

Present: Ennis A.C.J. and Dalton J.

1925.

STEPHENS *v.* GHAFOR.

251—D. C. Colombo, 5,908 and 6,484.

*Holidays. Ordinance—Arbitration proceedings—Dies non—Ordinance
No. 4 of 1886, s. 4.*

Where an arbitrator fixed an inquiry on a public holiday and, having refused an application for a postponement by one of the parties, held the proceedings on that day in the absence of the party.

Held, that the proceedings were irregular.

A PPEAL from an order setting aside an award made on a reference to arbitration by Court of two cases which were consolidated for the purpose. After some delay, the arbitrator issued notice on April 15, 1924, fixing the inquiry for April 22. On April 19 the defendant wrote to the arbitrator saying that he had just received notice, and that he was unable to get ready. On April 22 the arbitrator proceeded to hear the plaintiff and his witnesses, when the defendant appeared and asked for a postponement. His application was disallowed, and the defendant then withdrew. The arbitrator completed the inquiry and filed his award which was set aside by the District Judge on the motion of the defendant.

Bartholomeusz (with him *Choksy*), for the appellant.

E. W. Jayewardene, K.C. (with him *H. V. Perera*), for the respondent.

1925

May 6, 1925. ENNIS A.C.J.—

*Stephens v.
Ghafoor*

This is an appeal from an order setting aside an award. It appears that there were two cases before the District Court—Nos. 5,908 and 6,484. In the first of these cases, the plaintiff, who is the liquidator of the estate of Dutton Massey & Co. sued the defendant on three bills of exchange, and the defendant admitted his indebtedness under the bills and claimed in reconvention for commission and other matters. In No. 6,484 the plaintiff sued the defendant for the return of certain goods entrusted to the defendant by Dutton Massey & Co. for sale; and he also claimed damages for failure by the defendant to use due diligence in selling the goods. The cases were fixed for trial on March 7, 1923, and again on March 27, and again on July 30, and again on August 31, and again on December 19, 1923, on which date the two cases were consolidated, and the matters in dispute referred to arbitration, the commission being returnable on or before March 3, 1924. On February 12, 1924, time was extended till May 26. But, for some reason, the papers were not sent to the arbitrator until March 7. On March 10 the arbitrator wrote to the proctors of the parties to ascertain a convenient day for the inquiry, and then learnt that the defendant proposed to revoke the proxy to his proctor. Finally on April 3, 1924, the arbitrator issued notice to the defendant through the Court that he would hold an inquiry on April 12. That notice was not served as the defendant could not be found. On April 15 a new notice was issued fixing the inquiry for April 22. The arbitrator sent this notice through the Court, and also by two registered letters to the defendant's private and business address. On April 19 the defendant wrote saying that he had just received notice, and was unable to get ready. On April 22 the arbitrator proceeded to hear the plaintiff and his witnesses, and in the middle of the inquiry the defendant appeared and asked for a postponement. His application was disallowed, and the defendant then withdrew. The arbitrator completed his inquiry and filed his award. Within the time prescribed, the defendant filed a petition with an affidavit in support, praying that the award might be set aside, and the learned Judge on an inquiry into the matter of the petition made the order under appeal.

The order under appeal draws attention to the fact that April 22 was a public holiday, and the learned Judge thought that a postponement should in the circumstances have been allowed. The petition of the defendant states that he had asked for a postponement as the vacation had then commenced, and he found it difficult in the circumstances to retain another proctor. We have turned to the Holidays Ordinance, No. 4 of 1886, and find that by section 4, public holidays and Sundays are *dies non*. For the effect of this section there are two cases. *Goonewardene v. Padrick Sinno*¹ and

¹ 5 C. W. R. 309.

*Kulantaielpillai v. Marikar.*¹ The first of those cases was decided on the ground that the proceedings taken on a Sunday were not thereby null and void if the parties had not been prejudiced. The second of those cases drew attention to the fact that the Holidays Ordinance declared certain days to be *dies non* in order to protect the members of the public from being forced to attend Court or judicial proceedings held elsewhere on those days. Had, therefore, the objection been taken definitely on the ground that April 20, 21, and 22 were all *dies non*, and the defendant had received his notice only on April 19, it is difficult to see how the arbitrator could have refused a postponement. Nobody, however, appears to have noticed the fact that these days were *dies non*, and that the defendant could not be compelled to appear on those days. It appears that he took no part in the proceedings, and had appeared only for the purpose of asking for a postponement. The fact, therefore, that the proceedings were conducted by the arbitrator without the defendant being in attendance becomes an irregularity by virtue of the Ordinance, and the defendant has been prejudiced by the proceedings being had on a *dies non*. Counsel for the appellant contended that this was a technical objection, and that he could meet it by another technical objection, namely, that the petition by the defendant did not set out this ground. It is true that the petition does not in terms do this, but it gives the effect of the Holidays Ordinance by drawing attention to the fact that the arbitration inquiry was being held in vacation and to the petitioner's difficulty in obtaining a proctor at that time.

In the circumstances I am of opinion that the petition has sufficiently set out the substance of the objection, and that the order under appeal is right. I would accordingly dismiss the appeal with costs.

DALTON J.—

I concur. There is only one thing that I would add. The trial Judge says in accordance with his order that it is quite competent for the arbitrator to fix any date he wished. That, in my opinion, requires qualification. It would be subject to any party to the proceedings who might appear waiving his right to object to the hearing being held on a day declared by the Ordinance of 1886 to be a *dies non*.

Appeal dismissed.

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ENNIS A.C.J.

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