

NAGPUR HIGH COURT

Jiwibai

Vs

Ramkuwar Shrinivas Murarka Agarwala

(Pollock,CJ. Bose and Sen, JJ.)

01.07.1946

JUDGMENT

Pollock,CJ.

1. The questions referred concern the powers of an agent and counsel respectively to refer a dispute pending in a Court to arbitration without express authority from the principal.

2. The facts briefly are that the appellant sued for possession and certain other reliefs. The trial proceeded at some length (evidence was recorded, there was an appeal, a remand and so forth) and eventually an application was made to the Court to have the matter referred to the sole arbitration of one Tulsidas. The application was allowed. The matter was referred. Both sides appeared before the arbitrator through counsel. He heard them at length. Then he gave his award. It went against the plaintiff and the plaintiff now challenges it on various grounds. Of these, we are only concerned with the powers of the agent and counsel of the plaintiff. The objection is this. Neither of the parties to the suit signed the application for reference. It was signed by one Mohanlal on behalf of the plaintiff and by the plaintiff's counsel (an advocate), and on the other side by one Chunnilal and the defendant's counsel. Mohanlal held a special power of attorney (a khas mukhtyarnama) and his counsel also had a vakalatnama. Neither of these documents confers express authority to refer the dispute to arbitration. The plaintiff challenges their respective powers to make the reference on his behalf. In the two lower Courts the authority of the defendant's agent Chunnilal, and of his counsel, was also challenged, but we are not concerned with them in this reference. The order of reference only discusses the plaintiff's position, and though the questions referred are general, they must of course be read in conjunction with the order. Accordingly, we say nothing about the powers of Chunnilal and the defendant's counsel.

3. Now so far as Mohanlal's power is concerned it was argued on the one hand that the power to refer is included not only in the words "to compromise and to sign compromise petitions," but also in the more general clause, and whatever would be required to be done in the conduct of this suit would be done by the agent and the same would be binding on me as if I had done the same.

4. As against this, the other side contended that a power to refer is not included in the power to compromise and that the general clause is restricted to matters done in the conduct of the suit,

and that this does not include a power to remove the dispute from the jurisdiction of the Court and transfer it elsewhere. A more fundamental objection was also taken. It was said that the word 'compromise' is a free English translation of the vernacular words "apsat tad-jod" which, being literally translated mean "to give and take between ourselves." It was said that even if one of the meanings of the English word compromise is a reference to arbitration that is because the term has acquired a technical or secondary significance in the English Courts which cannot be extended to a vernacular term literally restricted to a giving and taking "between ourselves," especially as there is no case law on the point in India and accordingly it cannot be contended that these vernacular expressions have acquired an extended significance beyond their literal meaning because of time-honoured practice or custom.

5. This raises the question whether we can go behind the terms of reference and construe the power. The question referred, so far as this is concerned, is, Whether an express authority to compromise given to an agent includes power to refer a pending suit to arbitration.

6. It will be seen that the English word 'compromise' is used. Had the power of attorney been in English, or if the English term had been introduced into the vernacular document, we think it possible that a power to refer to arbitration would have been included because that is one of the meanings of the English word "compromise" as used in Courts of law. See as to this *Chanbasappa v. Basalingayya*¹ and the observations of the Pull Bench in *Ramdayal v. Sheodayal*² also *Subbaraju v. Venkat Ramaraju*³ *Basao v. Jagan Nath*⁴ and *Laljee Serang v. Chanderbhan*⁵ But we do not intend to decide that here, so far as the agent, as opposed to counsel, is concerned, because we are not dealing with the English term but a vernacular expression. In our opinion, the reference must be read in conjunction with the rest of the order and the facts of the case because it is fundamental that Courts are not to discuss and decide abstract problems, however intriguing they may be, but to deal with concrete cases. Accordingly, if realism is to be imported, to our opinion, it will be necessary to bear in mind that the word "compromise" used in the question referred is a convenient though loose, but nevertheless accurate translation of longer phrases used in another language.

