CALCUTTA HIGH COURT

Ganeshmal Bhawarlal

Vs.

Kesoram Cotton Mills Ltd

O.O.C.J. Suit No. 268 of 1950

(Bachawat, J.)

02.01.1951

ORDER

Bachawat, J.

1. This is an application for setting aside an ex parte decree passed on the 28th February, 1950 by this Court. The facts are fairly simple but certain important questions of law arise in this case.

2. There were disputes between the petitioner firm Ganeshmal Bhawarmal and Keshoram Cotton Mills Ltd. The disputes were eventually referred to the arbitration of the Indian Chamber of Commerce. The arbitration tribunal made an award in favor of the respondent on the 5th July 1950. The award was filed in Court and on the 18th January, 1950 notice of such filing was issued by the Registrar. A clerk in the employ of the Attorneys of the respondents went to Raipur for serving Ganeshmal Bhairudan and Hastimal all alleged to be partners of the petitioner firm. It appears from the affidavit of the process server that on the 24th January 1950 three several copies of the notices were tendered to and accepted by all the three persons who were then at Raipur but all of them refused to sign acknowledgment of the receipt of the notice. The original notice was returned to this Court along with the affidavits of the process-server and of the person accompanying him. On the 27th January, 1950 Messrs. P. D. Himatsingka and Co., the attorneys for the respondents sent three letters by registered post to Ganeshmal, Hastimal and Bhairudan recording the service of the notice. The registered covers sent to Ganeshmal and Hastimal came back with the endorsement 'left' and 'refused' respectively. The letter sent to Bhairudan was duly received by him. On the 17th February, 1950 Messrs. P.D. Himatsingka and Co., received a letter from one of these three persons. In that letter the writer says that he was not in Raipur and was not served with any notice and that he was not a partner of Ganeshmal Bhawarmal. In the affidavit on behalf of the respondent it is stated that the writer of this letter is Hastimal. But this appears to be a mistake and it seems now to be the common case that the writer is Bhairudan. There was no further correspondence. On the 28th February 1950 this Court pronounced a

judgment according to the award and a decree followed. The decree was eventually transmitted outside Calcutta for execution. The petitioner firm alleges that it came to know of the passing of the decree for the first time in September 1950 during the Puja holidays and the present application was moved on the day the Court reopened after the holidays. The petition is signed by Ganeshmal and supported by only his affidavit. The ground taken is that the petitioner was not served with the notice. On the 22nd November 1950, I gave directions for affidavits which were complied with and the matter came up for hearing on the 13th December, 1950. On my pointing out to the counsel for the respondent that there were no affidavits from Hastimal and Bhairudan, the counsel asked for adjournment. After the matter was part-heard, the matter was adjourned until 20th December, 1950 in order to allow further affidavits to be filed. On the 20th December, 1950 further adjournment was asked but was refused by me as it appeared to me that the petitioner was trying to delay the matter and the application was then heard on the merits.

3. I have no hesitation in accepting the affidavit of the process-server in its entirety and in holding that the process-server went to Raipur and that three several copies of the notice were tendered by him to and accepted by each of the three alleged partners of the petitioner firm. Hastimal and Bhairudan have not filed any affidavits contradicting the process-server and I must hold that copies of the notices were tendered to and accepted by them. The attorneys for the respondents were acting *bona fide* and openly sent letters to each of the alleged partners informing them of the service and there is no attempt to suppress service of the notice. The only person who has denied the service on affidavit is Ganeshmal. He simply denies that he was served but he does not explicitly deny that the copy of the notice was riot tendered to or accepted by him. He does not swear that he was not at Raipur when the letter dated the 27th January 1950 addressed by Messrs. P.D. Himatsingka and Co., reached Raipur.

4. Mr. Sethia appearing on behalf of the petitioner next contended that assuming that notices were tendered to the partners of the petitioner, on their refusal to sign the acknowledgment of service copies of the notices ought to have been affixed on the outer door of the premises where they were residing and carrying on business and in the absence of such affixation the notices were not duly served and the decree ought to be set aside as a matter of course. Mr. Deb appearing on behalf of the respondent admitted that there was no affixation of copies but he contended that the notices were served in accordance with law and that the Court has no power and ought not to set aside the decree.

