

Chacko Vs. Chacko

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Court : Kerala

Decided On : Sep-29-1958

Reported in : AIR1959Ker149

Judge : Sankaran and; Varadaraja Iyengar, JJ.

Acts : [Arbitration Act, 1940](#); [Code of Civil Procedure \(CPC\) , 1908](#)

Appeal No. : Civil Revn. Petn. No. 74 of 1956 (k)

Appellant : Chacko

Respondent : Chacko

Advocate for Def. : N.D.P. Namburipad, Adv.

Advocate for Pet/Ap. : K.K. Mathew and; George Vadakkal, Advs.

Judgement :

Vahadahaja Iyengar, J

1. This revision raises the question as to whether the provision in paragraph 2 of the First Schedule to the Indian Arbitration Act X of 1940 (hereinafter called the Act) is mandatory or merely directory, in character. In view to its importance it was referred by one of us before whom it came on in the first instance to a Division Bench.

2. The petitioner and the 1st respondent by agreement dated 19-5-1954, referred their differences in the matter of the settlement of their partnership accounts, to two arbitrators viz., respondents 2 and 3. The arbitration agreement did not, within the meaning of Section 3 of the Act exclude the applicability of the First Schedule to the Act, paragraph 2 of which provided :

'(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'.

However, respondents 2 and 3 did not appoint an umpire whether before they commenced functioning as arbitrators or during its course and on 31-3-1954 that is, well within the month after their appointment, they brought out their award. Later, at the instance of the petitioner they filed the award in the Thodupuzha Munsiff's Court, with prayer for decree being passed in terms thereof. The 1st respondent thereupon took objection to the validity of the award on several grounds both technical and on the merits. We are concerned here with the technical objection, that the non-appointment at all by the arbitrators of an umpire, was fatal omission which rendered their award void and unacceptable. The courts below accepted this objection and so dismissed the motion before them. Hence this revision.

3. The corresponding provision in the repealed Arbitration Act of 1899 (Indian) ran as follows :

'If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award'.

The change in the present wording, in the opinion of the court below was deliberate and meant that the appointment of the umpire by the arbitrator was mandatory with the consequence that 'disobedience implied a nullification'. Learned counsel for the petitioner urges that the concerned provision is merely directory so that non-compliance therewith is only an irregularity and in cases where no prejudice is caused the award cannot be invalidated.

4. Now on the general rule as to whether a particular statutory provision is mandatory or directory it is unnecessary to go further than the classic Statement of Lord Penzance in *Howard v. Bodington* (1877) 2P.D, 203, at p. 211. The learned judge quoted the dictum of Lord Campbell in *Liverpool Borough Bank v. Turner*, (1860) 45 E. R. 715.

'No universal rule', said he, 'can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed'. and then went on :

'I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory'.

The Supreme Court in *Hari Vishnu v. Ahmed Ishaque*, AIR 1955 S. C. 233, has observed :

'An enactment in form mandatory might in substance be directory. The use of the word 'shall' does not conclude the matter. However, these and other rules are only aids for ascertaining the true intention of the legislature which is the determining factor and must ultimately depend on the context'.

Three fundamental tests were laid down on this matter in *Ajit Kumar Sen v. State of West Bengal*, AIR 1954 Cal. 49 :

'They are based on considerations of the scope & object -- sometimes called the scheme & purpose -- of the enactment in question, on considerations of justice and balance of convenience and on a consideration of the nature of the particular provision, namely, whether it affects the performance of a public duty or relates to a right, privilege or power, in the former case, the enactment is generally directory, in latter, mandatory.'

Applying these tests, we find, to begin with, that there is no declaration in any portion of the Act or the First Schedule that the violation of the provision as to the appointment by the arbitrators of an umpire, whether at all or within the time limited, renders their award to any extent void. On the other hand we have Section 8 of the Act investing power in the court to appoint an umpire in case the arbitrators fail in that matter and also paragraphs 4 and 5 of the First Schedule indicating how the umpire's function differs from that of the arbitrators.

That is to say while the arbitrators have to sit together to make the award, the umpire is called upon to act only 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 and the umpire has two months time from then to make his award. It would appear accordingly that if the arbitrators have agreed on all points, the umpire is not called upon to act at all the failure to appoint an umpire is then not such a breach of the provision in paragraph 2 of the First Schedule as to vitiate an award and might amount merely to an irregularity.

