[IN THE COURT OF CRIMINAL APPEAL]

1961 *Present :* **Basnayake, C.J., Sansoni, J., and Tambiah, J.**

THE QUEEN *v.* A. K. PETER

Appeal No. 24 of 1961, with Application No. 23

S. C. 11—M. C. Gampaha, 50497/A

Trial before Supreme Court—Assigned Counsel—Requirement that he should be given time to prepare his case.

When Counsel is assigned to defend an accused person in a trial before the Supreme Court, he should be allowed sufficient time for the preparation of his case and for obtaining instructions from the accused.

APPEAL against a conviction in a trial before the Supreme Court.

M. M. Kumarakulasingham, with *M. H. Amit* (Assigned), for Accused-Appellant.

J. G. T. Weeraratne, Crown Counsel, for Attorney-General.

May 8, 1961. BASNAYAKE, C.J.—

The only ground urged by learned counsel for the appellant is that when the trial commenced on 20th January the accused's counsel who had been retained by him did not appear, and that at 11 a.m. on that day counsel was assigned to defend the accused and the case was taken up for trial at 12.30 p.m. It is submitted by learned counsel for the appellant that the time allowed for assigned counsel to prepare the case was not sufficient. He has drawn our attention to the fact that the defence was gravely prejudiced by the situation in which assigned counsel was placed. We agree that assigned counsel should be allowed sufficient time for the preparation of his case and for obtaining instructions from the accused. In the instant case sufficient time was not allowed. Learned counsel for the Crown agrees with the submission of learned counsel for the appellant.

We therefore quash the conviction and direct a fresh trial.

Sent back for fresh trial.

1962 *Present:* Basnayake, C.J., Sansoni, J., and H. N. G. Fernando, J.

R. CHELLIAH, Appellant, *and* N. NAVARETNAM, Respondent

S. C. 459A-B/58—D. C. Jaffna, 349/M

Civil Procedure Code—Reference to arbitration—Procedure—Requirement of application in writing—Sections 676, 677, 691(2), 692, Form 108 of Schedule.

Held (BASNAYAKE, C.J. dissenting), that a minute made by the Judge of an *oral* application of the parties or their lawyers that all matters in dispute between the parties be referred to an arbitrator, coupled with the signature of the minute by the parties to the action in token of their consent to the reference, is a valid application in terms of section 676 of the Civil Procedure Code, which requires an *application in writing*.

Madasamy v. Amina (1951) 45 C. L. W. 40, not followed.

APPEAL from a judgment of the District Court, Jaffna.

H. V. Perera, Q.C., with *S. Sharvananda* and *S. T. Croos*, for Defendant-Appellant in both Appeals.

C. Ranganathan, with *E. B. Vannitamby*, for Plaintiff-Respondent in both Appeals.

Cur. adv. vult.

March 16, 1962. BASNAYAKE, C.J.—

The question that arises for decision on this appeal is whether—

(*a*) an application under section 676 of the Civil Procedure Code should be made in writing by the parties themselves or by their specially authorised Proctors and should contain a statement to the effect that they desire that any matter or matters in difference between them should be referred to the determination of the arbitrator.

(*b*) it is open to a party to an action who has participated in an arbitration to object to the award on the ground that the order of reference has been made without the conditions precedent to such an order being satisfied.

Shortly the facts of the case are as follows :—Nagalingam Navaretnam the plaintiff sued R. Chelliah for the recovery of the sum of Rs. 10,670 and the return of certain implements, machinery, and other articles set out in Schedule A to the plaint. The defendant denied his liability and claimed in reconvention a sum of Rs. 5,629·86. The plaintiff in his replication asked that the defendant's claim in reconvention be

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dismissed. The trial of the action was postponed from time to time and eventually took place on 20th May 1957. On that day both parties were represented by counsel and the record reads as follows :—

" At this stage learned counsel on both sides move that the matter in dispute between the parties in this case be referred to the sole arbitration of Mr. S. Kulasingham, Managing Director, Jaffna Co-operative Stores Ltd., and that his award will be final and accepted by the parties.

Each party to deposit a sum of Rs. 73·50 as preliminary fees of the arbitrator.

Parties consent to the above terms and sign the record.

Reference and arbitration fees on 22. 5. 57."

The document which represents the application of the parties under section 676 is a shorthand note signed by them without more. It was assumed at the hearing of this appeal that the transcript of the shorthand notes is contained in the minute I have quoted above. Now section 676 is in the following terms :—

" (1) If all the parties to an action desire that any matter in difference between them in the action be referred to arbitration, they may at any time before judgment is pronounced apply, in person or by their respective proctors, specially authorised in writing in this behalf, to the court for an order of reference.

