

APPELLATE CIVIL

Before Falshaw & Kapur, JJ.

M/s KAPOOR AND SONS.—Appellants

versus

RAJ KUMAR KHANNA AND ANOTHER —Respondents.

First Appeal from Order No. 36 of 1953

1955
April, 27th

Arbitration Act (X of 1940)—Sections 14, 20, 31(4) and 42—Evidence Act (I of 1872) Section 114 illustration (f)—Arbitration proceedings—Service of notice—Mode of—Jurisdiction—Transferee Court—Whether can pass decree in terms of the award—Section 31(4)—effect of—Minor—Party to Arbitration agreement—Effect of.

Contract between K & Sons and Messrs R.K.-R.K. for sale of parachutes. Contract containing a clause that all disputes in respect of the Contract to be settled by arbitration. On breach of the Contract R.K. and R.K., on the 19th January, 1950 applied under section 20 of the Arbitration Act for filing the arbitration agreement. This application was allowed. On the 1st December, 1950 both parties appointed their arbitrators. The arbitrator appointed by K & Sons refused to act and on the 21st December, 1950 they applied for appointment of S.S. as their arbitrator. This application was allowed on the 25th December, 1950. S.S. refused to act as arbitrator as he was too ill. On the 29th September, 1951, registered notice from R.K.-R.K. to K. & Sons and to his Advocate A.R. that as S.S. had refused to act, K. & Sons should appoint their arbitrator failing which the arbitrator appointed by R.K.-R.K. will act as the sole ar-

bitrator. Notice was served on A. R. but the one issued to K. & Sons was returned with the endorsements :—

“27th September, 1951—To be kept in deposit.

28th September, 1951—The addressee without an address has gone out of Amritsar and the letter should be returned.”

On the 1st November, 1951 R.K.-R.K.'s arbitrator purporting to act as the sole arbitrator sent notice to K. & Sons and to A.R. to appear on the 10th November, 1951, at 3 p.m. A.R. received this notice on the 9th November, 1951, and the notice to K. & Sons could not be served. A.R. wrote to the arbitrator that he was no longer a counsel for K. & Sons and that they be informed directly. On the 30th December, 1951, the arbitrator published a notice in the newspaper calling upon the parties to appear on 6th January, 1952. K. & Sons did not appear and an *ex parte* award was made on the 9th January, 1952. Copy of the award was sent to K. & Sons and was served on the 22nd January, 1952 and was also received by A.R. on the 15th January, 1952. R.K.-R.K. applied under section 14 of the Arbitration Act that the award be made a rule of the court. On the 19th April, 1952, K & Sons made an application under section 9 of the Arbitration Act that S.N.A. could not act as the sole arbitrator, and that the reference was bad as R.K. was a minor. On the 25th April, 1952, K. & Sons filed objections to the award and pleaded—

- (1) that the arbitrator was guilty of misconduct because he served no notice on them ;
- (2) that the arbitrator had no jurisdiction because his appointment was bad in law ;
- (3) that the reference was void because of the minority of Raj Kumar ;
- (4) that the award had not been filed within time ; and
- (5) that no interest could be allowed.

The trial Court decided all the points except that of interest against K. & Sons and made the award a rule of the Court. K. & Sons came up in appeal to the High Court.

Held that, section 42 of the Indian Arbitration Act requires service of notice by a registered letter being sent to the usual residence or place of business of the person to be served and where this is done the provisions of law are complied with and there is no question of presumption under

section 114 illustration (f) Evidence Act. The notice to appoint an arbitrator in substitution of the arbitrator who had refused to act having been sent as contemplated in section 42 of the Indian Arbitration Act and was returned with the endorsement that the addressee had left without address, the notice was properly served.

Held also, that where an application was made in the Court of a subordinate judge which was later transferred by the District Judge to another subordinate judge in the same place, the transferee court had jurisdiction to pass a decree on the award filed in Court. Section 31(4) of the Arbitration Act must be confined to a question of territorial jurisdiction alone in that if an application under the Arbitration Act is made in a Court of competent jurisdiction at one place then all proceedings under the Act have to take place in the Court at that place and not in any other Court at any other place, and if such restricted meaning were to be put as has been contended for then it means that if a Court is abolished at a particular place, proceedings under the Arbitration Act cannot go to any other Court in the same place.

