions of this Code imposing a fine of directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;
- (i) any order made under rules from which an appeal is expressly allowed by rules."

I, therefore, hold that no appeal was competent against the order of the Senior Sub-Judge and the judgment of the Additional District Judge is without jurisdiction and must be set aside. If the plaintiff felt aggrieved against the order of the Senior Sub-Judge he should have filed revision against the same in this Court. I may also notice that the Single Bench decision in *Ram Narain's case (supra)* was overruled by a Division Bench decision of this Court reported as *Sadhu Ram, and others v. Ude Ram (2)* which will be discussed below.

(8) The second contention raised by the counsel for the petitioner is that the reference to the referees was illegal and it could not be

made pertaining to the validity and genuineness of a will or wills, that the decision of the referees is not a statement of the referees within the meaning of section 20 of the Evidence Act but a decision of the case and that the same is invalid. He further maintained that as a matter of fact this case was referred for decision to the arbitration of Ganga Ram and others and it was not a case of reference to the referees for making a statement. In support of this contention he relied on various decisions.

(9) In *Mst. Khela Wati v. Chet Ram and another* (3), it was held as under:—

“Question of genuineness or otherwise of a will cannot be referred to arbitration; but must be decided in accordance with the law dealing with probate of wills under the Succession Act.”

To the same effect was the law laid down in *Monmohini Guha v. Banga Chandra Dass* (4).

(10) In *Sadhu Ram's case* (supra), the facts were that on June 30, 1962, one Ude Ram filed a suit for declaration that the joint Hindu family comprising of the parties to the suit had disrupted and he claimed a half share by partition of the joint properties listed in the schedule attached to the plaint and the rendition of the accounts regarding the income from the properties, or in the alternative for dissolution of some alleged partnerships. On the first date of hearing the defendants made an application under section 34 of the Arbitration Act to stay the proceedings of the suit on the basis of an arbitration agreement contained in the partnership deed, under which the firm came into existence. The Court passed order on 7th of September, 1962, staying the proceedings of that part of the suit which referred to the dissolution of the partnership and rendition of accounts. The plaintiff was allowed to bifurcate the suit and to proceed, if he so

(3) A.I.R. 1952 Pb. 67.

(4) I.L.R. (1904) 31 Calcutta 357.

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desired, with the suit so far as it related to the partition of the joint Hindu family property. The plaintiff elected to do so subject to the result of an appeal to be filed by him against the order staying the other part of the suit. An appeal against that order was in fact filed and was dismissed *in limine* by this Court. So the plaintiff proceeded with the suit for partition of the joint Hindu family property. In the meantime the plaintiff filed an application under section 8 of the Arbitration Act, which was registered as a separate case, for the appointment of an arbitrator in respect of the matters relating to the alleged partnership on the ground that the parties had failed to agree on the choice of an arbitrator. Both the suit and the proceedings under the Arbitration Act came up for hearing on the 19th of August, 1963. On that date statement was made by the parties and their counsel as follows:—

“Let L. Laxmi Chand be appointed as a sole referee for the disputes between the parties. Whatever decision he arrives at will be wholly or solely acceptable to us. He may hear the parties, record evidence or may not do so. The defendants do know the fact that L. Laxmi Chand is counsel for the plaintiff.”

L. Laxmi Chand was present in Court at that time and he gave his consent to act as referee. L. Laxmi Chand referee filed on 28th October, 1963, his written statement in Court in which he set out the history of the litigation between the parties and gave his decision on all the points in dispute between them both regarding the matters which were still pending before the Court in the suit for partition of the joint property as well as the matters regarding which the suit stood stayed and which were the subject-matter of the reference to the arbitration of Diwan Sham Lal, Advocate. The referee gave a decision about shares of the parties and partitioned the property between them by metes and bounds and also stated that a sum of Rs. 60,000 was payable by one party to the other in a certain contingency. The referee had given the decision after taking the written statements of claims and counter claims from the parties and had recorded their evidence and placed all these proceedings before the Court. On these facts it was held by a Division Bench of this Court that it was not a reference made to a referee within the meaning of section 20 of the Evidence Act and that it was a reference to an arbitrator and the decision given by him is an award and not a statement under section 20 of the Evidence Act.