7. Now the power of attorney confers express authority on the agent to settle the dispute between themselves by "give and take." But it does not stop there. It goes on, and whatever would be required to be done in the conduct of this suit would be done by the agent and the same would be binding on me as if I had done the same. We think this second phrase must be read in conjunction with the clause about "give and take" and that the two read together leave no doubt that the intention was "to confer the wide powers and several meanings which are embraced in the single English word "compromise." That includes a power to refer a dispute to arbitration.

8. There can be no doubt that one of the matters which must be done in the conduct of a suit is to determine, if and when the question arises, whether the dispute should be settled by arbitration. That is one of the recognised methods of settling disputes which come before the Courts. It is therefore one of the matters required or necessary to be done, as necessary as to decide whether to compromise, using the term in its more restricted sense as meaning to adjust the differences by mutual agreement. In our opinion, the English word "compromise" embraces both methods of settlement. The document in this case does not use the English term but sets out its two shades of meaning in separate phrases, one being set out specifically-"give and take," and the other in more general terms so as to include not only the matter of arbitration but other things as well.

Construing the term "compromise" as used in the question referred, in this special sense, we are of opinion that the authority to "compromise" conferred by this particular document did include the power to refer the dispute to arbitration. We desire to confine ourselves to the particular power of attorney used in this case and express no opinion regarding other powers which use only one term or restrict themselves to one phrase.

9. Pollock and Mulla point out at p. 539 of Edn. 7 of their Indian Contract and Specific Relief Acts that though a power of attorney must be construed strictly, and though, where special powers are followed by general words the general words are to be construed as limited to what is necessary for the proper exercise of the special powers and as enlarging those powers only for the carrying out of the purposes for which the authority is given nevertheless, a power of attorney is construed as including all incidental powers necessary for carrying out its object effectively.

The illustration given is that a power to commence and carry on all actions, suits and other proceedings, touching anything in which the principal might be in anywise concerned was held to authorize the signature by the agent on behalf of the principal of a bankruptcy petition against a debtor of the principal. If a bankruptcy petition, then why not a reference to arbitration during the pendency of a suit?

10. We answer the first question as follows. The express authority given to the agent in this case to "compromise" includes the power to refer the suit to arbitration because the document sets out in separate phrases the two aspects of "compromise" which the single English word normally connotes. We express no opinion as to what should happen when the several aspects of the word "compromise" are not separately set forth in a power in the vernacular given to an agent as opposed to a pleader.

11. Turning next to the position of counsel the question referred asks:

Whether counsel in India (Advocates including Barristers) have implied powers to compromise a pending suit or refer it to arbitration without express authority or consent of the client, even though they cannot act without a written authority from the client, or plead without filing a memorandum of appearance.

Our answer is yes, they can. We will consider the power to compromise first.

12. The Judicial Committee of the Privy Council decided in *Sourendranath v.*

*Tarubala Dasi*⁶, that the power to compromise a suit without reference to the client is inherent in the position of an Advocate in India. It is implied in the authority conferred on him by the client to conduct the suit on his behalf in the best way possible, unless the implied authority is expressly countermanded or withdrawn. It is thus implicit in his appointment. It is true their Lordships were dealing with an Advocate who was entitled to appear without a power and that they reserved their judgment in a case like the present where a power is necessary, but in our opinion there is no difference between the two cases.

13. We have no doubt when counsel is appointed by a power, or when the law requires a power the usual rule about powers must be followed. As Pollock & Mulla observe (p. 538):

Such an instrument is construed strictly, and confers only such authority as is given

expressly or by necessary implication.

But the whole point is, what are the necessary implications when counsel is appointed?

