

Shambhu Nath vs Hari Shankar Lal And Ors. on 5 January, 1954

Equivalent citations: AIR1954ALL673, AIR 1954 ALLAHABAD 673

JUDGMENT

Malik , C.J.

1. This is a defendant's appeal against an order passed by the lower court directing that a decree be passed in terms of an award. The parties are brothers. On 17-8-1943, they entered into an agreement along with their mother Rajwanti and the dispute was referred to two arbitrators, Girdha-rilal and Madho Prasad. Within 10 or 12 days of the reference the two arbitrators started the work, gave notice to the parties and started recording the evidence. On 25-7-1949 Rajwanti died. On 31-8-1950 one of the brothers, Hari Shanker Lal, gave a notice to the arbitrators that they should proceed with the reference and give an award by an early date. On 1-10-1950, the award was given. Thereafter Hari Shanker Lal applied that the award be filed and made a rule of the court. The application was registered as a suit and notice was issued to Shambhu Nath and Kedar Nath, Shambhu Nath filed the following objections:

(i) That the arbitrators had not complied with the provisions of Rule 2, Schedule 1, Arbitration Act and the award was void on that ground.

(ii) That the award was given beyond time.

(iii) That after Rajwanti's death the reference had elapsed and there was no fresh agreement of reference.

(iv) That the arbitrators were personally interested in Hari Shanker Lal and the award was therefore vitiated as it was to benefit one of the arbitrators and the arbitrators were therefore guilty of misconduct.

2. Learned counsel has agreed that there is no substance in the third objection. It is not necessary for us to go into the fourth. The second objection of limitation must be decided in favour of the appellant. Section 3 of the Arbitration Act (Act No. 10 of 1940) provides that: "3. An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference."

Paragraph 3 of the First Schedule is as follows: "3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

The lower court has held that the arbitrators have a right to make their award either within four months after entering on the reference or after having been called upon to act by notice in writing, and as the notice to act was given on 31-8-1950, the award was within time. We do not think that this view is sound. If the arbitrators have entered on the reference then the award must be made within four months from such date. If they have not entered on the reference the arbitrators may be called upon by notice in writing to act and in that case the four months' period is to be counted from the date of the notice.

Here the arbitrators had entered on the reference 10 or 12 days after the reference. That will be 28th or 30th August 1948. The four months expired on the 28th or 30th December 1948. Seven months after the period fixed had expired Rajwanti died and almost after a further period of one year from that date a notice was given long after the expiry of the period of four months. In the circumstances, the award had clearly been given after the expiry of the period of limitation. This view is supported by a decision of this Court in -- 'Sardar Mal, Hardat Rai v. Sheo Bukhsh Rai, Sri Narain', AIR 1922 All 106 (A).

3. As regards the first point, that the arbitrators had not appointed an umpire, reference is made to para. 2 of the First Schedule of the Act which is as follows:

"2. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments."

If the arbitrators do not nominate an umpire then under Section 8(1)(c) a party has to serve the arbitrators with a notice in writing and if within 15 days they do not make the appointment then under Section 8(2) the court has the right to appoint an umpire. An umpire however is different from an arbitrator in this respect that, while the arbitrators have to sit together to make the award, the umpire is only called upon to act if the arbitrators have allowed the time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree; the umpire then has to enter on the reference in lieu of the arbitrators and to make his award within two months. (See paragraphs 4 and 5 of the First Schedule). Where, therefore, the arbitrators have agreed on all points, the umpire is not called upon to act at all.

In the circumstances, it may be that the failure to appoint an umpire is not such a breach of the above provision as to vitiate an award and might amount merely to an irregularity which it is possible to waive. As the lower court has pointed out, if the parties had so desired they could have served notice on the arbitrators to appoint an umpire and on the failure of the arbitrators to make such an appointment they could have moved the court. The parties however did not follow that procedure and in spite of the fact that the arbitrators had not appointed an umpire they appeared before the arbitrators and produced all their evidence. In the circumstances the lower court has rightly held that the parties must be deemed to have waived the irregularity and were estopped.

4. Learned counsel for the appellant, has, however, relied on a decision of a Bench of this court to which one of us was a party, viz., -- 'Jawala Prasad v. Amar Nath', AIR 1951 All 474 (B) and has urged that it has been held that the provisions of paragraph 2 of First Schedule are mandatory as the arbitrators are bound to appoint an umpire; in the absence of such appointment the award is invalid. The provisions of paragraph 2 of the First Schedule impose an obligation, and it cannot be denied that the arbitrators should have appointed an umpire. But the question remains, what is the effect of such failure. The question whether the parties had waived the irregularity and were estopped from questioning the award on that, ground was not considered in that case as the point was not raised. The learned Judges took care to confine their decision to the facts of that particular case and have said that in the circumstances of "this particular case" the award made is not valid.

5. The lower court has held that the agreement of reference dispensed with the necessity of appointing an umpire. The relevant portion has been quoted by the learned Judge in his judgment. We find it difficult to agree with the learned Judge that the reference either expressly or by necessary implication ruled out the necessity of the arbitrators appointing an umpire. In this connection it may be useful to quote from the judgment in

-- 'Jawala Prasad's case (B)' already cited above where the learned Judges commented on similar provisions in the agreement of reference:

"What the reference recites is that the parties had agreed to refer the case for decision jointly to two arbitrators, that they had nominated those two arbitrators and that the arbitrators had been authorised by them to decide the case after making such inquiries as they liked and after satisfying themselves in such manner as suits them. The so-called wide powers given to the arbitrators under the agreement are no larger than powers generally given by arbitration agreements to arbitrators. They are not of sum a nature as to make us hold that the condition requiring that the arbitrators shall appoint an umpire was dispensed with."

6. The result, therefore, is that this appeal must be allowed, the order of the lower court be set-aside and the plaintiff's suit dismissed with costs in both the courts.