Held further, that an objection that a party to the arbitration agreement is a minor and therefore the arbitration agreement is void should be raised when an application under section 20, Arbitration Act, for filing the Arbitration agreement is made and cannot be raised subsequently when the application under section 14 Arbitration Act, for filing the award is made.

Jagannath Brakhhau v. J. E. Sassoon and others (1), *Gobinda Chandra Saha v. Dwarka Nath Patita* (2), *Vaman Vithal Kulkarni v. Khanderao Ram Rao Sholapurkar* (3), *Butto Kristo Roy v. Gobindaram Marwari* (4), *Kumbha Mawji v. Union of India* (5), *Moolchand Jothajee v. Rashid Jamshed Sons and Co.*, (6), *Shukrulla v. Rahmat Bibi* (7), *Kodali Ramakoteswara Rao v. Kodali Suryanarayana and another* (8), and *Toyo Menka Kaisha, Ltd. v. Sohansing Harnamsing* (9), referred to.

-
- (1) I.L.R. 18 Bom. 606
 - (2) 26 I.C. 962
 - (3) 156 I.C. 1020
 - (4) A.I.R. 1939 Pat. 540
 - (5) 1953 S.C.R. 878
 - (6) A.I.R. 1946 Mad. 346
 - (7) A.I.R. 1947 All. 304
 - (8) A.I.R. 1940 Mad. 905
 - (9) A.I.R. 1944 Sind 51

Application under section 14 of the Arbitration Act, 10 of 1940, for the filing of the award.

D. K. MAHAJAN and K. L. KAPUR, for Appellants.

I. D. DUA and P. L. BAHL, for Respondents.

JUDGMENT

KAPUR, J. This is an original opposite party's appeal against an order of a learned Subordinate Judge of Amritsar, dated the 14th June, 1953, dismissing the objections of the original opposite party against an award and passing a judgment and decree in accordance with the award. The matter was placed before me on the 5th of July, 1954, sitting singly and I referred it to a Division Bench.

Kapur, J.

The dispute relates to an arbitration award. The present appellants, Kapur and Sons, are the original opposite-party. They entered into an agreement with Messrs. Raj Kumar-Rajinder Kumar agreeing to sell parachutes at \$ 9.0 F.O.B. New York, per parachute and 5 per cent commission. On the 6th January, 1947, Rs. 3,000 were paid as advance to Kapur and Sons and 100 parachutes were delivered by them. As the contract was not fulfilled, Raj Kumar-Rajinder Kumar under the terms of the sale contained in Exhibit R. 1, invoked the arbitration clause on the 25th June, 1947. On the 19th January, 1950, they made an application under section 20 of the Arbitration Act for filing the arbitration agreement which was allowed *ex parte* on the 20th July, 1950, but the *ex parte* proceedings were set aside, and on the 31st October, 1950, this application was again allowed and on appeal was upheld by the High Court.

On the 1st December, 1950, the original applicants Raj Kumar-Rajinder Kumar appointed Shiv Narain Arora as their arbitrator under the arbitration clause and on the same day the original

Ms Kapoor
and Sons
v.
Raj Kumar
Khanna and
another
Kapur, J.

opposite-party, the present appellants appointed the Manager of the Lloyds Bank as their arbitrator. On the 14th December, 1950, he expressed his refusal to act and on the 21st December, 1950, Kapur and Sons applied to the Court for the appointment of Sardar Bahadur Sampuran Singh. On the 25th December, 1950, this application was allowed on payment of Rs. 10 as costs. Why these costs, has not been explained.

