

## APPELLATE CIVIL

Before Kapur, J.

SHAM SUNDER,—Appellant.

versus

JAGAN NATH KAPUR, ETC.,—Respondents.

## First Appeal from Order No. 6 of 1954

*Arbitration—Award—Ex-parte proceedings—No notice that ex-parte proceedings will be taken—Award whether bad and should be set aside.*

*Held*, that it was the duty of the arbitrator to give notice in writing before proceeding *ex-parte* that in case of non-appearance on a given date, time and place *ex-parte* proceedings will be taken. The failure to do so will make the award invalid.

1954  
March, 11th

*Gladwin v. Chilcote* (1), and *Udaichand v. Debibux* (2), relied upon.

*First Appeal from the decree of the Court of Sardar Madan Mohan Singh, Sub-Judge, 1st Class, Delhi, dated the 12th day of January, 1953, setting aside the award and leaving the parties to bear their own costs.*

A. N. GROVER, for Appellant.

R. S. NARULA, CHATTAR SINGH, and JOTI SARUP BHATNAGAR, for Respondents.

## JUDGMENT

KAPUR, J.—This is an appeal brought by the original respondent Sham Sunder against an order passed by Mr. Madan Mohan Singh, Sub ordinate Judge 1st Class, dated the 12th January 1953, setting aside the award made by Mr. Balwant Rai Mathur. The facts of the case are that Jagan Nath

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(1) 61 R.R. 825

(2) I.L.R. 47 Cal. 951

m Sunder Kapur and Chandu Lal Goel entered into an agree-  
 v. ment of partnership on the 23rd July, 1951. The lat-  
 gan Nath ter was the financing partner, but it appears that  
 apur, etc., he could not finance the partnership and therefore  
 Kapur, J. Sham Sunder the present appellant was brought  
 into the partnership. Some disputes arose and  
 on the 13th August, 1951, the parties entered into  
 an agreement of arbitration appointing one Mr.  
 Balwant Rai Mathur, Advocate, as their arbitra-  
 tor. Two of the important clauses of this agree-  
 ment were (1) that the arbitrator was to give a  
 notice in writing as to the time, date and place of  
 hearing and (2) —

“2. That it shall be lawful for the arbitra-  
 tor and at his discretion to adjourn  
 the proceedings from time to time or  
 to proceed in the absence of either  
 party or their respective evidence, if  
 default be made by them or either of  
 them in appearing before him or in  
 producing their or his evidence after  
 reasonable notice of which the arbitra-  
 tor shall be the sole judge, has been  
 served to them by the arbitrator.”

The proceedings of the arbitrator in regard to  
 which a great deal of criticism has been levelled  
 before me by counsel for the present respondents  
 started on the 13th August, 1951, when all the par-  
 ties were present and 15th August was fixed for  
 the proceedings at the house of Mr. Amar Nath  
 Kakkar O. W. 2. On that date respective claims  
 were to be filed. On the 15th the parties met as  
 before and the proceedings were adjourned to the  
 19th August at the same place at 5-30 p.m. The  
 proceedings of this date are on a separate sheet  
 of paper. Why, it has not been explained. The  
 parties were present as before and they were dir-  
 ected to file their respective claims on the 21st

August, 1951, at 5-30 p.m. This is signed by all the parties. It is not stated in this document as to where they met. On the 21st which was the next date Sham Sunder with Mr. Kishan Gopal, Advocate, and Chandu Lal were present, but Jagan Nath was absent. The former filed their claims and the arbitrator allowed Jagan Nath to file his claim on the 22nd August, 1951, when the evidence was also to be produced. The proceedings end as follows:—

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“L. Jagan Nath may be informed of this through Mr. Kakkar. The evidence to be recorded at 5-30 at Darya Ganj.”

On the 22nd August again Sham Sunder with Mr. Kishan Gopal, Advocate, and Chandu Lal were present. Suraj Parkash, a son of Jagan Nath, is stated to be present and he asked for adjournment for half an hour as his father had gone on some private business—a request which was granted. This order ends—

“It is 6-20 now. Suraj Parkash may file claim if he so desires.”