(2) Every such application shall be in writing, and shall state the particular matters sought to be referred, and the written authority of the proctor to make it shall refer to it, and shall be filed in court at the time when the application is made, and shall be distinct from any power to compromise or to refer to arbitration which may appear in the proxy constituting the proctor's general authority to represent his client in the action.

(3) The arbitrator shall be nominated by the parties in such manner as may be agreed upon between them.

(4) If the parties cannot agree with respect to such nomination, or if the person whom they nominate refuses to accept the arbitration, and the parties desire that the nomination shall be made by the court, the court shall nominate the arbitrator. "

On the reading of the section it is clear to me that it contemplates a writing signed by both the parties or by their Proctors specially authorised in that behalf in which they ask that any particular matter of difference in the action specified therein be referred to the decision of an arbitrator.

But some of the decisions of this Court take the view that a document which the District Judge has composed for the parties on statements made by counsel constitutes sufficient compliance with the section whether the parties sign the record or not. In the case of *W. H. Bus*

Co. Ltd. v. S. M. Heen Banda[1] my brother H. N. G. Fernando examined the reported decisions of this Court and formed the view that a minute made by a Judge to the effect that all the parties to the action desired that all matters in difference be referred to an arbitrator was sufficient compliance with section 676. I find myself unable to agree with that view as it does not give effect to the plain words of the enactment. The decision of the Collective Court in D. C. Galle No. 42400[2] as I read it contains the true statement of the law and is binding on this bench. Dias J. stated—

> "This case differs from that of *Ramasami Kangani v. Agakutti Kangani* (2 S. C. C. 59) in the fact that here the formal minute of the reference to arbitration having been made with the consent of the parties is signed by the district judge, while there it was not so. But the bare record to this effect, however authenticated, is not sufficient. The Legislature, by clause 12 of Ordinance No. 15 of 1866, has made a particular procedure necessary in order to ensure that the reference to arbitration (one effect of which will be to deprive the parties of the right of appeal against the final judgment) should certainly be the act of the parties themselves; the application to the court for the order of reference must be in writing, signed either by the parties or by their proctors or agents immediately authorised by them by means of a written instrument which itself must be filed, to sign that particular written application. The award, therefore, is without any foundation, and must be set aside."

There the Court was dealing with a minute to the following effect signed by the District Judge :—

> ". . . . parties present with their proctors; referred to arbitration by consent of parties to Cornelis Goonewardene Mohandiram of Mahamodara; P. P. 1st August."

This Court held that the reference was wholly irregular, as it has not conformed with the provisions of the 12th clause of the Ordinance No. 15 of 1866. That decision was later approved by the Full Bench decision of *Bimbarahami v. Kiribanda Muhandiram*[3] in which Fleming A.C.J. after referring to the previous decisions stated—

> "But nothing can be clearer than the decision in D. C. Galle No. 42400, which was moreover a decision not by one or two Judges only, but by the fully constituted Collective Court. In that case it was distinctly held that the absence of an application in writing to refer the matters to arbitration as required by the Ordinance was not cured by a minute of the District Judge that an arbitration had been agreed to. Presuming that I was inclined to favour the later decisions given on the points in question in preference to that delivered in the case I have last mentioned, I should almost feel bound to follow such decision,

[1] *(1955) 57 N. L. R. 337.*
[2] *(1879) 2 S. C. C. 85.*
[3] *(1885) 7 S. C. C. 99.*

in as much as it is a decision of the Full Court, whereas the others are not. . . . . It may be that these somewhat stringent provisions were enacted to guard against the very danger alluded to by Chief Justice Cayley, but whether this was so or not it appears to me that an application such as is required by the Ordinance is the very foundation of the matter being referred to arbitration, and that no subsequent conduct of the parties can render an appointment valid which, as a matter of fact, was never validly made . . . . I am of opinion that in this case there was no valid appointment of an arbitrator, and that this is an objection which no subsequent conduct of the parties can waive or cure.