On the 21st January, 1951, the Court gave notice to the arbitrators to enter on arbitration and make the award. On a notice being sent to Sardar Bahadur Sampuran Singh, he indicated that he was ill and could not act as arbitrator. On the 21st March, 1951, another notice was sent to the arbitrators to enter on arbitration. A notice was also sent to Mr. Abnashi Ram, Advocate who had been engaged in section 20 proceedings indicating to him the change of some date of proceedings and he was called upon to appear. Although he could not be served in the beginning, he was personally served on the 27th March, 1951. On the 28th March, 1951, the endorsement on the notice sent to Sardar Bahadur Sampuran Singh, was that he was too ill and could not act as arbitrator. On the 25th April, 1951, Mr. Balak Ram Khanna, Advocate, on behalf of the original applicants Raj Kumar-Rajinder Kumar sent a notice to both the arbitrators to proceed with the arbitration and to make the award.

On the 29th September, 1951, Mr. Balak Ram Khanna, Advocate, acting on behalf of Raj Kumar-Rajinder Kumar sent a registered notice to Kapur and Sons, Cooper Road, Amritsar, and to Mr. Abnashi Ram, Advocate, stating that Sardar Bahadur Sampuran Singh appointed on behalf of Kapur and Sons had refused to act, that Kapur and Sons had not appointed an arbitrator in his place

and it called upon Kapur and Sons "to appoint your arbitrator by way of substitution within fifteen days of the service of this notice, failing which Mr. Shiv Narain Arora (the arbitrator already appointed by my client—i.e., the plaintiff) shall act as a sole arbitrator in the above matter and this award shall be binding on both the parties. This notice is being given to the defendant as well as his counsel." This notice was served on Abnashi Ram, Advocate, but the notice issued to Kapur and Sons although it was addressed to their address "Cooper Road, Amritsar" was not delivered and was returned to the sender, but the endorsements on this registered letter are important and are as under:—

"26-9-51—Shambu Nath and Sons, K. College.

27-9-51—(in Urdu) To be kept in deposit.

28-9-51—(in Urdu) The addressee without an address has gone out of Amritsar and the letter should be returned."

In English on the last mentioned date there is an endorsement—

"The proprietor out of station without address."

On the same day the endorsement of the Post Office is—

"Left without address. Returned to the sender."

Then it was returned to the sender.

On 1st November, 1951, Shiv Narain Arora purporting to act as the sole arbitrator sent a notice to Kapur and Sons as well as to Raj Kumar-Rajinder Kumar to appear before him on the 10th November, 1951, at 3 p.m. for arbitration proceedings and called upon them to produce their witnesses and documents, and the notice ended—

"Take notice that in default of your appearance at the appointed time and place

Ms Kapoor
and Sons
v.
Raj Kumar
Khanna and
another
—
Kapur, J.

M/s Kapoor
and Sons

v.

Raj Kumar
Khanna and
another

Kapur, J.

the matter in dispute will be heard and determined in your absence *ex parte*."

Abnashi Ram, received this notice on the 9th November, 1951. Why on that day, is not quite clear. But Kapur and Sons although the letter was addressed to their old address "Cooper Road, Amritsar", could not be served. On the 9th November, Abnashi Ram wrote a letter to the arbitrator stating that he was no longer "counsel for Messrs. Kapur and Sons of Cooper Road, Amritsar", and he asked the arbitrator to inform "the party direct". The notice to Kapur and Sons was returned with the endorsement that the firm had closed its business since some time. By way of precaution on the 30th December, 1951, the arbitrator issued an advertisement in the 'Vir Bharat' calling upon the parties to appear on the 6th January, 1952. As Kapur and Sons did not appear an *ex parte* award for Rs. 12,160 with interest was made against Kapur and Sons on the 9th January, 1952, and a copy of the award was sent to Kapur and Sons which was served on them at their Cooper Road address on the 22nd January, 1952, and a copy was also received by Abnashi Ram, Advocate on the 15th January, 1952.

Raj Kumar-Rajinder Kumar made an application under section 14 for filing of the award on the 20th February, 1952. The award was put into Court on the 4th April, 1952, and notice was issued on the 10th April, 1952, to the parties to file objections by 25th April, 1952.

On the 19th April, 1952, an application was made under section 9 by Kapur and Sons that Shiv Narain Arora could not act as the sole arbitrator and the reference was bad as Raj Kumar

was a minor. On the 25th April, they filed objections to the award and pleaded—

M's Kapoor
and Sons

v.