(11) In *M/s. Ram Lal Jagan Nath v. Punjab State* (5), the facts were that there was a clause in the printed Works Contract Form to the effect that in the matter of dispute the case shall be referred to certain authority whose order shall be final. The point which came up for decision in that case was whether this clause amounted to valid arbitration agreement or not. On these facts the Full Bench of this Court held as follows:—

“An agreement to arbitrate apart from what the Arbitration Act prescribes, is not required to be stated in any particular form of wording and the use of that technical or formal words such as ‘arbitration’ and ‘arbitrator’ is not required. The essential requirement is that the parties should intend to make a reference or submission to arbitration and should be *ad-idem* in this respect. Considering this clause rationally in its context, there can be no doubt that the parties intended the specified authority to act as an arbitrator and in no other capacity. Further ‘reference’ is defined in section 2(e) (Arbitration Act) as ‘reference to arbitration’. The absence of words like ‘Arbitrator’ or ‘arbitration’ in the context and attending circumstances are wholly immaterial because their omission is more than amply supplied by the language expressly providing that the case, in the matter of dispute, shall be referred to the specified authority whose order shall be final.”

(12) The law laid down in all these decisions is fully applicable to the facts of this case. In the instant case, the validity and factum of the will set up by the plaintiff Som Dutt and the unregistered will set up by Suraj Kaur defendant were in dispute. Therefore, in view of the law laid down in *Mst. Khela Wati's case (supra)*, these points could not be referred for a decision to an arbitrator or for a statement under section 20 of the Evidence Act to a referee. In the instant case according to the joint application made by the parties, Ganga Ram Sarpanch and six others were appointed as referees to decide all the points in dispute between the parties involved in the suit and they could record evidence in the presence or absence of the parties and could make any other enquiries and their decision was made final. Therefore, it was not a case of reference to referees

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but a reference to arbitration to decide all the points in dispute in the case.

Section 20 of the Evidence Act reads as follows:—

“Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.”

The illustration given under this section reads as follows:—

“The question is, whether a horse sold by A to B is sound.

A says to B “Go and ask C, C knows all about it”. C’s statement is an admission.”

In *Chhabba Lal v. Kallu Lal and others* (6), it was held as under:—

“A reference to an outside party to decide matters in dispute in a suit and the question of costs is not a reference to that party for information in reference to a matter in dispute, and if the reference is to be regarded as made only under section 20, it is a bad reference.”

According to section 20 of the Evidence Act, if a party to a suit agrees to be bound by a statement of fact made by a third party, the statement of that third party, when made is to be treated as an admission by the party who made the offer, and if both the parties agree to refer a matter to a third party his statement will be binding on both the parties. The word ‘information’ in this section means a statement on a question of fact and not a decision of any kind. For the purpose of reference to a third party under section 20 of the Evidence Act it is not necessary that a reference should be on a question of fact within the knowledge of the referee. Now, in the instant case, the case was referred for decision to Ganga Ram and six others, the so-called referees. The case involved questions regarding the factum, genuineness and validity of the two wills set up by the parties and the decision of these referees on these points cannot be said to be a statement on a question of fact. These referees were entitled to record evidence in the presence or

absence of the parties or they may or may not record any evidence or make any other enquiries and their decision was to be final. This was not a reference to these persons to make a statement on a question of fact, but the decision of the case was referred to them and it was a reference for arbitration to decide the case. The decision of the Additional District Judge that it was a reference made to a referee under section 20 of the Evidence Act is incorrect and must be set aside.

(13) For the reasons given above, it is held that the reference which was made to Ganga Ram and others was for arbitration and not for making statement under section 20 of the Evidence Act and that a question pertaining to the genuineness or validity of a will cannot be referred to an arbitrator and, therefore, this reference was wholly illegal.