The order of the learned commissioner must therefore, I think, be set aside ; "

In *Casim Lebbe Marikar v. Samal Dias* [1] Bonser C.J. held that although the Full Bench decisions above referred to were decisions under the Arbitration Ordinance they were equally applicable to the corresponding provision of the later Civil Procedure Code. He said—

" It is true that these decisions were prior to the enactment of the Civil Procedure Code ; but the provisions of Ordinance No. 15 of 1866 have been substantially re-enacted in Chapter LI of the Code ; and it is admitted by Counsel that no distinction could be drawn between the two enactments. That being so, the provisions of Ordinance No. 15 of 1866 will apply to Chapter LI of the Code. "

The *ratio decidendi* of these two Full Bench decisions, as I understand it, is that enactments which provide for a reference to arbitration of matters in dispute in an action pending in a Court of law must be strictly construed and that any substitute for what is prescribed however close to the procedure laid down will not do. But in the case of *Menike v. Ukku Amma* [2] Wood Renton C.J. took the view that a minute made by the Judge and signed by the parties to the effect that all the parties agreed to refer all matters in difference between them to arbitration satisfied the requirements of section 676. He went on to state that the record made by the Commissioner of Requests of the agreement of the parties, and the authentication of that agreement, not merely by his signature but by the marks of the parties themselves, seemed to him to constitute good evidence that there was an application to the Court that would satisfy even the letter and the spirit of section 676 of the Civil Procedure Code. But he added—

" I would desire to call the attention of the Courts of first instance to the importance of seeing that there is on the face of the record affirmative evidence of the assent of both sides to a proposed reference to arbitration, which it is the main object of the provisions of section 676 of the Civil Procedure Code to secure. "

[1] *(1896) 2 N. L. R. 319.* [2] *(1915) 18 N. L. R. 413.*

That case fails to take into account the *ratio decidendi* of the previous decisions which are binding on us. The rule of interpretation is that words should be given their plain meaning where there is no ambiguity. As I have explained earlier and as indicated in the judgment of the Collective Court, an application in writing by the parties means an instrument which they tender as their document signed by them and requiring the Court to refer a particular matter of difference to an arbitrator. It would be strange indeed to permit the parties to make use of the minute sheet of the record for the purpose of making such applications as the law allows them to make and to make the Judge the person recording their application.

Now I come to the next point whether the matters in difference should be specifically stated in the order under section 677. Subsection (1) of that section reads—

> "The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the delivery of the award and specify such time in the order."

Having regard to the language of section 676, which requires the parties to state in the application the particular matters sought to be referred, and the words "refer to the arbitrator the matter in difference", I am of opinion that the particular matters in difference which the arbitrator is required to determine should be stated in the order. It was pointed out in the course of the argument that the present reference is in accordance with Form 108 to the Schedule to the Code. That form speaks of all matters in dispute. The forms in the Schedule cannot override the provisions of the main enactment. A reference in terms of the form may satisfy a case in which the Court has determined the matters in difference in the form of issues ; but not a case in which there has been no such determination.

Now I come to the third point whether it is open to a party who has participated in an arbitration held on an application and order of reference which do not satisfy the requirements of sections 676 and 677 of the Civil Procedure Code to object to the award on the ground that the requirements of the Code have not been observed and ask that it be set aside. The grounds on which an award may be set aside are in section 691 (2). That provision reads—

> "No award shall be set aside except on one of the following grounds, namely :
>
> (*a*) corruption or misconduct of the arbitrator or umpire ;
>
> (*b*) either party having been guilty of fraudulent conccalment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire ;
>
> (*c*) the award having been made after the issue of an order by the court superseding the arbitration and restoring the action".

The same provision goes on to declare that no award shall be valid unless made within the period allowed by the Court. In the context the word "award" can only mean an award made on a proper application and reference.

It would appear from the provision I have quoted that the power of the Court under section 691(2) to set aside an award in the sense indicated above is limited to the cases prescribed therein. Where an award is not made within the period allowed by the Court it is declared to be not valid and need not therefore be acted on. Now non-compliance with section 676 or 677 or both of them does not fall within the grounds specified. A Judge of first instance would have no power under section 691(2) to set aside an award on any ground not specified therein. The words of the section are—

"No award shall be set aside except on one of the following grounds, namely :

(*a*) corruption or misconduct of the arbitrator or umpire ;

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire ;

(*c*) the award having been made after the issue of an order by the court superseding the arbitration and restoring the action."

But in view of the decisions in 2 S.C.C 85, 7 S.C.C. 99 and 2 N.L.R. 319, in all which the awards were set aside on the ground that the applications for reference were bad and the cases were sent back for proceeding with the trial, I am not free to act according to the view I have formed as I am bound by the decisions above cited.

