

Feb. 13, 1911

Present : Hutchinson C.J. and Van Langenberg A.J.

SUBANERIS APPU *et al.* v. APPUHAMY *et al.*

360—D. C. Kurunegala, 3,739.

Arbitration—Award not made within time allowed by Court—The Court has no power to delegate to the Secretary the duty of fixing the date for the return of award—Civil Procedure Code, ss. 677, 683, 691.

The matters in dispute in this case were referred to arbitration, and the arbitrator was required to deliver his award on or before July 12, 1910. On that date, no award having been made, the District Judge extended the time, but fixed no period within which the award was to be delivered ; it was left to the Secretary to fix the date, and he fixed the date for the 29th. The Secretary wrote to the arbitrator to send the award without delay, but did not mention any date. The award was filed before July 29.

Held, that it was not competent for the Judge to delegate to the Secretary the duty of fixing the date; that the award in this case was not valid, as it was not made within the time allowed by the Court.

THE facts are set out in the judgments.

Seneviratne, for the second defendant, appellant.

A. St. V. Jayewardene, for the respondents.

Cur. adv. vult.

February 13, 1911. HUTCHINSON C.J.—

This action was brought for a declaration of the plaintiffs' title to, and to recover possession of, a piece of land which the defendants had undertaken to plant ; the first defendant admitted the plaintiffs' title, but claimed compensation for planting ; and the second defendant claimed that the action should be dismissed, and that the plaintiffs should be ordered to pay certain damages and to convey a share of the land to the defendants.

The matters in issue were referred to arbitration, and the order of reference fixed July 12 as the date on or before which the award should be made. The arbitrator took evidence, but did not send his award to the Court by that date. The reason for the delay appears to have been that the parties had not supplied the arbitrator with the necessary stamps to put on the award ; he says in his evidence that he told the Secretary of the Court that he could not send the award as the stamps were not supplied ; the Secretary confirms this ; and the second defendant says that he had not then (*i.e.*, on July 12) his share of the stamps for the award.

The arbitrator made no formal application to the Court for an extension of time, nor did any of the parties do so, but the Secretary brought the matter before the Judge on July 12, when the Judge made this order in the minute book ; "Extend and call," which he

and the Secretary say meant "Extend the time and call for the award." According to the usual practice in that Court the minutes are entered in the journal of the case and signed by the Judge the next day. That was not done on this occasion, because the record, including the journal, was with the arbitrator. The minute in the minute book does not fix the date to which the time was to be extended ; the Secretary says that it is the practice for him to give the date (*i.e.*, I suppose he means to fix it and insert it in the journal) according to the state of the roll : and he says that in this case the time was extended to July 29 ; and he produced the calendar in which the case was entered on that date. The Secretary then wrote to the arbitrator to send the documents without delay, but not mentioning any date ; and the award was made and received in the Court before July 29. The second defendant raised several objections to the award. The District Court over-ruled them and entered judgment in terms of the award ; and this is the second defendant's appeal.

The only point which presents any difficulty is the objection that the award was not made in time. Section 691 of the Code enacts that "no award shall be valid unless made within the period allowed by the Court." By section 677, when an order is made for reference to an arbitrator, the Court shall fix such time as it, thinks reasonable for the "delivery of the award," and shall specify the time in the order. Section 683 enacts that if from any cause the arbitrator cannot "complete the award within the time specified in the order," the Court may grant further time, and may from time to time "enlarge the period for the delivery of the award." And by section 685, when an award has been "made," the persons who made it shall sign it and cause it to be filed in Court ; the "making" of it seems to be one thing, and the "filing" to be another afterwards, and the "filing" must be the same thing as the "delivery." And yet I think that the word "made" in section 691 must mean "delivered." The appellant argues that the order of July 12 fixed no time for delivery, and therefore the order was bad. The Judge's answer is that it was left to the Secretary to fix the date, and he did fix it for the 29th ; that the journal entry should have been "Extend the date to July 29, and call for the award" ; that the journal entry was not made, for the simple reason that the record was with the arbitrator ; and he said "I order it to be made now."

The order of July 12 did not fix any period within which the award should be delivered. Therefore the award was not delivered within the period allowed by the Court, and we are bound to hold that it was not valid. There is no substance in the other objections made by the appellant.

The decree of the District Court must, therefore, be set aside and the case go back for trial. Under the circumstances each party should bear his own costs of this appeal.

Feb. 13, 1911

HUTCHINSON
C.J.

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Feb. 13, 1911 VAN LANGENBERG, A.J.—

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In this case the matters in dispute between the plaintiffs and the second defendant were referred to arbitration, and the arbitrator was required to deliver his award on or before July 12, 1910. On that date, no award having been made, the District Judge extended the time under section 683 of the Code, but fixed no period within which the award had to be delivered. The Judge says that it is left to the Secretary of his Court in many cases to fix the date according to the exigencies of the roll, and that the Secretary extended the date until July 29.

The award was filed before this date, and the second defendant moved to set it aside, on the ground, among others, that it was made out of time. The Judge found that the "award was made within the extended date allowed by the Court."

In my opinion it was not competent for the Judge to delegate to the Secretary the duty of fixing the date, and I do not think it can be said in this case that the "extended date" was "allowed by the Court."

The question, then, remains whether the omission of the District Judge to fix a returnable day in his order extending the time rendered that order invalid. Counsel for the respondent referred us to the case of *Muttukutti Nayakan v. Acha Nayakan*,¹ where it was held that section 508 of the Indian Act 14 of 1882, which corresponds to section 677 of the Civil Procedure Code, was merely directory and not mandatory, and that therefore the mere omission to fix a time was not fatal. He argued that if the original order was not void on account of the omission, a similar defect in an order extending the time would not invalidate it. The Judges who decided the Madras case followed the decision in *Narainsingh v. Bhagwant Kuar*.²

There was an appeal to the Privy Council against the decision in the latter case, and Lord Morris, in delivering the judgment of the Board, said: "Their Lordships are of opinion that section 508 is not merely directory, but that it was mandatory and imperative. Section 521 declares that no award shall be valid unless made within the period allowed by the Court, and it appears to their Lordships that this section would be rendered inoperative if section 508 is merely treated as directory."³ Section 521 corresponds to section 691 of our Code. It appears to me that, following this decision, we must hold that the order of the District Judge dated July 12, 1910, was bad in law, and that the award must be set aside, and the case remitted to the District Court to be proceeded with.

As regards costs, I agree to the order proposed by my Lord.

Case sent back.

¹ (1894) I. L. R. 18 Mad. 22.

² (1887) I. L. R. 10 All. 137.

³ (1891) I. L. R. 13 All. 300.