5. Under Section 14 of the Arbitration Act on the award being filed the Court shall give notice to the parties of such filing. Section 17 then provides as follows

> "Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it proceed to pronounce judgment according to the award, and upon

the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award."

6. The following conditions must be complied with before the Court may pronounce judgment upon award and before the decree can follow : (a) The Court has given notice to the parties of the filing of the award. (b) The time for making an application to set aside the award has expired or if such application has been made it has been refused. (c) Where the Court sees no cause to remit or set aside the award.

7. All these conditions are cumulative and must be strictly fulfilled. If not, the Court may and ought to set aside the judgment and decree which follows.Even in the exercise of its revisional powers the Court has set aside such judgment and decree (a) if no notice has been given. *'Rangasami v. Muthusami[1]', 'Ranjit v. Bissay'[2], 'Punoo v. Nebhraj[3]', 'Venkata Ramayya v. Papayya[4]', 'Mani Ram v. Ram AsRay[5]',* or (b) if the time for applying to set aside the award has not expired *'Ravibhai v. Dahya Bhai[6]', 'Srikishin v. Relumull[7]', 'Udit Singh v. Ram Lakhan Singh[8]', 'Valu Pillay v. Appaswami[9]', 'Rangiah v. Govindasami[10]', 'Subbaya v. Papayya[11]',* The Court has also set aside on revision such decree if the lower Court refuses to exercise its jurisdiction to consider on the merits ah application showing cause for remitting or setting aside the award erroneously on the ground of limitation. *'Sahib Rai v. Chaitram[12]', 'Ratnam v. Ramasamy[13]', 'D. B. Das v. Dayalal and Sons[14]',* or on the ground of estoppel : *'Kamta Pershad v. Uman Prasad[15]',* and also where the lower Court exercised such jurisdiction with material irregularity by refusing to give to the party sufficient opportunity to adduce evidence in support of such application : *'Juggobundu Sahu v. Chand Mohan[16]', 'Betana v. Kedar Nath[17]', Darbari Ram v. Bhika Ram[18]', 'Subba Rao v. Ramlingayya[19]',* Having regard to the language of Section 17 of the Arbitration Act there is a conflict of opinion whether appeal from the decree passed under that section lies if one or more of these grounds have not been complied with. It was held that the decree should be set aside even on appeal in *'Mairamjan Bibi v. Asaraddi[20]',* if no notice was given : *'Ibrahim Ali v. Mohsin Ali[21]'. 'Dawoodji and Son v. S.C. Sherman[22],*: if the Court refused to give opportunity to the objector to produce evidence; *'Sahadeo Singh v. Melhu Singh[23]',* if the Court refused to consider the objections to the award on the merits; *Najum-ud-din Ahmed v. Albert Puech[24]', 'U. Ba Thein v. U Po Mya[25]',* if the time for applying to set aside the award had not expired before the passing of the decree.

8. The notice of the filing of the award under Section 14 of the Arbitration Act must be given by the Court. Notice received by a party aliunde and not through Court is not sufficient. *'Chatarbhuj Das v. Ganesh Ram[26]',* and *'Guruditta v. Basant'[27],*

9. There is no express provision in Section 14 as to how and in what manner the notice is to be given. By Section 43 of the Arbitration Act the provision of the Code of Civil Procedure will apply to proceedings under Section 17 for judgment on award and such proceedings being an

original matter by Section 141 of the Code of Civil Procedure the procedure with regard to suits is to be followed as far as it can be made applicable. Section 142 of the Code provides that all notices given to or served under the provisions of the Code shall be in writing. By Order 48 Rule 2 of the Code all notices required by the Code to be given to or served on any person are to be given in the manner provided for