Learned counsel contended that where there is no compliance with section 676 or 677 or both a condition precedent to a valid reference is lacking and that an award made in a case in which these conditions precedent have not been observed is not valid. I am in agreement with the submission of learned counsel but my difficulty is that there is no provision of the Code under which an award can be set aside on the ground that application or order of reference or both are not in conformity with it. Nevertheless there are binding precedents of this Court which support the view that a judgment entered according to an award made on an order of reference or application which is not in accordance with the statute may be set aside in appeal as void or without foundation.

My own view is that a party who states that there are defects in the reference should in the absence of provision in the Code for setting aside an award on that ground seek remedies outside the Code ; but as I am bound by the Full Bench decisions I have cited, I have no other course open to me but to set aside the judgment and send the case back for proceedings in due course. I would allow costs both here and below.

SANSONI, J.—

When this case was taken up for trial, Counsel for the respective parties moved that the matter in dispute be referred to an arbitrator, whose award would be final and accepted by the parties. The District Judge recorded this application, the parties consented to these terms, and signed the record. At that stage they had only the shorthand notes of the proceedings before them, but I do not think that the signing of these notes is in any way less valid than the signing of the typescript of what those notes contained.

If there was no valid application for arbitration, there can be no valid reference or award. An appeal raising an objection to the validity of these proceedings would lie, and would not be covered by section 692 of the Code.

The main point on which this appeal turns is whether there was an application in writing made to the Court as required by section 676 (2) of the Code.

I shall briefly refer to some judgments which deal with the question. It was considered as far back as 1879 by the Collective Court, although the statute in force then was the Arbitration Ordinance No. 15 of 1866. That section required the application to be made by an instrument in writing. It was held that the consent of parties, evidenced by a minute of the application made and signed by the District Judge in the record was insufficient, and that the application must be signed by the parties or their proctors or agents [1]. This judgment was followed by another Court of three judges in *Gonsales v. Holsinger* [2]. There too, the District Judge had made a minute that the matter in dispute was referred to arbitration by consent of parties and he had signed the minute. " But ", proceeds the judgment, "it is not pretended that it was signed by the parties ". The judgment then refers to earlier decisions which held that " such a minute made by the court, and unsigned by the parties to the suit, was not a sufficient compliance with the requirements of section 12 of the Arbitration Ordinance ". In my view, the court impliedly held that if a minute, such as we have to deal with here, was made by the judge and signed by the parties, there would be a sufficient compliance with the terms of the section which required that the application should be in writing. And it was, in fact, so held in *Menike v. Ukkuamma* [3] and again in *Appuhamy v. Dingiri Mahatmaya* [4]. The practice has always been to get the signatures of the parties, as required by these decisions. The contrary has been held only in *Madasamy v. Amina* [5].

Mr. H. V. Perera submitted that since the section deals with the manner of divesting the court of jurisdiction already vested in it, and conferring that jurisdiction upon another person, it must be strictly

[1] *(1879) 2 S. C. C. 85.*
[2] *(1885) 7 S. C. C. 101.*
[3] *(1915) 18 N. L. R. 413.*
[4] *(1928) 30 N. L. R. 254.*
[5] *(1951) 45 C. L. W. 40.*

followed ; and that although it is only a requirement of form that is enacted, it cannot be disobeyed. I think the argument raises two questions :

(1) as to what is an " application in writing " and

(2) as to whether the requirement of an application in writing is obligatory or merely directory.

On the first point, I would hold that a record in writing made by the Judge, of an oral application of the parties or their lawyers, is the equivalent of an application in writing ; for, as it has been said, " the personality of the writer makes no difference ". The local cases which I have referred to have insisted on the signature of the parties as an essential requirement, on the view that an application cannot be said to be in writing by anybody unless it is signed by him. That seems to me a reasonable view to take, although the Privy Council decided in *Singh v. Mel Dhadha*[1] that there can be an application in writing which is unsigned. I do not think that we are free now to take a different view from that which this court, with one exception, has held for over 80 years. That view, as I understand it, is that a minute made by the Judge in the record that the parties wished to refer their dispute to arbitration becomes an application in writing (even though the parties or their lawyers applied orally) once the record is signed by the parties. " In a matter where certainty and uniformity of practice is more important than theoretical unassailability, we do not feel justified in dissenting from the view which has been expressed or assumed in the several cases referred to ", said Varadachariar, J. and with respect I think there is much to be said for this attitude.