14. Now as to this, their Lordships of the Privy Council have laid down the general rules which govern counsel in England, in Scotland, in Ireland and in India; also, we would add, in the United States of America. (See Story on Agency, Section 24). Their Lordships point out that it is necessary in the interests of the client himself that such rules should obtain. They also point out that it is necessary hour by hour and almost necessary minute by minute, for counsel to exercise powers which almost amount to powers of compromise;

The Advocate is to conduct the cause of his client to the utmost of his skill and understanding. He must, in the interests of his client, be in the position, hour by hour, almost minute by minute, to advance this argument to withdraw that; he must make the final decision, whether evidence is to be given or not on any question of fact; skill in advocacy is largely the result of discrimination. These powers in themselves almost amount to powers of compromise: one point is given up that another may prevail. (p. 1317).

15. Consider the impracticability of any other rule. It would be next to impossible for a power of attorney to envisage every contingency and to embody every act and duty which it may be necessary for counsel to perform in the conduct of a suit. However full and detailed a power may be it would always be necessary to embody a general clause "and to perform such other acts as may be requisite and necessary for a proper conduct of the case," if incompleteness is to be avoided. How would it be possible to interpret such a clause except with reference to the normal duties of counsel? The *eiusdem generis* rule is not of universal application. It has its limitations and exceptions. Nearly every contract, of necessity, leaves matters which are to be implied. Such contracts must therefore, be construed with reference to the surrounding circumstances and the parties who made them. Section 9, Indian Contract Act provides for this. As Pollock and Mulla observe at p. 58 of their work:

The language of the section appears to assume that the terms of a contract may be (as undoubtedly they may, by familiar law and practice) partly express and partly implied.... There is a class of cases, of considerable importance in England, where the parties are presumed to have contracted with tacit reference to some usage well known in the district or in the trade, and whatever is prescribed by that usage becomes an additional term of the contract, if not contrary to the general law or excluded by express agreement. Such terms are certainly implied, as resulting not from the words used, but from a general interpretation of the transaction with reference to the usual understanding of persons entering on like transaction in like circumstances.

16. What is the engagement of counsel but a special kind of contract? It is true, Barristers cannot sue for their fees in England because of a fictitious supposition that they are acting not for reward but for an honorarium. But the essentials of contract are there. They must be engaged (retained as it is termed). That must be done by an agent of the client (his solicitor). It must be on behalf of

the client. Counsel must agree to act (accept the brief, it is called). Brush unrealities aside and what do we get but a contract? How much more is that the case in those parts of India where no solicitor intervenes and counsel and client meet face to face? How much more when there is an actual instrument of engagement or a power of attorney? How much more when the law requires writing?

17. Consider what Order 3, Rule 4 prescribes: "No pleader shall act for any person in any Court unless he has been appointed for the purpose by such person by a document in writing." Say, a power were to say quite simply, I hereby appoint to act for me in such and such a case or, as the power in the present case says to conduct this suit.

would that be an invalid power? Would it be void for uncertainty? Of course it would not. It would be in exact compliance with the provisions of the statute and the Court would read into the document all those terms which the law implies when counsel are engaged, terms which the Privy Council tell us are implicit in the fact of his appointment.

18. Consider next another type of case. Consider the type of power which embodies details, the kind of power we have here for the agent. He is empowered to plead, to sign written statements, verifications and applications, to produce documents in evidence and take them back, to withdraw deposits, to execute a power of attorney in favor of a pleader, to pay process, to swear affidavits, to compromise and sign compromise petitions, and to take inspection. Ignore for the moment the general clause and assume that a pleader was appointed. Formidable as this array of powers looks it is yet incomplete. The man is empowered to produce documents, but not to produce witnesses. He is not empowered to cross-examine. He cannot administer or answer interrogatories, for in strictness, these are not "applications." He can "plead", but not file a plaint because he has not been empowered to "act" generally, but only to do the specified things set out, none of which embraces a plaint, particularly if the word "plead" is construed, as it has to be, under Order 3, Rule 4(5), and contrasted with the word "act" in Sub-rule (1). It would be impossible for him to conduct the case without reading into the power a number of terms which are not there. Objections would be taken at every stage and the client would be exposed to the danger of losing his case because of some unauthorized step.