[1]11 Mad 144 [3] AIR 1930 Lah 228 [5] AIR 1921 Oudh 148(1)
[2] AIR 1926 Cal 1018 [4]1943-2 Mad L Jour 152 [6]45 Bom 832
[7] AIR 1916 Sind 79 [9]21 Mad L Jour 444 [11] AIR 1929 Mad 789
[8]1933 All L Jour 149 [10]45 Mad 466 [12] AIR 1915 Lah 352
[13] AIR 1916 Mad 927 [15] AIR 1924 Oudh 344 [17] AIR 1917 Oudh 240
[14] AIR 1933 Ran 38 [16]22 Cal L Jour 237 [18] AIR 1921 Lah 249
[19] AIR 1934 Mad 619 [21]18 All 422 [23]49 All 178
[20]43 Cal WN 924 [22] AIR 1925 Rang 238 [24]29 All 584
[25] AIR 1930 Rang 307 [26]20 All 474 [27] AIR 1925 Lah619(1).

service of summons. By Order 49, Rule 3 of the Code in a chartered High Court such notices can be served by an attorney or his clerk. This Court has framed arbitration rules under Section 44 of the Arbitration Act. Rule 14 of the Arbitration Rules provides that the Registrar shall issue notice of the filing of the award and such notice shall be served by such party as he may direct. By Rule 15 the notice shall be served in the manner provided for service of notice in Chap. VIII of the Rules. By Chap. VIII R. 26 except as provided by statute and the Rules all notices required to be served on or to be given to any party shall be served in the manner provided by the Code. By Rule 24 service on a party appearing in person may be made by leaving the notice at his address for service. By Rule 24A the service may be directed to be made by registered post. By Rule 25 the service to an attorney may be made by delivering or leaving the notice with his clerk at the place of business. By Rule 28 where personal service is required service shall be effected as nearly as may be in the manner prescribed for personal service of the writ of summons. In this case the applicant firm did not appear either in person or by an attorney nor was the notice served by registered post. Section 14 of the Arbitration Act does not require personal service of the notice on the party. There is therefore no question of service under Chap. VIII, Rules 24, 24A, 25 and 28. The service must therefore be under Chap. VIII, R. 26 and must be in the manner provided for service of summons.

10. Our Arbitration Rules make it clear that the notice of the filing of the award must be in writing and in a prescribed form. An oral notice cannot be served like a writ of summons. It was held in *'Hari v. Lachman[28]',* and also apparently in the cases of *'Valchand v. Galba[29]',* and in *'Saroj v. Jatindra[30]',* that such notice may be oral. It is not necessary to decide if these cases correctly lay down the law having regard to Section 142 and Order 48, Rule 3 of the Code and having regard to the language of Article 158 of the Indian Limitation Act. Under our Rules notice cannot be oral.

11. There is a difference of opinion whether in a case of reference and award in a pending suit the notice may be served on the pleader or attorney retained by the party in the suit having regard to Order 3, Rule 5 of the Code. The service was held to be good in *'Saroj v. Jatindra[31]',* and *'Bhola*

v. Batakrishna[32]*',* and it was held to be bad in *'Holaram v. Governor-General in Council*[33]*',* In the instant case there is no question of service on any pleader or attorney and it is therefore not necessary to decide how far and when Order 3, Rule 5 enables service of the notice on the pleader or the attorney.

12. As service must be in the manner provided for in the Code for service of summons we must look at relevant provisions which are contained in Order 5 of the Code. Order 5 provides for 3 modes of service of summons on a defendant viz. : (1) by delivering or tendering a copy and obtaining the requisite signature of acknowledgment of service under Order 5, Rule 16 read with R. 10; (2) by affixing a copy under Order 5, Rule 17; (3) by substituted service under order of Court under Order 5, Rule 20. Order 5, Rule 10 provides that service shall be made by delivering or tendering a copy of the summons and Rule 16 provides that the serving officer shall require the signature of the person to whom the copy is tendered or delivered. Order 5, Rule 17 as amended by the Calcutta High Court is as follows :

[28] AIR 1948 East Punjab 11 [30]45 CLJ 458 [32]6 Pat 29 (sic) (AIR 1927 Pat 135)
[29] AIR 1926 Bombay 312 [31]45 CLJ 458 [33] AIR 1947 Sind 145

> "Where the defendant or his agent or such other persons as aforesaid refuses to sign the acknowledgment or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of summons on his behalf nor any other person upon whom service can be made the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court from which it was issued with a report endorsed thereon or annexed thereto stating that he has so affixed the copy the circumstances under which he did so and the name and the address of the person if any by whom the house was identified and in whose presence the copy was affixed."