Mr. S. P. Jain, the learned counsel for the plaintiff-respondent, relied on *Mt. Akbari Begam v. Rahmat Husain and others* (7), it was held as under:—

“An agreement to abide by the statement of a particular witness is in substance not a reference to arbitration. The essence of arbitration is that the arbitrator decides the case and his award is in the nature of a judgment which is later on incorporated into a decree of the Court. The arbitrator can either proceed on the basis of his own knowledge or make enquiries and take evidence and then give his decision on such evidence. But where parties agree to abide by the statement of a third person or a referee, the referee merely makes a statement according to his knowledge or belief and the Court then decides the case and pronounces its judgment on the basis of such a statement and passes a decree thereon. The referee is not authorized to make inquiries and take evidence, and then announce his decision on the basis of such evidence. He is called upon to make a statement according to his knowledge or belief. In the case of an arbitration, as the arbitrator's award is an expression of an opinion and his procedure resembles that of a Court, a party is entitled to file objection and challenge the validity of the award. The making of a statement by a referee or a third person has

(7) A.I.R. 1933 Allahabad 861.

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no resemblance to a proceeding conducted by him as if he were a Court of law and accordingly there can be no procedure of filing objections as to its validity. It is for the Court, in pronouncing judgment, to consider its effect.

For purposes of reference to a third party under section 20, it is not necessary that the reference should be on questions of fact within the knowledge of the referee."

To the same effect was the law laid down in *Umruli Ali Khan and others v. Intizami Begam and others* (8), *Narain Das and others v. Firm Ghasi Ram Gojar Mal* (9) and *Abdul Rahman v. Kalloo Khan* (10). In the first two decisions, the above-mentioned Full Bench decision in *Mt. Akbari Begam's case* (*supra*) was followed. These decisions do not support the contention of the counsel for the respondent, but rather support the petitioner. According to these decisions the referee to whom the reference is made for information under section 20 of the Evidence Act is not authorised to make enquiries and take evidence and then announce his decision on the basis of such evidence and he is simply called upon to make a statement according to his knowledge and belief and the Court then decides the case and pronounces the judgment on the basis of such statement. On the other hand the arbitrator decides the case and his award is in the nature of judgment which is later on incorporated in the decree and the arbitrator can either proceed on the basis of his knowledge or make enquiries and take evidence and then take decision.

(14) From the analysis of the above-mentioned decisions, the legal position that emerges is that the question of validity or genuineness or otherwise of a will cannot be referred to arbitration or to a referee under section 20 of the Evidence Act and it must be decided in accordance with law dealing with probate of wills under the Indian Succession Act. A reference to a third party to decide matters in dispute in a suit and the question of costs is not a reference to that party for information in reference to a matter in dispute within the meaning of section 20 of the Indian Evidence Act but is a reference to arbitration. The word 'information' in

(8) A.I.R. 1939 All. 176.

(9) A.I.R. 1938 All. 353.

(10) A.I.R. 1935 Oudh 118.

section 20 of that Act means a statement on a question of fact and not a decision of any kind. If the parties agreed to abide by the statement of a referee then the latter merely makes a statement according to his knowledge or belief on a question of fact and this statement is deemed to be the admission of the party or parties, who made the reference under section 20 of the Evidence Act and the Court decides the case and pronounces the judgment on the basis of such a statement and passes decree thereon. A referee is not entitled to make enquiries and take evidence and then pronounce the decision on the basis of such evidence.

(15) However, the essence of arbitration is that the arbitrator decides the case and the parties can file objections and challenge the validity of his award, and the award, if upheld, is in the nature of a judgment which is later on incorporated into a decree of the Court. The arbitrator can either proceed in the basis of his own knowledge or make enquiries and record evidence and then give his decision on such evidence.

(16) For the reasons given above, this revision petition is accepted and the order dated October 9, 1974, of the Additional District Judge, Gurgaon, is set aside and the order dated November 28, 1973, of the Senior Sub-Judge, Gurgaon, is restored. The parties are directed through their counsel to appear in the Court of the Senior Sub-Judge, Gurgaon, on November 14, 1975, who will then proceed to try and decide the suit on merits. In view of the point of law involved, there will be no order as to costs.

N.K.S.

CIVIL MISCELLANEOUS

Before Muni Lal Verma, J.

RAJINDER KHANDPUR ETC.,—Petitioners.

versus

THE DIRECTOR-PRINCIPAL, MEDICAL COLLEGE, ROHTAK
and another,—Respondents.

Civil Writ No. 1 of 1975

October 23, 1975.

*Punjab University Calendar Volume II 1971—Regulation 12—
Students of M.B.B.S. Course failing to clear in all subjects of Second*