

(1922) 05 BOM CK 0005
In the Bombay High Court

L. Oppenheim and Co.

APPELLANT

Vs

Mahomed Haneef

RESPONDENT

Date of Decision : 07-05-1922

Acts Referred:

Citation : (1922) 24 BOMLR 1245

Hon'ble Judges : Viscount Cave, J; Shaw, J; Phillimore, J; John Edge, J; Ameer Ali, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Viscount Cave, J.—This is an appeal from a decree of the High Court of Judicature at Madras, in the exercise of its appellate jurisdiction, allowing an appeal from a decree made by Mr. Justice Coutts Trotter in the exercise of the ordinary original civil jurisdiction of the same Court.

2. The appellants are merchants carrying on business in London, and the original respondent (who has died during the pendency of this appeal and is represented by the present respondents) was a merchant carrying on business in Madras.

3. By a contract in writing made in London and dated October 23, 1913, the appellants bought from the respondent 20,000 tanned Madras sheepskins of a specified quality to be shipped to the appellants in London. The contract contained the following clause :-

Any differences arising out of this contract, failing amicable adjustment, to be submitted to arbitration in London in the usual manner, and the award of such arbitration to be final and binding on both buyer and seller.

4. Certain skins were shipped to London, and the appellants paid to the respondent ?1,495 15s. 4d. in respect of those skins. When the skins arrived in London, the appellants alleged that they were of inferior quality and refused to accept delivery, They were ultimately sold, with the consent of the respondent, at

the price of ₹1,242 108. Od., thus leaving a deficiency of ₹253 58, 4d, which the appellants demanded from the respondent and which the respondent refused to pay. Thereupon the appellants, in pursuance of the arbitration clause contained in the contract and of the English Arbitration Act, appointed Mr. R.H. Pringle as arbitrator on their behalf in the difference which had arisen, and caused the respondent to be served at Madras with a notice, dated February 3, 1916, whereby they informed him of the appointment of Mr. Pringle and required him, within seven days from the service of the notice, to name to the appellants or their agents in Madras an arbitrator to act on their behalf in London in the matter of the difference which had arisen, the notice stating that otherwise the difference would stand referred to Mr. Pringle alone as sole arbitrator. The respondent refused to appoint an arbitrator to act on his behalf or to take part in the arbitration; and thereupon Mr. Pringle, at the request of the appellants, proceeded with the arbitration. He gave no opportunity to either party to appear and give evidence before him, but, having read the contract and correspondence and inspected the skins, he made his award in writing dated July 11, 1916, and thereby awarded that the respondent should pay to the appellants the sum of ₹258 58. 9d., with interest and costs.

5. On July 15, 1916, the appellants brought an action in the King's Bench Division of the High Court of Justice in England for the amount payable under the award, and, the writ of summons having been served by leave upon the respondent at Madras and no appearance having been entered, the appellants, on November 28, 1916, recovered judgment against the respondent for the sum of ₹286 28. 9d. being the amount of the award with some interest and costs.

6. The appellants then brought the suit out of which this appeal arises against the respondent in the High Court of Judicature at Madras, claiming the sum of ₹286 28. 9d. due under the judgment of the King's Bench Division, or in the alternative ₹263 108. 9d. being the amount of the award and costs, with interest, or as a further alternative ₹253 58. 4d., being the loss on the contract. The respondent pleaded (among other pleas which are not now material) that the judgment of the High Court of Justice in London was not binding upon him, as it was not given on the merits, that the claim under the contract was barred by limitation, and as to the award, that it was not binding upon him as no notice was given to him by the arbitrator that he was proceeding to arbitrate.

7. The suit was heard by Mr. Justice Coutts Trotter, who held that, having regard to the decision of this Board in (1916) L.R. 44 I.A. 6 (Privy Council) the action upon the judgment could not be maintained, as the judgment has been entered in default of appearance and the action had not been tried upon its merits, and that the claim under the contract was statute-barred. This part of the judgment has not been challenged and need not be further referred to. With regard to the award, the learned Judge in a lucid judgment held that the plea of want of notice could not be raised by defence in the suit. After observing that the grievance of the respondent was more imaginary than real, the award having been made by a

commercial man who took the commercial documents with which he was familiar and saw the goods and gave his opinion on the spot, he added that if the objection could have been raised in the proceedings he would have felt constrained to give effect to it. But he referred to *Thorburn v. Barnes* (1867) L.R. 2 C.P. 384 as a complete authority for the proposition that according to the English law any objection relating to an irregularity in bringing an award into existence must be taken by motion under the Arbitration Act, 1889, to set aside or remit the award, and if not so taken could not be raised by way of defence to an action on the award. He, therefore, held that the defence that the award was tainted with irregularity by the fact that the respondent had not had an opportunity of being present at the arbitration, was not open to him in the suit. An application having been made by counsel for the respondent to treat the written statement as an application to the Court at Madras to set aside the award, the learned Judge held that he had no jurisdiction to entertain such an application, adding :-

How a judge in Madras is supposed to have jurisdiction to upset an award made by an arbitrator in London passes my comprehension, and it is perfectly clear that the Court which is given jurisdiction by the English Act is the English Court.

8. He added that even if he had had jurisdiction he would have declined to exercise it.

9. Against this judgment an appeal was brought and was allowed by the Appellate Division, the learned Judges of that Division holding that the rule in *Thorburn v. Barnes* did not apply in India. Thereupon the present appeal was brought.

10. In their Lordships' opinion Mr. Justice Coutts Trotter came to the right decision and this appeal should succeed. The contract of October 23, 1913, was made and was to be performed in England; and the arbitration clause provided for an arbitration which was to take place in London and in accordance with English law and procedure. Under that law, by which both parties agreed to be bound, any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator must be taken by motion to set aside or remit the award, and if not so taken cannot be pleaded in answer to an action on the award. In the present case no such motion was made within the time limited by Order LXIV, Rule 14, of the Rules of the Supreme Court, England, or at all, and accordingly the award became as fully binding on both parties as if it had been incorporated in the contract. No doubt any defence going to the root of the award—for instance, that the arbitrator had no jurisdiction or that the matter was tainted with fraud—could have been pleaded in the suit; but a defence on the ground of irregularity not appearing on the face of the award was excluded by the law by which both parties had agreed to be bound.

11. On this view of the case the Indian law as to arbitration is irrelevant, and their Lordships accordingly express no opinion on the question whether if the

arbitration has taken place in India the defence on the ground of irregularity could have been pleaded. It is plain that the Indian Court could not set aside an English award on that ground.

12. In order to prevent misconception it appears desirable to add that it was not pleaded or contended at any stage of the proceedings that the award had merged in the English judgment, and accordingly their Lordships do not deal with that point.

13. For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed and that the order of Mr. Justice Coutts Trotter should be restored, the respondents to pay the costs in both Courts in India and the costs of this appeal.