19-20. Next add the general clause:

and whatever would be required to be done in the conduct of this suit.

Where do we get now? Apply the ejusdem generis rule and even then it is necessary to construe it with relation to the usual powers of a pleader. View the matter how you will, it is impossible to escape the conclusion that the conduct of cases in Indian Courts would become unworkable unless powers are construed in the light of their Lordships' observations.

21. Now we have referred here to the power given to the agent and considered how it would be construed if it had been given instead to a pleader. We must not be understood by this to imply that the rule of construction is the same in the two cases. It is not. In the case of the agent, the power must be construed strictly and only such authority as is conferred expressly or by necessary implication can be taken into consideration. In the case of the pleader the rule is otherwise because there we are dealing with a profession where well known rules have

crystalised through usage. It is on a par with a trade where the usage becomes an additional term of the contract, "if not contrary to the general law or excluded by express agreement." Compare the rule given by Pollock and Mulla at p. 58 with what their Lordships say at p. 1818:

First, the implied authority of counsel is not an appanage of office, a dignity added by the Courts to the status of barrister or advocate at law. It is implied in the interests of the client, to give the fullest beneficial effect to his employment of the advocate. Secondly the implied authority can always be countermanded by the express directions of the client. No advocate has actual authority to settle a case against the express instructions of his client.

22. The rule their Lordships lay down is the same as the more general rule quoted by Pollock and Mulla. In our opinion, it is the rule which applies here, and the only difference between the present case, where written authority of appointment is necessary because of Order 3, Rule 4, and the case their Lordships decided, lies in the necessity of obtaining a writing as a condition precedent to the appointment.

23. Once this is accepted then, because of what their Lordships say, the authority to compromise is implicit in the appointment unless it is expressly countermanded, and that, whether there is authority expressly conferred by the power or not. We answer this part of the question accordingly.

24. The Calcutta High Court held in *Askaran Choutmal v. E.I. Ry. Co*⁹. that the general authority of counsel to compromise extends in India only to compromise in Court, but, as the learned authors of Mulla's Contract Act point out at p. 540, Edn. 7, the Privy Council do not mention this distinction. In our opinion, such distinction would cramp the general powers to which their Lordships refer and would weaken one of the reasons given by their Lordships as a foundation for the rule. In our opinion, the authority is not so limited. It is general and can only be qualified by express prohibition; not necessarily however in writing, or in the power, provided of course the compromise relates to matters in the suit and not outside it. We also recognise that our view is contrary to the one expressed in *Jagapati v. Ekambera*¹⁰ where a distinction is drawn between a pleader and other advocates; also to the view in some other cases. With the utmost respect we differ from them.

25. We think it right to add that Section 188, Indian Contract Act leads to the same conclusion. An agent has implicit authority to do every lawful thing necessary for the act for which he is appointed, and in particular to do that which is usual in the conducting of such business. The Privy Council tell us what is usual in the case of counsel. The power to compromise is one of the things they may do.

26. We have next to consider whether an authority to compromise embraces authority to refer to arbitration. We have already referred to the cases which hold that one of the meanings of compromise is arbitration, indeed, that, according to some authorities, was its original meaning, and it is still its primary meaning in the dictionaries. We are referred to an impressive list: Murray's Dictionary: Ainsworth's Latin English Dictionary: Wharton's Law Lexicon: The Oxford English Dictionary: and Story's Equity Jurisprudence. To this we add Sir Dinshah Mulla's opinion at p. 15, Edn. 11, of his Civil Procedure Code. He refers however to two cases taking the

other view which draw the distinction between a pleader and other advocates to which we have already referred. With respect we do not agree with such a view. The cases on which Pollock and Mulla rely are English cases and about the rule in England there can be no doubt. It is enough to refer to Halsbury's Laws of England (Hailsham Edition vol. II, p. 525, para. 714. We are unable to see how or why a different rule should obtain in India and agree with the opinion of Pollock and Mulla.