Raj Kumar
Khanna and
another

Kapur, J.

- (1) that the arbitrator was guilty of misconduct because he served no notice on them;
- (2) that the arbitrator had no jurisdiction because his appointment was bad in law;
- (3) that the reference was void because of the minority of Raj Kumar;
- (4) that the award had not been filed within time; and
- (5) that no interest could be allowed.

On all these points except as to the question of interest the findings of the learned Judge were against the opposite-party, Kapur and Sons. A judgment was passed on the award and a decree followed and the opposite-party has come up in appeal to this Court.

The first question raised is that a notice to Abnashi Ram, Advocate, was not a proper notice to the party because by the terms of his power-of-attorney his engagement was limited to proceedings under section 20 of the Act. The notice to the Advocate in the present proceedings is not such an important matter, but it is clear that this gentleman appeared for Kapur and Sons when an application was made under section 8 for the appointment of Sardar Bahadur Sampuran Singh and, therefore, it cannot be said that his engagement was confined to the proceedings under section 14, it not having been shown that there was no other power-of-attorney under which he acted for Kapur and Sons. But assuming though not deciding that Abnashi Ram, Advocate, had not any instructions

M.s Kapoor
and Sons
v.
Raj Kumar
Khanna and
another
Kapur, J.

beyond what strictly came under section 20 of the Arbitration Act, in this particular case there is sufficient proof of service on Kapur and Sons themselves.

Under section 42 of the Indian Arbitration Act two modes of service of notice otherwise than through Court are provided for. This section runs as under:—

“42. Any notice required by this Act 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 maner provided in the arbitration agreement, or if there is no such provision, either—

(a) by delivering 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.”

In this particular case the arbitration agreement does not lay down any particular mode of serving a notice. The terms of the agreement are contained in clause 2 of the contract between the parties and the relevant part is—

“* * * and other disputes including claims for non-payment, non-delivery or damages, shall be referred to the arbitration of two similar Merchants at Amritsar, always one to be appointed by each party. It shall be obligatory on the party raising a dispute to nominate their arbitrator first, and should the

other party fail to appoint their arbitrator within fifteen days after being requested in writing to do so, the arbitrator appointed in the first instance shall have power to determine and decide the disputes as sole arbitrator. In case of two arbitrators acting, should they disagree they will have the power to appoint an Umpire. The decision of arbitrators, sole arbitrator or of the Umpire shall be binding on both parties. In all other respects the Indian Arbitration Act, X of 1940, and its amendments, if any, shall apply. The losing party to bear all costs. The submission clause shall remain in force notwithstanding any determination."

Ms Kapoor
and Sons
v.
Raj Kumar
Khanna and
another

Kapur, J.

Thus the party was to be served in the manner provided by section 42. The notice was not delivered to Kapur and Sons or to its proprietor D. C. Kapur. The first notice which was sent on behalf of Raj Kumar-Rajinder Kumar through Mr. Balak Ram, Advocate, was sent to the address of Kapur and Sons at Cooper Road, Amritsar. It is surprising that at the relevant time all kinds of endorsements were written on this letter showing that the address of this firm was unknown, that he had gone out of station without leaving any address and then Shambu Nath and Sons, K. College, which in my opinion was nothing more than an attempt to refuse accepting notice, a copy of which had been served on Abnashi Ram, Advocate, who was also the legal adviser of Shambu Nath and Sons, where it is alleged that D. C. Kapur was working at that time as the Manager. Abnashi Ram when examined in Court as D.W. 2, stated that he did not inform Kapur and Sons because he did not think it necessary. He also said that D. C. Kapur, the

M/s Kapoor
and Sons
v.
Raj Kumar
Khanna and
another
—
Kapur, J.

proprietor of the appellant firm, was out of station on the 25th September, but he came 2 or 3 weeks later and he was meeting him Abnashi Ram, he being employed in the same company where Abnashi Ram was working, i.e., Shambu Nath and Sons. In my opinion the circumstances show that Kapur and Sons did come to know the contents of the notice and that it is wholly false that D. C. Kapur was away from Amritsar at the time and in my opinion he deliberately refused to accept the notice which had been sent by Raj Kumar-Rajinder Kumar. But be that as it may, all that the section requires is that a notice has to be sent by post to his usual place of business and Cooper Road, Amritsar, was the last known place of abode and business as is clear from the applications which have been filed by Kapur and Sons from time to time and even in the memorandum of appeal filed in this Court the address is "Cooper Road, Amritsar". I hold, therefore, that the notice of the 25th September, 1951, was a good and proper notice to Kapur and Sons.

