

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.

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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

Sham Sunder Kapur and Chandu Lal Goel entered into an agreement of partnership on the 23rd July, 1951. The latter was the financing partner, but it appears that he could not finance the partnership and therefore 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 arbitrator. Two of the important clauses of this agreement 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 arbitrator 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 arbitrator 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 parties 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 directed to file their respective claims on the 21st

August, 1951, at 5-30 p.m. This is signed by all Sham Sunder
 the parties. It is not stated in this document as
 where they met. On the 21st which was the next
 date Sham Sunder with Mr. Kishan Gopal, Advoca-
 tate, 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. Kakkār. 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 alter-
 native in view of the above circumstan-
 ces, 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 same 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. Debibur* (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

(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.