There is something missing on the previous page. On the same day, i.e., the 22nd August, 1951 the order states—

“It is now 7-15, but Jagan Nath nor his son Shri Suraj Parkash has turned up. Shri Suraj Parkash was directed to file claim on behalf of his father, but he has not done so. I have no other alternative in view of the above circumstances, but to proceed with the case in the absence of Shri Jagan Nath Kapur.”

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The order then proceeds to say—

“It is now about 6-35. Let him produce his witnesses on 23rd August, 1951 to 5-30 at 4, Daryaganj. He would be responsible to produce his witnesses on 23rd August, 1951.”

At this stage no attempt was made to give notice to Jagan Nath as to the next date and that if he did not appear proceedings will be taken *ex parte*. On the 23rd witnesses were examined on behalf of Sham Sunder. On this date Jagan Nath was not present. On the next date, i.e., the 24th August, 1951, Jagan Nath again was absent and the statements of witnesses of Chandu Lal were recorded and it was not finished which was continued on the 25th August. On the 26th arguments were heard and the award was made on the 27th August, 1951, by which Jagan Nath was ordered to pay Rs. 11,151 with interest at 1 per cent and Chandu Lal was awarded a sum of Rs. 2,600 but without interest.

On the 27th August, 1951, Jagan Nath made an application under section 11 of the Indian Arbitration Act, for the removal of Mr. Balwant Rai Mathur as an arbitrator alleging that he was made to enter into this arbitration agreement by the persuasion of the arbitrator himself and Sham Sunder, that he had serious doubts about the integrity of the arbitrator, and made certain other allegations of the arbitrator being interested. On the 30th August, 1951, an application was made by Sham Sunder for filing of the award under section 14 of the Arbitration Act. Objections were taken to the award by Jagan Nath in which certain allegations were made in regard to the misconduct of the arbitrator on the ground of

his being interested etc. It was also pleaded that on the 21st August 1951 the arbitrator was shifting his residence and was not present at his old house and had left a message that he would take up the case on some other day, that on 22nd August the arbitrator had sent a telegram to the Imperial Bank stopping payment in his favour and that on the 23rd August he (the objector) contacted the arbitrator who ordered him to see him in the afternoon but he (the arbitrator) was again absent from his place on that date. These facts were denied and in the Court only two issues were raised and the learned Subordinate Judge came to the conclusion that the award was bad because no notice had been given to Jagan Nath that proceedings will be taken *ex parte* against him. Sham Sunder has come up in appeal to this Court.

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In his statement as a witness the arbitrator has stated that Jagan Nath told him that he had suffered a loss of Rs. 4,200 and therefore, it cannot be said that Jagan Nath was not interested in putting forward his part of the case. Even if it be assumed that on the 21st August Jagan Nath had not appeared, it cannot be said that the arbitrator could proceed without giving notice of the time and place where he would take proceedings and also that he would proceed *ex parte*, if Jagan Nath did not appear. As a matter of fact the main contention of Jagan Nath before me was circumscribed to this aspect of the case. The question that arises for decision is was it sufficient compliance with law if a message was given to Amar Nath Kakkar to inform Jagan Nath of the next date of hearing. Amar Nath Kakkar has as a witness stated that he did not inform Jagan Nath

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of the next date of hearing, but Mr. Grover has submitted that this statement should not be accepted because if information had not been given the son of Jagan Nath would not have appeared and asked for time. In the first place, it is not quite clear that Suraj Parkash who is stated to be the son of Jagan Nath did appear. No doubt Mr. Kishan Gopal has appeared and stated that on the 22nd August a Suraj Parkash did appear and asked for time, but this gentleman does not know Suraj Parkash, and as the man said he was Suraj Parkash this witness also said that he was. The learned Judge has found that the arbitrator started on the 22nd August 1951 the proceedings 50 minutes later than the time fixed and he has accepted the testimony of Jagan Nath that he waited till 6-30 and then went away. But even if one were to accept the case of the present appellant, in my opinion the order of the learned Judge should not be interfered with.

In *Gladwin v. Chilcote* (1), it was held that to justify an arbitrator proceeding *ex parte*, a very strong case of wilful delay by the party not attending must be shown. This rule has been stated in Hailsham's Edition of Halsbury's Laws of England Volume 1, at page 651, as follows:—

“If a reasonable excuse for not attending the appointment can be shown, the Court will set aside an award made by an arbitrator who has proceeded *ex parte*.”