13. Rule 20 enables the Court to order service by affixation or in such manner as the Court thinks fit where it is satisfied that the defendant is avoiding service or that for any other reason the summons cannot be served in the ordinary way.

14. In this case the signature to an acknowledgment for service was not obtained from any party nor was there any order for substituted service and it is not contended that there was any service under Order 5, Rules 16 and 20. It is also conceded that Rule 17 was not strictly complied with inasmuch as copies of the notice was not affixed on the outer door. It is contended by Mr. Dev learned counsel on behalf of the respondent that (a) service is complete under R 10 when a copy was tendered (b) non-affixation of a copy is only an irregularity and gives no ground for the setting aside of a decree (c) the retention of the copy rendered affixation of the copy on the outer door impossible and the applicants cannot take advantage of their wrong.

15. In my judgment the provisions of Rule 17 are mandatory. Service of summons must be effected strictly in the manner prescribed by law if any party is to be charged with its receipt. *'Rajendra v. Jan Meah'[34], 'Kalinarain v. Shaikh Bajoo[35]', 'Re Kassim Ibrahim v. Johurmal[36]',*

16. The contention that in case of personal service the service is complete if a copy is delivered under Rule 10 is unsound. The contention is no doubt supported by *'Gopaldas v. Islu'[37],* but with respect I do not agree with that decision. The case of personal service is not fully and exhaustively dealt with by Rule 10 and there are other Rules with regard to such service. Rules 11 to 15 provide for persons on whom such service must be made. Rule 16 provides that in such a case the serving officer shall require the signature to an acknowledgment of service. Rule 17 enjoins the affixation of a copy if such signature is refused. Service is not complete simply because a copy is tendered or delivered. Signature of the defendant to the acknowledgment of service must be obtained and when he refuses the copy must be affixed on the outer door. I respectfully agree with the observations of Jenkins, J., in *'Rajendra v. Jan Meah[38]',* that the primary mode of service, by tendering a copy fails if the defendant refuses to sign the acknowledgment. R. 17 provides for another mode of service. Affixation of a copy is a necessary condition of the validity of this mode

[34]26 Cal 101 [36]43 Cal 447 [38]26 Cal 101
[35]3 CWN 307 [37] AIR 1917 Nag 49

of service.

17. On the face of Rule 17 the provision as to affixation is imperative and obligatory. The process-server shall affix a copy where the defendant refuses to sign and also where he is absent from his residence. This provision cannot be construed to be directory without strong and cogent reason. There is no doubt that the provision is obligatory in the case of service on the absent defendant. I see no reason to hold that the provision is in part obligatory and is in part directory and that it is not obligatory in the case of refusal to sign.

18. The affixation of the copy on the outer door is not an idle ceremony nor it is an immaterial part of the service. Its object is to give due publicity to the act of the process server and to impress the party that formal service is being effected. Rule 17 itself shows its importance. The report of the process-server must show the affixation, the circumstances under which it was made and the persons in whose presence it was done. The cardinal fact and important matter of Rule 17 is affixation of the copy. If Rule 17 provides for a mode of service, the affixation itself is the service or at least the most essential part of the service.

19. The case of non-affixation of a copy of refusal to sign is not a case of an irregular service. Irregular service presupposes a service. But here there is no service under Rules 16 and 20. As there is no affixation there is also no service under Rule 17. Even assuming that it is only a case of irregularity the irregularity is neither trifling nor immaterial nor has the irregularity been waived by the defendant. The defendant may well believe that he is entitled to ignore the service

and to treat it of no legal effect. The defendant not being duly served with the summons in a suit has the statutory right to have the ex parte decree set aside under Order 9, Rule 3.