The next question that arises is whether the notice given by Shiv Narain Arora after he was appointed a sole arbitrator was a proper notice. For reasons which I have given already this notice was also a proper notice.

Appellants' counsel has relied on certain rulings which deal with endorsements on letters. The first is *Jagannath Brakhhbhai v. J. E. Sassoon and others* (1). Summons in this case was sent by post but the packet was returned and an *ex parte* decree was passed. In the circumstances of that case it was remarked that there was nothing to show that the packet was refused by the defendant himself. This case is really confined to the facts of that particular case. Reliance was then

(1) I.L.R. 18 Bom. 606

placed on *Gobinda Chandra Saha v. Dwarka Nath Patita* (1). In this case the endorsement on the cover was that it was tendered and refused and it was held that without the writer of the endorsement being called no presumption could be raised that it was as a matter of fact refused. At page 965 a large number of cases were referred to, but the case before us is distinguishable on facts. The letter went to the house where D. C. Kapur was residing. That was the usual place of residence as well as the business. It was not sent once but three or four times and ultimately it was returned on the ground that the addressee had left the place without address, although before and since he was residing there, and it is significant that every time a notice has to be served on Kapur and Sons they cannot be served at Cooper Road, but when they want to be served the notice is received at the same place, and throughout the course of proceedings dealing with the arbitration their address is 'Cooper Road.' In these circumstances it cannot be said that the matter is merely one of presumptions. Reference was then made to *Vaman Vithal Kulkarni v. Khanderao Ram Rao Sholapurkar* (2). Really what this case lays down is that it cannot be assumed that because an addressee declines to accept a particular sealed envelope he has guessed correctly its contents. It is interesting to see that even in this case the learned Chief Justice in his judgment observes that there are authorities of the Bombay High Court which have taken the view that a notice served in the manner that the notice was served in the present case is sufficient to bring the contents of the letter to the notice of the person to whom the letter is addressed. The next case relied upon is *Butto Kristo Roy v. Gobindaram Marwari* (3), where it was held that if

M's Kapoor
and Sons
v.
Raj Kumar
Khanna and
another
Kapur, J.

(1) 28 I.C. 962

(2) 156 I.C. 1020

(3) A.I.R. 1939 Pat 540

M/s Kapoor
and Sons
v.
Raj Kumar
Khanna and
another
Kapur, J.

a letter is returned no presumption arises under section 114, Illustration (f) of the Evidence Act that this letter was received by the addressee. The question before us is not whether it was received or not but whether it was a proper service. The Arbitration Act requires service by a registered letter being sent to the usual residence or place of business of the person to be served and that is what was done in the present case. In my opinion there is no question of presumption in the present case. The provisions of the law were complied with.

On behalf of the opposite-party certain witnesses have appeared. D.W. 2 Charan Das is Head Time-Keeper in the firm Shambu Nath and Sons. He has produced a copy of a register showing that D. C. Kapur was absent on leave on the 25th September 1951. But it is of interest to see that no attendance register is kept in this firm. I have already referred to the statement of Abnashi Ram Advocate D.W. 1, and I cannot believe that although he was an Advocate for Kapur and Sons he would not tell D.C. Kapur as to the receipt of the notice by him in regard to the appointment of Shiv Narain Arora as a sole arbitrator or as to the date of the hearing fixed by the arbitrator, particularly when he had been appearing in Court on 1st December 1950 and on the 21st of December 1950, i.e., after the proceedings under section 20 of the Arbitration Act. I hold, therefore, that notices sent both by Raj Kumar-Rajinder Kumar and by the sole arbitrator were proper notices.

