

(1916) 01 CAL CK 0001
In the Calcutta High Court

**In Re: The Indian Arbitration Act (IX of 1899)
 Joy Lal and Co.**

Date of Decision : 10-01-1916

Acts Referred:

Contract Act, 1872 — Section 230, 236

Citation : 35 Ind. Cas. 3

Hon'ble Judges : Chaudhuri, J

Bench : Single Bench

Judgement

Chaudhuri, J.—This is an application to set aside an award made by the Bengal Chamber of Commerce. Joy Lal and Company entered into a contract "for principals" for the sale of certain goods to the Mulliks hereinafter referred to as plaintiffs and defendants respectively. The defendants did not take delivery of the goods and the plaintiffs referred the matter of their dispute to the Bengal Chamber of Commerce under a Clause in the contract. The defendants thereupon took a plea before the Chamber that it had no jurisdiction (1) inasmuch as the plaintiffs were merely brokers in the transaction and the contract was "for principals," (2) there were fraud and misrepresentation when the contract was entered into, that is to say, in fact Joy Lal and Company had no principals at all, although the contract purported to be by them as brokers on behalf of principals. The Chamber has made an award in favour of the plaintiffs. In answer to the application now made the plaintiffs alleged that there was a custom in the market by which brokers are held liable upon such contracts and that such custom being well-known to the Chamber it is submitted that they have properly made their award and it is accordingly valid. Upon that an issue was framed for trial before me as to whether there was such a custom. Learned Counsel appearing for the defendants submitted that no evidence of that kind could be taken inasmuch as it would contradict the terms of the contract. I have, however, allowed evidence to be taken subject to such objection. The evidence is that brokers in such contracts in Calcutta, in gunny, hessian and other manufactured jute goods, are held by custom responsible by both buyers and sellers for the performance of the contract. Such evidence has been given on behalf of the plaintiffs and has not been contradicted by any one on the side of the

defendants, Inasmuch as learned Counsel for the defendants also contended that his clients, if there was such a custom, were unaware of it, he was allowed to call one of the defendants. It appears that he had previous dealings with the plaintiffs and I may say at once that I am not all satisfied with his evidence. The custom pleaded by the plaintiffs has been, proved "and I am not satisfied that the defendants did not know it. I think they: knew. The question, therefore, is, can evidence of such custom be taken, or its existence considered by the Chamber.

2. It is urged that it has been decided in *Patiram Banerjee v. Kankinarra Co. Limited* 31 Ind. Cas. 607 : 19 C.W.N. 623 : 42 C. 1050 that a broker on such a contract is not liable. "It is to be noticed that Woodroffe, J., guarded his decision in that case, by stating that it was said that there was a custom in Calcutta that such contracts were regarded as principal contracts, but that there was no such evidence" before them.

3. *Mollett v. Robinson* (1870) 5 C.P. 646 has been relied upon as having held "It is also an elementary proposition, that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character. No usage unknown to principal can justify a broker in converting himself into a principal seller." It is argued⁵ that the contract itself cannot be contradicted.

4. In *Hutchinson v. Tatham* (1873) 8 C.P. 482 : 42 L.J. C.P. 260 : L.T. 103 : 22 W.R. 18 Brett, J. laid down "that though you cannot contradict a written document by evidence of custom you may add a term not inconsistent with any term of the contract."

5. In *Hutcheson v. Eaton* (1884) 13 Q.B.D. 861 : 51 L.T. 846 it was held that the arbitrator had no jurisdiction to decide on custom inconsistent with the terms. In that particular transaction the plaintiffs alleged that the goods were of inferior quality. This case was discussed and followed in *North-Western Rubber Co. and Huttenbach & Co. In re* (1908) 2 K.B. 907 : 78 L.J. K.B. 51. The cases dealing with this point are to be found in Smith's Leading Cases under the head *Wigglesworth v. Dallison* Smith's Leading cases Eleventh Ed. I 545 1 Dougl. 201 : 99 E.R. 132 and were referred to. There is no doubt that with respect to commercial contracts it has been long established that evidence of a usage of trade applicable to the contract which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of impacting terms into the contract respecting which the instrument itself is silent: that with regard to particular commercial usages evidence is admissible either to engraft terms with the, contract or to explain its terms. In *Humfrey v. Dale* (1857) 7 El. & Bl. 266 : 119 E.R. 1246 : 26 L.J. Q.B. 137 : 3 Jur. (N.S.) 213 : 110 R.R. 587 it was held that not merely a term but a party on oral evidence of custom may be added to a contract in writing.

6. On behalf of the plaintiffs *Fleet v. Murton* (1871) 7 Q.B. 126 : 41 L.J. Q.B. 49 : 26 L.T. 181 : 20 W.R. 97 has been relied upon. It is very similar to *Humfrey v.*

Dale (1857) 7 El. & Bl. 266 : 119 E.R. 1246 : 26 L.J. Q.B. 137 : 3 Jur. (N.S.) 213 : 110 R.R. 587. In *Fleet v. Murton* (1871) 7 Q.B. 126 : 41 L.J. Q.B. 49 : 26 L.T. 181 : 20 W.R. 97 evidence was adduced on behalf of the plaintiff - that in the London Fruit Trade if the brokers did not name their principals in the contract note itself, the brokers are held personally responsible on the contract. Cockburn, C.J., held that evidence of the custom was admissible on the ground that although when a party professes to contract as broker it might prima facie be taken that he contracts without the intention of incurring liability on his own part, yet, if by the custom of the particular trade there is that qualification of the contract (which if written into the contract in extenso, would undoubtedly bind him), that qualification might, he thought, be imported into the contract by evidence of the custom." Blackburn, J., was of the same opinion. The custom sought to be proved in that case was that if the broker did not disclose his principal's name on the contract, he was personally liable.

7. *Fleet v. Murton* (1871) 7 Q.B. 126 : 41 L.J. Q.B. 49 : 26 L.T. 181 : 20 W.R. 97 was followed in this Court in *Gubby v. Avetoom* 17 C. 449. It is difficult to distinguish the point arising in *Fleet v. Murton* (1871) 7 Q.B. 126 : 41 L.J. Q.B. 49 : 26 L.T. 181 : 20 W.R. 97 from that in the matter before me. It appears from the correspondence relating to the matter which was placed before the Chamber that the plaintiffs were not being addressed as agents or brokers: the plaintiffs were demanding fulfilment of the contract and the defendants were asking for extension of time. It also appears from some of the letters that they held the plaintiffs responsible to them upon the contract and, upon the evidence before me, I am of opinion that the defendants knew of the alleged custom. There is a clear distinction between Sections 230 and 236 of the Contract Act. The latter Section deals with the case of a person falsely contracting as agent. He is not entitled to performance: the former, with the case of undisclosed principals. The agent in such cases is not personally bound unless he does not disclose the name of the principal. It does not appear that the plaintiffs were ever asked to disclose the name of their principals. I think that in a contract of the character, in suit evidence can be taken about the custom alleged. It does not cease to make the principal liable, but makes the agent also liable. It does not, therefore, appear to me to contradict the terms of the contract or to change the intrinsic character of it. It is a matter essentially fit for the Chamber, being within their knowledge. The gunny business in Calcutta is very extensive and of daily occurrence and contracts of the nature in suit are usual. I think the Chamber had jurisdiction in this matter and properly made the award. The Rule is, therefore, discharged with costs.