20. In cases of refusal to sign the acknowledgment of service either the defendant may retain or he may not retain the copy which is tendered to him. If he does not retain a copy it has been held in *'Maruti v. Vithu*[39]*',* *'Mahadeo v. Basgit Singh'*[40]*,* *'Sudhansu v. Patna Municipality*[41]*',* and *'Farangu v. Hari Kishan*[42]*',* that there is no due service and I respectfully agree with these decisions. It is not even enough to leave a copy at the defendant's residence *'S.N. Grama v. Bombay Steamship*[43]*',* It is obligatory to affix a copy on the outer door of the house where the defendant ordinarily resides or carry on business or works for gain. There is no service even if a copy is affixed on the outer door of any other even where the defendant happens to be present there as was held in *'Braja v. Surendra*[44]*.* I am unable to hold that non-affixation of a copy in such circumstance is merely an irregularity. No doubt the latter contention is supported by the decisions in *'Nathu v. Salim*[45] and *'Teja Singh v. Jeswant Singh*[46] but I respectfully disagree with the these decisions.

21. On principle I see no distinction between a case where the defendant refuses to accept a copy and a case where the defendant retains a copy and there are no circumstances showing that it was impossible to affix a copy. In fact in some of the cases cited above

[39] 16 Bom 117 [41] AIR 1932 Pat 150 [43] 31 Bom LR 424
[40] AIR 1925 Pat 441 [42] AIR 1929 Lah 334 [44] AIR 1918 Cal 179
[45] 1933 All LJ 165 [46] AIR 1935 Lah 171

namely 16 Bom 117 AIR 1918 Calcutta 179 and AIR 1929 Lahore 334, it is not clear from the facts whether a copy was retained or returned.

22. Let me next deal with the case where the defendant retains the copy without signing the acknowledgment of service and the copy of the summons is not affixed on the outer door under circumstances showing that it is not possible to do so. In *'Diwanchand v. Parbati*[47]*',* it was held that in such circumstances there was no service and I agree with that decision and with respect I do not agree with the decision to the contrary in *'Nageshwar v. Bisseswar*[48]*'* and *'Ved and Co. v. Hayem*[49]*'* Exconcessis there is no affixation and Rule 17 is not complied. If there can be no service by affixation the plaintiff is not without any remedy. Order 5 Rule 20 of the Code provides for such a case and the plaintiff may obtain an order for substituted service. It may Be impossible to comply with Rule 17 because of other wrongful acts of the defendant. He may be present at his residence but may be evading service. He may forcibly prevent affixation of copy on the other door. In all such cases the defendant must be served under Rule 20 by obtaining an order for substituted service. It is contended that the retention of the copy and the refusal to sign are wrongful and criminal acts and are offences punishable under the Indian Penal Code. Under Section 173 of the Indian Penal Code the intentional prevention of service of the notice or of lawful affixing of the copy to any place is an offence. A refusal to sign the acknowledgment however is not a wrongful act and is not an offence under Section 173 of the Indian Penal Code

'In Re. Bhoobaneswar Dutt[50]*,* and *Queen-Empress v. Krishna Govinda*[51]*'.* Retention of the copy also is not a wrongful act. The copy is given to the defendant in order that he may keep it. From the mere fact of retention of a copy there is no necessary inference that the defendant intentionally prevented the affixation of the copy and that he is guilty of an offence under Section 173 of the Indian Penal Code. Assuming that the retention of the copy and the refusal to sign are offences such offences cannot constitute service of the summons where there is none. If there is an offence it is that of preventing service. The service is prevented and not effected.

23. Besides in this case I cannot hold on the evidence that it was impossible to affix a copy. There is no allegation to that effect in the report or in any affidavit. It is not even alleged that the defendant was asked to return the copies for the purpose of affixation or that they refused to do so. Though ordinarily the process-server has only one copy it is not alleged that in fact he had only one copy. From the fact of retention of the copy tendered I cannot necessarily infer that it was impossible to affix a copy on the outer door.

24. The decree in this case was passed without serving the notice under Section 14 of the Arbitration Act duly or in accordance with the Code and our Rules. In my judgment the decree in this case was also passed without complying with the mandatory provisions of Section 17 of the Arbitration Act. Under that section no decree can be passed unless the time for applying to set aside the award has expired. Under Article 158 of the Limitation Act such time is 30 days from the service of the notice of the filing of the award. In my judgment service means at least lawful service, at least service in the manner prescribed

[47] AIR 1918 Lah 59 [49] AIR 1943 Bom 340 [51]20 Cal 358
[48]3 Pat 236 [50]3 Cal 621

by law. It is not necessary to decide whether having regard to the principles laid down by Reilly, J., in *'Gyanammal v. Abdul*[52]*,* such service must not only be lawful service but also service which is really effective by bringing the claim to the knowledge of the defendant. In the absence of lawful service mere knowledge of the institution of the proceedings is not sufficient Re. *'Kassim Ibrahim v. Johurmal'*[53]*,* As there is no service in the manner prescribed by law there is no service as contemplated by Article 158 of the Limitation Act. The limitation for applying to set aside the award therefore never started to run and the decree was, passed before the expiry of the time for applying to set aside the award and without complying with the mandatory provision of Section 17 of the Arbitration Act.

