MYSORE HIGH COURT

Ratnawa

Vs

Gurushiddappa Gurushantappa Magavi

Regular Appeal No. 70 of 1957, in Spl. Suit No.29 of 1954

(N. Sreenivasa Rau, Offg. C.J. and K.S. Hegde, J.)

04.12.1961

JUDGMENT

Hegde, J.

1. This appeal arises out of a proceeding under Section 14 (2) of the Indian Arbitration Act to be referred to as the "'Act" hereinafter. The parties to this appeal are relations. The appellant as the plaintiff instituted Special Civil Suit No.29 of 1954 in the Court of the learned Civil Judge, Senior Division, Dharwar, praying that the award made and signed by defendants 1 and 2 on 7-1-1950 or a signed copy of the same be caused to be filed in Court and judgment according to that award be pronounced. Some of the parties to the award raised various objections to the reliefs prayed for by the plaintiff. On the pleadings, the Court below raised three preliminary issues. They are:-

"1. Is this suit in time?

2. Is the award before the Court void as contended?
and

3. Is the suit barred under Section 32 of the "Act"?" It answered the first and the third issues in favor of the plaintiff. But, under issue No.2, it held that the award is vitiated as the Arbitrators have contravened clause (2) of the First Schedule of the "Act". In the result, it dismissed the suit. The aggrieved plaintiff has come up in appeal to this Court. He challenges the correctness of the conclusion reached by the Court below. The contesting defendants are not only supporting the decision of the Court below on Issue No.2, they go further and contend that the suit under appeal is barred under Article 178 of the Limitation Act. Therefore, the two questions that arise for decision by this Court, are : (1) Has the failure of the Arbitrators to appoint an umpire vitiated the award made by them? and (2) Is the suit barred by Article 178 of the Limitation Act?

2. The material facts are undisputed. The parties to the arbitration referred their disputes to defendants 1 and 2 as per Ex.3/1 dated 26-10-1949. Immediately thereafter, the Arbitrators entered upon their duties. The award in question was made and signed on 7-1-1950. The two

Arbitrators mentioned above were unanimous in their decision. No umpire had been appointed by them. In the terms of reference, no provision for the appointment of an umpire was made. But, as per Section 3 of the "Act", 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. For our present purpose, only clause (2) of the First Schedule is relevant. That clause reads:-

> "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".

The award was made and signed long before the time fixed for the appointment of an umpire under clause (2) of the First Schedule. The Court below has opined that the appointment of an umpire within the stipulated time is a mandatory requirement of the law and any failure to comply with that requirement vitiates the award made. Is this view correct?

3. The language employed in clause (2) of the First Schedule appears at first sight as imperative. That clause lays down that "the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments". But as observed in *Hari Vishnu Kamath v. Ahmad Ishaque*[1],:-

> "It is well-established that an enactment in form mandatory might in substance be directory, and that the use of the word "shall" does not conclude the matter. The question was examined at length in *Julius v. Bishop of Oxford*[2] and various rules were laid down for determining when a statute might be construed as mandatory and when as directory. They are well-known, and there is no need to repeat them. But they are all of them only aids for ascertaining the true intention of the legislature which is the determining factor and that must ultimately depend on the context. What we have to see is whether in Rule 47, the word "shall" could be construed as meaning "may"".

Before proceeding further, it may be noticed that the "Act" nowhere stipulates, either specifically or by necessary implication, that if the Arbitrators fail to appoint an umpire, the award made by them, for that very reason would become void.

4. In construing whether a particular rule is mandatory or directory, we have to look to the language employed therein, the purpose behind the rule, the scheme of the "Act" etc. Clause (2) of the First Schedule comes into play only in the absence of any provision in the terms of reference as regards the appointment of an umpire. In other words, it is open to the parties to the reference to refuse to have an umpire. It is equally open to them to devise other measures for appointing an umpire in case of need. From this it follows that the provisions contained in clause (2) were included only as a measure of convenience and not as the crux of the matter. The reason for having that clause is obvious. There is always the possibility of evenly balanced

[1] AIR 1955 SC 233 at p.245
[2](1880) 5 AC 214

disagreement amongst the arbitrators. Therefore, it is necessary to create a machinery
to resolve that disagreement unless the parties insist on some other course. The time limit was

evidently fixed in the present Act for two reasons. Firstly, it must have been thought desirable that the Arbitrators should appoint an umpire even before there was any disagreement between them; once they begin to disagree on any point, human reactions being what they are, the atmosphere is likely to be surcharged with suspicion, prejudice and the like; it may be difficult for them to make an impartial selection thereafter. Secondly, provision is made in the Act for the parties to approach the Court, for the appointment of an umpire if the Arbitrators fail to do so. Unless a time limit is fixed for the Arbitrators to make their selection, it is difficult for the parties to approach the Court.

5. An umpire does not come into the picture unless and until there is evenly balanced disagreement between the Arbitrators. Even if an umpire is selected as required by clause (2) of the First Schedule, he would have to remain in the background till occasion arises for him to step out. In cases where the Arbitrators are unanimous in their decision, or even in cases where they are able to arrive at a majority decision, the appointed umpire would function as the fifth wheel to the coach. If we bear in mind all these aspects, is clear that the requirements laid down in clause (2) of the First Schedule cannot be considered as mandatory.