In Russell on Arbitration the law is stated at page 144 in the following words—

“If one of the parties, after having been duly summoned, neglects to attend before the arbitrator, and the latter is

of opinion, from the circumstances which are brought to his notice, that the party is absenting himself with a view to prevent justice and defeat the object of the reference, it is the arbitrator's duty to give due notice to the absent party that he intends, at a specified time and place, to proceed with the reference, whether the said party shall attend or not. If this notice is ineffectual to secure his attendance, and he does not allege some excuse satisfactory to the arbitrator, the latter not only may, but ought, to proceed *ex parte*.”

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And at page 145 it is stated as follows—

“In general, the arbitrator is not justified in proceeding *ex parte* without giving the party absenting himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator's intention clearly, otherwise the award may be set aside. An ordinary appointment of a meeting with the addition of the word ‘peremptory’ marked on it is, however, sufficient.”

This law has been accepted in this country in *Udaichand v. Debibux* (1). At page 129 in Sircar's Law of Arbitration the law has been summarised as under—

“In another Calcutta case the test of ascertaining when failure to give notice of

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proceeding *ex parte* amounts to a real grievance was formulated thus:—  
 'It need not be disputed that arbitrators should give notice of their intention to proceed *ex parte* if one of the parties should not appear: *Crompton v. Mohan Lal* (1), *Sukhmal v. Babulal* (2), and *Udaichand v. Debibux* (3), if it is established that notwithstanding such warning, he would not have appeared before the arbitrators, he has really no grievance and cannot invite the Court to set aside the award on the ground of the alleged defect in procedure, *Bhowanidas Ramgobind v. Har-Sukhdas Balkishendas* (4).

I find that the arbitrator instead of informing Jagan Nath asked Amar Nath Kakkar who was not an attorney for Jagan Nath to inform Jagan Nath about the next date and when Jagan Nath did not appear on the following day it was in my opinion the duty of the arbitrator to give him notice in writing to appear with a warning that if he did not appear, proceedings will be taken *ex parte*. Mr. Grover submits that Jagan Nath deliberately did not appear and as the arbitrator was convinced that Jagan Nath did not appear it must be taken to have been established that the arbitrator was of the opinion that Jagan Nath would not have appeared in spite of the warning that the proceedings will be taken *ex parte* and therefore Jagan Nath could have no grievance. This seems to have been taken from *Udaichand's case* (3), but in the present case there is no finding of any kind

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(1) 41 Cal. 313

(2) 42 All. 525

(3) 47 Cal. 951

(4) 27 C.W.N. 933 at p. 935



by the arbitrator that he is proceeding *ex parte* because he was convinced that Jagan Nath would make a default in any case. On the other hand it appears to me that proceedings were taken in such a haste that it has given me an impression that the arbitrator wanted to give his award irrespective of whether Jagan Nath appeared or not.

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In my view therefore the learned Judge was justified in setting aside the award and I would therefore dismiss this appeal with costs. The injunction is consequently discharged and the Controller Defence Accounts, Western Command at Meerut, and the Imperial Bank of India at New Delhi may also be informed.

LETTERS PATENT SIDE

Before Kapur & Bishan Narain, JJ.

DALMIA JAIN AIRWAYS,—Appellant.

versus

THE REGISTRAR, JOINT STOCK Cos., ETC.,—Respondents.

Letters Patent Appeal No. 1-D of 1954

Letters Patent (Lahore High Court) clause 10—Judgment—Order granting application to be made a party to proceedings, whether judgment within the meaning of clause 10 of the Letters Patent—Code of Civil Procedure (V of 1908) Order 41 rule 20—Addition of Registrar as party—Whether falls under Order 41 rule 20.

1955

January, 13th

Company D went into voluntary liquidation in June, 1952. Scheme under sections 153 and 153-A of the Indian Companies Act proposed and approved by the shareholders. Scheme sanctioned by the District Judge, Delhi, with certain modifications on the 10th February, 1953. Four appeals filed against the order sanctioning the scheme on the 3rd December, 1953. Registrar, Joint Stock Companies, Delhi, applied to be added a party to the appeals. The Company Judge granted the application and allowed the Registrar to make certain evidence available to the Court.