27. The Privy Council tell us that there is inherent in the position of counsel an implicit authority to do all that is expedient, proper and necessary for the conduct of the suit and the settlement of the dispute. One method of settlement is compromise as ordinarily understood. Another is compromise by arbitration. There can be no question that a reference is right and proper because the law contemplates it. The Indian Arbitration Act, and before it the Code of Civil Procedure makes or made, express provision for this. Arbitration is therefore one of the matters which can be called in aid as requisite and proper for the settlement of a dispute. If it is, then under the general rule laid down by the Judicial Committee, counsel have inherent power to resort to it unless their authority has been expressly countermanded. In England this is no longer doubted. In India the force of the reasoning which concedes the power of counsel to compromise applies equally to the power to refer. In the circumstances it would be illogical to concede the one and withhold the other, and this, quite apart from the dictionary meaning of the word 'compromise',

28. Turning next to Order 3, Rule 4, consider again the case in which a pleader is appointed simply to "act" without any attempt to set forth the scope of his acting. (That incidentally is in substance the power given to the plaintiff's counsel in this case). Is compromise not an acting? If so, is reference to arbitration not an acting

also? Let us assume the existence of express authority, though not contained in the power of attorney and not filed in Court. Would counsel not be competent to sign a reference if he was appointed to "act"? Of course he would. What else is this but one of the many ways in which counsel can "act". If that be the case then the legislature, which requires the existence of a power in writing to "act" draws no distinction between the various lands of acting, and consequently we are relegated to the general powers of counsel as envisaged by the Privy Council. As we have shown, there is in their Lordships' opinion no distinction between the power of counsel in England, Scotland and Ireland and advocates in India who are not required to file a power.

29. Had it not been for Order 3, Rule 4 there would have been no distinction at all. Order 3, Rule 4 therefore makes the difference. But the only requisite it lays down is a written authority of appointment. Once that is given it leaves counsel so appointed free to "act", and draws no distinction between various kinds of acting. If the legislature draws no distinction how can we? We must in the circumstances give full effect to the rule of their Lordships, and that, in our judgment, embraces not only the authority to compromise but also to refer to arbitration, except where the authority has been expressly withdrawn.

30. We may mention in passing that Devadoss J., placed a reference to arbitration on the same footing as compromise and admissions, so far as counsel's powers are concerned, in *Muthiah Chetti v. Karuppan*¹¹ It is true the remark was obiter so far as a reference to arbitration is concerned and that though the remark is incidental still, the observation has weight.

31. It will be observed that in our view it becomes unnecessary in the pleader's case to construe the vernacular equivalent of the word "compromise." That was necessary in the agent's case

because the agent is not a member of a profession governed by well-known usage, In the pleader's case all we have to see is whether there is a valid appointment and whether there is express prohibition.

32. Our answer to the second question is that counsel in India, whether Barristers, Advocates, or pleaders, have inherent powers, both to compromise claims, and also to refer disputes in Court to arbitration, without the authority or consent of the client, unless their powers in this behalf have been expressly countermanded, and this, whether the law requires a written authority to "act" or "plead" or not.

Cases Referred.

¹ A.I.R. 1927 Bom. 565

² A.I.R. 1939 Nag. 186

³ A.I.R. 1928 Mad. 1025

⁴ A.I.R. 1931 Oudh 127

⁵ A.I.R. 1931 Rang. 58

⁶ AIR 1930 PC 158 : (1930) ILR 57 P.C. 1311 : 1930-31-LW 803

⁹ A.I.R. 1925 Cal, 698

¹⁰(98) 21 Mad 274

¹¹ A.I.R. 1927 Mad. 852