25. If a defendant in a suit is not duly served and an ex parte decree is passed against him the Court must set aside such decree on his application under Order 9, Rule 13 of the Code. I have no doubt that the decree in this case should be set aside as a matter of course if Order 9, Rule 13 apply to this case. In my judgment in spite of Section 43 of the Arbitration Act and Section 141 of the Code strictly the provision of Order 9 Rule 13 does not apply to proceeding for setting aside an ex parte decree passed under Section 17. In a suit there is plaintiff and defendant and Order 9 deals with them differently. Strictly neither party to an award is a plaintiff or defendant

and both parties are entitled to ask the Court to pronounce judgment according to the award. In a suit if the plaintiff does not appear no decree can be passed and if the defendant does not appear the plaintiff must prove his case. Under Section 17 a judgment must be pronounced and a decree must follow, if the conditions of Sections 14 and 17 are complied with. Such a decree even if pronounced in the absence of the parties cannot be said to be passed ex parte so as to attract Order 9, Rule 13 *'Raghunath Rai Dilsuk Rai v. Bridhichand Srilal[54]'* Order 9, Rule 13 enables the Court to set aside an ex parte decree in case where the summons was not duly served but it does not provide for a case where the decree under Section 17 of the Arbitration Act is passed without complying with its mandatory provisions and before the expiry of the time for applying to set aside the award. The provision of Order 9, Rule 13 of the Code cannot be made applicable to the proceedings for setting aside a judgment pronounced under Section 17 of the Arbitration Act. In spite of Section 43 of the Arbitration Act such provisions of the Code as are not consistent with the provision of the Indian Arbitration Act will not apply to the proceedings under the latter Act. *'Subramaniam v. Vasudevan[55]', 'Prafulla v. Panchanan[56]',* at p 293, *'Matandas v. Wadhwani[57]',*

26. I have o doubt however that the principles of Order 9, Rule 13 should be followed and the judgment and the decree passed under Section 17 should be set aside where such decree was passed without duly giving the notice of the filing of the award or without allowing the time for applying to set aside the award to expire. In both cases the decree is irregularly passed and this Court sitting in revision will set aside such decree if passed by the muffassil Court. In my judgment if these are good grounds for revision they are equally good grounds for setting aside the ex parte decree on a summary application. It is settled law that the Court has the inherent power and duty to correct injustice and to set aside a judgment and order passed ex parte without notice to the party. *'Bibi Tasliman v. Harihar[58]', 'Sudevi Devi v. Sovaram[59]', 'Hiralal v. Premamoyee[60]',* at p. 309; In *'Hamp Adam v. Hall[61]',*

[52]61 Mad L Jour 920 [54]3 Pat 839. [56]50 Cal WN 287
[53]43 Cal 447 [55]1950-1 Mad LJ 237, [57] AIR 1948 Sind 74 [59]10 Cal WN 306
[58]32 Cal 253 [60]2 Cal L Jour 306 [61](1911) 2 KB 942

Buckley, L.J., observed that where proceedings are taken by default every step in the proceeding must comply with the rules and that is a matter stricticirum juris. To obtain a judgment irregularly is a wrongful act and the party applying is entitled ex debito justitiae to set it aside *'Anlaby v. Paaetorious[62]', 'Muir v. Jenks[63]',*

27. The Court has also inherent power to recall the previous order or decree if it is without jurisdiction. *'Rashmoni v. Gnada Sundari dasi'[64],* In my judgment a decree passed under Section 17 before the expiry of the time for applying to set aside the award is without jurisdiction. That such decree was without jurisdiction and the Court has power to set aside such judgment and decree was not disputed in *'Johurimull v. Kashiprosad'[65],*

28. The language of Article 164 of the Limitation Act appears to be singularly inappropriate to

an application for setting aside an ex parte judgment and decree passed under Section 17 of the Arbitration Act. A party to the award can hardly be said to be a defendant. It is further conceded in this case that even if Article 164 of the Limitation Act applies, this application is not barred by limitation. It is not, therefore, necessary to decide whether any and if so what article of the limitation Act would apply to this application.