On the next question, as to whether the requirement in section 676 (2) is directory or obligatory, Mr. Perera's argument, even if we were disposed to reconsider the view so long held, can only succeed if the requirement is held to be obligatory, with an implied nullification for disobedience. It is not always easy to decide such a question. The test laid down by Lord Penzance in *Howard v. Bodington*[2] has often been cited. " In each case you must look to the subject matter ; consider the importance of the provision that has been disregarded 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 matter is what is called imperative or only directory. "

My own view is that, as has been held by the Indian Courts, the requirement in section 676 (2) is only directory as to the form in which the application is made, and a non-compliance with it is a mere irregularity which will not affect the validity of the reference. The essentials of the jurisdiction to refer are contained, in my view, in subsection (1) while subsection (2) deals with a mere matter of form. Although I express that view for what it is worth, I do so merely in deference to the interesting arguments which were addressed to us. I only add that the interpretation of the particular provision which is being considered cannot be affected by the consideration whether substantial injury has resulted or not by reason of non-compliance with its terms.

[1] *(1915) A. I. R. (P.C.) 79.* [2] *(1876) L. R. 2 Prob. 203.*

The Indian Courts have, in dealing with this question, often referred to the Privy Council decision in *Pestonjee v. Khan Bahadoor*[1]. That case dealt with a regulation which enacted, among other things, that the deed of reference must contain " the time within which the award is to be given ". The Privy Council held that a deed which contained no provision regarding the time was bad, and an award made under it was bad; but it must be noted that the Privy Council held also that if it could have been satisfied that the provision as to time was merely directory the case might have been very different. The decision in each case must necessarily turn on the terms of the particular statute when considered in the light of the test laid down by Lord Penzance.

But whatever views I may hold on these matters seem to me to be of little consequence in this connection. The matter is not *res integra*. I do not therefore wish to add to these *obiter dicta* by touching on the question of estoppel which was referred to in the argument. We are dealing with the construction of a statute upon which a certain interpretation had been placed a long time ago. It is well settled that " the construction of a statute of doubtful meaning once laid down and accepted for a long period of time, ought not to be altered " unless it could be said positively that it was wrong and productive of inconvenience: see *Bourne v. Keane* [2]. A practice based upon the long-accepted interpretation has existed for a long time, and has been approved and recognised by this court time and again. Our duty in the circumstances is to uphold that practice. The Privy Council held in *Migneault v. Malo* [3] that where, for a long period of years, the local courts had acted on an incorrect construction of a law relating to the effect of a grant of probate, it should not put a different construction on it. It follows that we should not now—even if we agree that it is correct, which I personally do not—accept the argument put forward by Mr. Perera that a separate written application that the matter in dispute be referred to arbitration, prepared by the parties or their lawyers, is necessary. The main submission on which the appeal was based must therefore be decided against the appellant.

The other matter urged by Mr. Perera was that a reference of all matters in dispute or of " the matter in dispute " is bad, because section 676 (2) provides that the application " shall state the particular matters sought to be referred ". I do not think that the argument has any force in view of the terms of form No. 108 to be found in the second Schedule to the Code. According to that form, an order of reference of " all matters in difference " is justified, and this objection also fails. I would dismiss the appeal with costs.

H. N. G. FERNANDO, J.—

The principal question which arises in this case is whether a record by the Judge of an *oral* application to the court that matters in dispute between parties to an action be referred to an arbitrator, coupled with

[1] *(1855) 6 M. I. A. 134.* [2] *(1919) A.C. 815.*
[3] *(1872) L. R. 4 P. C. 123.*

the signature of the record by all parties to the action in token of their consent to the reference, is a valid application in terms of section 676 of the Civil Procedure Code, which requires *an application in writing*. This question was answered in the affirmative by Wood Renton and de Sampayo, JJ. in *Menike v. Ukkuamma* [1] in the year 1915, and again received full consideration by Gratiaen, J. and myself in *W. H. Bus Co., Ltd. v. Heen Banda* [2] in 1955. In the course of my previous judgment, several early authorities were considered, which in my opinion fully justified the 1915 decision. Counsel for the appellant in the present case has not adduced any argument which might persuade me of the error of my former opinion. On the contrary, the new matters now brought to our notice, namely the decisions in Indian cases (construing similar statutory provisions in the Indian law) to the effect that the requirement of an application *in writing* is not mandatory, serve to confirm me in that opinion.

The practice approved in 1915, of a record signed by the Judge and the signature of the record by the parties to an action, has regularly been followed in our courts in connection with references to arbitration. Indeed, the validity of the procedure adopted in the District Court of Jaffna in this very case was not questioned even in the petition of appeal. Counsel has not persuaded me that any benefit is to be gained, or any disadvantage to be avoided, by the adoption after these many years of a more strict view of the requirements of section 676.

I would dismiss the appeal with costs.

Appeal dismissed.