The next question is as to whether Shiv Narain Arora could be appointed as the sole arbitrator. Under the provisions of clause (2) of the original agreement which forms the arbitration

agreement if a party did not appoint an arbitrator within 15 days of the notice sent to them by the other party in that behalf then the arbitrator appointed by the party raising the dispute shall become the sole arbitrator. Therefore the appointment of Shiv Narain Arora was made in accordance with the provisions of the agreement and it cannot be assailed.

M.s Kapoor
and Sons
v.
Raj Kumar
Khanna and
another

Kapur, J.

It was then submitted that the Court which passed the decree on the award had no jurisdiction because originally the application was made in the Court of Mr. K. S. Gambhir. It was then transferred by the District Judge to the Court of Mr. Hira Lal and ultimately Mr. Gambhir decided the case when he was appointed in place of Mr. Hira Lal Subordinate Judge. Reliance is placed on section 31 (4) of the Arbitration Act and it was contended that because a reference was made in the Court of Mr. K.S. Gambhir that Court alone had jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference had to be made to that Court. I do not think that according to the facts as they arise in the present case the original Court of Mr. Gambhir alone had jurisdiction to decide and not the subsequent Court to which he was transferred. In my opinion this must be confined to a question of territorial jurisdiction alone in that if an application under the Arbitration Act is made in a Court of competent jurisdiction at one place then all proceedings under the Act have to take place in the Court at that place and not in any other Court at any other place and if such a restricted meaning were to be put as has been contended for then it means that if a Court is abolished at a particular place, proceedings under the Arbitration Act cannot go to any other Court in the same place.

M/s Kapoor
and Sons
v.
Raj Kumar
Khanna and
another
Kapur, J.

Counsel for the appellants relied on *Kumbha Mawji v. Union of India* (1), but in that case the application had once been made in a Court at Gauhati and therefore subsequently the proceedings could not be taken in the original side of the High Court. That case has no application to the facts of the present case. Counsel then referred to *Moolchand Jothajee v. Rashid Jamshed Sons and Co.* (2), in which at page 347 there is a remark that by reason of section 31 of the Arbitration Act no Court other than that in which the award has been or may be filed has jurisdiction to decide any question relating to the validity, effect or existence of the award. This case is not of much assistance to decide the question now before us. Reliance was then placed on a Division Bench judgment of the Allahabad High Court in *Shukrulla v. Rahmat Bibi* (3), in which when the matter was pending in appeal in the High Court a reference was made to arbitration and the final decree was passed at a later stage of the proceedings by a Court at Gorakhpur. It was held that reference could not be made by an appellate Court and that in view of section 31(4) no Court other than the High Court could hear objections to the award. But this case does not support the submission of the appellants because (1) the observations in regard to section 31(4) were obiter, and (2), it was not a Court of co-ordinate jurisdiction in the same place but it were two different Courts in two different places. This objection of the appellants also is without force and I would repel it.

It was finally contended that the respondent is a minor and therefore the arbitration agreement was void. This question should have been raised when the application under section 20 was made

(1) 1953 S.C.R. 878
(2) A.I.R. 1946 Mad. 346
(3) A.I.R. 1947 All. 304

and it is not open to the appellants to raise this question now. But even if they could raise it, in my opinion, they cannot do so successfully. In *Kodali Ramakoteswara Rao v. Kodali Suryanarayana and another* (1), an arbitration in which the parties were a major and a minor was held not to be void. In *Toyo Menka Kaisha Ltd., v. Sohansing Harnamsing* (2), where the case was one of disability due to the war, it was held that this cannot be a ground available to the other party for attacking the legality of the reference. In any case, as I have said, this was a point which could have been raised, if at all, at the time when application under section 20 was made, and as it had not been raised it cannot be raised in this case.

I would, therefore, dismiss this appeal with costs.

FALSHAW, J.—I agree.

M/s Kapoor
and Sons
v.
Raj Kumar
Khanna and
another
Kapur, J.

Falshaw, J.