5. Reference may also be made to Clause (b) of the First Schedule to the corresponding English Act 1935 :

'If the reference is to two arbitrators, the two arbitrators shall appoint an umpire immediately after they are themselves appointed'

and the only consequence of the failure in this regard is as provided in Section 5 of the principal Act, viz., the intervention of the court in the matter of the appointment. The law is the same under the latest Arbitration Act, 1950.

6. The question came up for consideration in *Tikaram v. Hansraj*, AIR 1954 Nag. 241, in circumstances almost similar as here, in that the two arbitrators delivered their award within 30 days of their appointment and without nominating an umpire. The trial Judge held that the failure of the arbitrators to appoint an umpire vitiated the award but the High Court held however that paragraph 2 cannot be construed as a prohibition against the arbitrators making the award without appointing an umpire and the provision was only intended to facilitate the smooth progress of the

proceedings before the arbitrators. The learned Judges observed:

'The intention of Schedule 1, Clause 2 appears to be that the umpire whose function is to decide on a difference between the arbitrators should normally be appointed before any difference arises between them. Whatever may be the result in a case of a disagreement between the arbitrators, where no disagreement arises between the arbitrators and there is no need for an umpire, to regard the omission to appoint him as fatal to the validity of all the proceedings would only result in general inconvenience without promoting any object considered essential by the statute. The statute in such case could be complied with by the arbitrators appointing an umpire just before delivering their award. But such compliance, though punctilious, is purposeless. When the objector cannot point to any prejudice because of the omission to appoint an umpire the omission does not vitiate the award'.

There is no doubt the decision of the Allahabad High Court in *Jawala Prasad v. Amar Nath*, AIR 1951 All. 474 (L. B.) holding otherwise, in an arbitration pending suit and relied on by the courts below :

'The provisions of Section 25 of the Act make it clear that Section 3 is applicable to arbitration in suits also. Where, therefore, a reference to arbitration is made under Section 21 and the reference is to an even number of arbitrators, then, unless there is an express provision to the contrary in the agreement, the arbitrators are under a statutory obligation under Schedule 1, para 2, to appoint an umpire not later than one month from the latest date of their respective appointments. The provisions of para 2 of Schedule 1 are of a mandatory character and it is clearly the duty of the arbitrators to appoint an umpire. In the absence of the appointment of the umpire the award made will be invalid'.

But the learned Judges did not consider the difference between mandatory and directory construction of the word 'shall'. This decision was also distinguished in a later decision of that court in *Shambhu Nath v. Hari Shankar*, AIR 1954 All 673 on the ground that the question whether the parties had waived the irregularity and were estopped from questioning the award on that ground was not raised or considered there.

7. In *United Printing and Binding Works Ltd. v. Kishori Lal*, AIR 1956 Cal. 593, P. B. Mukharji, J., followed the ruling in AIR 1954 Nag. 241 just cited in preference to the ruling in AIR 1951 All. 474. The learned judge referred to the observations of Chitty, J., in *The Bombay Company, Ltd., v. The National Jute Mills Co. Ltd.*, ILR 39 Cal. 669 at p. 680 under the earlier Arbitration Law :

'The Court will, I take it, be averse to setting aside, or pronouncing as illegal, the proceedings of a Tribunal selected by the parties themselves. It certainly should not do so on technical grounds. Here it is conceded that the arbitrators have agreed upon their award. There has therefore been no necessity for the intervention of an Umpire. If one had been nominated, the parties would be in the same position. No further reference could have been made by either side to obtain the Umpire's opinion, or to question the correctness of the arbitrators' award'.

and went on to say :

'In this case the arbitrators have agreed and there was no occasion for any Umpire. It will be more than insensible technicality in such a case as this to hold that the award is bad because no Umpire was appointed who if appointed would have had no function as the arbitrators agreed in this case'.

See also *Union of India v. Allied Trading Co.*, AIR 1956 Punj. 7.

8. Learned counsel for the 1st respondent referred to *D.R. Fraser & Co. Ltd. v. Minister, of National Revenue*, AIR 1949 P. C. 120 for the proposition that when an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately. But that was a case of tax legislation where as observed by the Board, it was far from uncommon to find amendments introduced at the instance of the Revenue Department to obviate judicial decisions which the Department considered to be attended with undesirable results. In our judgment the instant provision is merely directory and its non-observance has not the result of vitiating the award. We therefore overrule the finding of the courts below in the above regard.

9. As however other questions on the merits still await to be determined, we remit the case back to the learned Munsiff for disposal in due course of law and in the light of the above observations. We may add that one other technical defect pointed out on behalf of the 1st respondent viz., that the Award as filed was not stamped, has been cured by payment of the requisite penalty in this Court.

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