29. Service of the notice may be waived and it was so held in *'Bhola v. Batakrishna[66]'* It is debatable whether in such a case limitation under Article 158 runs and if so from what date. There is a difference of opinion if the parties may waive their right to insist that judgment ought not to be passed before the expiry of the time for applying to set aside the award. In *'Pandurang v. Amrit Rao[67]',* it was held that there can be such waiver. In *'Srikishan v. Relumull[68]',* and in *'Kampta v. Umam[69]',* it was, however held that there cannot be any waiver. It is not necessary to decide this point here because there is no allegation of any waiver of the services of the notice by the applicant firm.

30. In this connection I should refer to the practice prevailing in this Court with regard to the issue of notice under Section 14. That practice is said to be as follows by Das, J., in *'Munsilal and Sons v. Modi Bros[70].'* at p. 596 :

> "The Act and the Rules suggest that the Registrar is to issue the notice under Section 14, sub-section (2) suo moto but on enquiry from the Registrar I gather that in practice the party seeking judgment or his attorney has to come to the Court's office and take out the notice signed by the Registrar or Deputy Registrar for service and unless the Registrar is so moved by the party or his attorney the notice is not actually issued. The name of the party or his attorney who moves the Registrar and gets notice out is shown at the foot of the notice. The reason for this practice is that while in the case of an individual or a corporation it might be possible for the Registrar to issue the notice in the name of the individual or the corporation concerned, in the case of a firm, for example, it is not possible for the Registrar to issue the notice in the name of partners unless somebody tells him the names. Be that as it may, in practice the party or his attorney comes on the scene so far as the Court is concerned when the Registrar is moved to issue the notice. This taking out of notice appears to me to be the initiation of the proceeding towards obtaining judgment on the award and is like issuing a writ in the English

[62](1888) 20 QBD 764 [64]20 Cal L Jour 213 [66]6 Pat 29 (sic.) (AIR 1927 Pat135)
[63]1913) 2 KB 412 [65] ILR (1942) 2 Cal 160 [67] AIR 1931 Nag 112
[68] AIR 1916 Sind 79 [69] AIR 1924 Oudh 344 [70]51 Cal WN 563

> practice."

31. On the filing of the award the Court office starts a separate award case with a distinctive number and title. The party who wants to move the Court for judgment usually appoints an attorney and gives his Warrant of Attorney which is filed in Court. Upon the request of such

attorney the Registrar issues the notice under Section 14 of the Arbitration Act. The number and title of the award case and the names of the parties appear at the top of the notice. The name of such attorney appears at the foot with a direction that the other parties are to be served 30 days before the returnable date. The original of the notice signed by or on behalf of the Registrar is then delivered to such attorney. Copies of the notice are then served on the other parties by a clerk of such attorney and the original is returned to the Court together with a return of the affidavit of the process served. It appears to be fairly clear that in view of Order 3 Rule 5 and Rule 25 of Chap. 8 of our Rules read with the Arbitration Rules delivery of the notice to the attorney for the party who moves the Registrar is due service of the notice to such party. The attorney is expressly retained in the matter of the judgment and award. Besides, by entering appearance such party waives service of the notice.

32. The judgment and decree passed in this matter is therefore set aside. It is conceded that there is no communication by registered post. I, therefore, order that the notice of the filing of the award may be served upon the applicant firm as also upon Ganeshmal, Bhairudan and Hastimal, as partners of the applicant firm by registered post. The costs of this application as also all the costs thrown away at the time of the previous judgment and award will abide the judgment and award and the matter will come up in the list for judgment on award seven weeks hence.

33. Let the Registrar act on counsel's endorsement and issue notices. Let fresh notices be issued.

Application allowed.