6. This view of ours is further strengthened by an examination of the scheme of the "Act". The failure of the Arbitrators to appoint an umpire does not finally close that chapter. As seen earlier, under Section 8(c) of the "Act", the Court can at any stage step in and appoint an umpire. If the failure of Arbitrators to appoint an umpire is deemed as per se vitiating the arbitration proceedings, Section 8(c) becomes meaningless. In our opinion, clause (2) of the First Schedule is just one step in the proceedings and by no means the final step. It may possibly put limits on the powers of the Arbitrators in the matter of appointing an umpire, - though we do not propose to express any firm opinion on that point; but, we are satisfied that any contravention of that clause does not in any manner enter into the validity of an award made. In other words, it is only a directory provision and not a mandatory one.

7. The preponderance of judicial opinion is in favor of the view taken by us. In *United Printing and Binding Works Ltd. v. Kishori Lal*[3], P.B. Mukharji J. held that the word "shall" in clause (2) does not make the provision mandatory in the sense that its breach will vitiate the entire arbitration proceeding and make the award illegal. A similar view was taken in *Shambhu Nath v. Harishankar Lal*[4], *Sheoramprasad Ram Narayanlal v. Gopal prasad Parmeshwardayal Shukla*[5], and *Chacko v. Chacko*[6],

8. The learned counsel for the respondents invited our attention to the decision in *Jawala Prasad v. Amar Nath*[7], and *Vinayak Vishnu Sahasrabudhe v. B.G. Gadre*[8], in support of the contrary view. The effect of the decision in Jawala Prasad's case, AIR 1951 Allahabad 474 is considerably weakened by the decision of another Bench of the Allahabad High Court in Shambhu Nath's case, AIR 1954 Allahabad 673. Sapru, J. who delivered the

[3] AIR 1956 Cal 593 [5] AIR 1959 Mad Pra 102 [7] AIR 1951 All 474
[4] AIR 1954 All 673 [6] AIR 1959 Ker 149 [8] AIR 1959 Bom 39

judgment in Jawala Prasad's case AIR 1951 Allahabad 474 was a party to the latter decision. The latter Bench distinguished Jawala Prasad's case, AIR 1951 Allahabad 474 with these words:-

"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. AIR 1951 Allahabad 474 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".

In view of the above decision, the decision in Jawala Prasad's case, AIR 1951 Allahabad 474 has to be confined to the facts of that particular case. With great respect to the learned Judges who decided Vinayak Vishnu Sahasrabudhe's case,AIR 1959 Bombay 39 we are unable to subscribe to the view taken in that decision for the reasons already mentioned. From what we have stated earlier, it follows that, in our opinion, the Court below was not right in holding that the failure on the part of the
Arbitrators to appoint an umpire has vitiated the arbitration proceedings.

9. For considering the question of limitation, it is necessary to set out the following facts: The award was made and signed on 7-1-1950. At the time of the signing of the award, the parties to the award were present. It appears the award was read out to them and their signatures obtained. But no notice of the making and signing the award as such had been issued to them. The present petition under Section 14 (2) of the "Act" was filed only on 24-12-1951. The question for consideration is whether the petition was barred by limitation, the relevant Article of the Limitation Act being Article 178. That Article reads thus:-

> "Under the Arbitration Act, 1940, for the filing in Court of the award.

Ninety days.

The date of service of the notice of the making of the award." From the above it is seen that the starting point of limitation is the date of service of the notice of the making of the award. It has been urged on behalf of the respondents that the notice contemplated under Article 178 is the same as the knowledge of the party about the making of the award. In other words, it was urged that the limitation for filing an application under Section 14 (2) of the "Act" begins to run from the date the party comes to know about the making of the award. This contention cannot be accepted. Under Section 14 (1) when the arbitrators or the umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof. Section 42 of the "Act" prescribes the mode in which the notice has to be given. It says :

> "Any notice required to be served otherwise than through the Court by a party to an arbitration agreement or by an arbitrator or umpire shall be served in the manner provided in the arbitration agreement, or if there is no such provision either -
> (a) by delivering it to the person on whom it is to be served,

or

> (b) by sending it by post in a letter addressed to that person at his usual or last known place of abode or business in India and registered under Chapter VI of the Indian Post Office Act,1898". Admittedly, in the instant case, no written notice of making the award had been given to the parties to the reference. All that is said is that the parties were aware of the making of the award. For the purpose of computing the period of limitation under Article 178 of the Limitation Act that circumstance is a wholly irrelevant circumstance. See: *Puppala Ramulu v. Nagidi Appalaswami*[9], *Jagadish Mahton v. Sunder Mahton*[10]. *Misri Lal v. Bhagwati Prasad*[11], and *Ganga Ram v. Radha Kishan*[12],

10. The only decision brought to our notice which has taken the contrary view is the decision of a single Judge of the Punjab High Court in *Ganga Ram v. Radha Kishan*[13], That decision was dissented from by a Division Bench of the Punjab High Court in Ganga Ram's case, AIR 1955 Punjab 145.

11. In our opinion before time begins to run under Article 178 of the Limitation Act, the parties concerned must have been notified by means of a notice in writing as contemplated in Section 14 (1) read with Section 42 of the "Act".

12. A feeble attempt was made to show that in the absence of a notice as contemplated under Section 14 (1) of the "Act", the suit under appeal must be considered as premature. We do not think that there is any substance in that contention. See AIR 1949 Patna 393.

13. In the result, this appeal is allowed and the decree and judgment of the Court below are set aside and the case remanded to that Court for deciding the other points arising in the case.

14. The costs of this appeal will abide the result of the suit in the trial Court and shall be provided for therein.

Appeal allowed.

[9] AIR 1957 AP 11
[10] AIR 1949 Pat 393
[11] AIR 1955 All 573
[12] AIR 1955 Pun 145
[13] AIR 1952 Pun 350