

(1944) 10 BOM CK 0014
In the Bombay High Court

Lewis W. Fernandez

APPELLANT

Vs

Jivatlal Partapshi and Others

RESPONDENT

Date of Decision : 12-10-1944

Acts Referred:

Arbitration Act, 1899 — Section 19
Arbitration Act, 1940 — Section 34

Citation : AIR 1947 Bom 65

Hon'ble Judges : Bhagwati, J

Bench : Division Bench

Judgement

Bhagwati, J.—The defendants have taken out this notice of motion for stay of the suit filed by the plaintiff against them by reason of "arbitration agreement" contained in the contracts which were entered into between the parties subject to the bye-laws of the East India Cotton Association, Ltd. The defendants are members of the East India Cotton Association, Ltd., and the plaintiff employed the defendants as his brokers to effect diverse transactions on his behalf for purchase and sale of cotton for July 1944 and September 1944 settlements, through a sub-broker by name Hooseinally Currimbhoy Chagla. In accordance with the instructions conveyed by the plaintiff from time to time through the sub-broker, the defendants entered into diverse transactions for the purchase and sale of Jarila cotton on behalf of the plaintiff in accordance with the rules and bye-laws of the East India Cotton Association, Ltd., for July 1944 and September 1944 settlements. The defendants rendered unto the plaintiff contract notes in respect of such several transactions and in due course sent the same to the plaintiff at the address which was given to them in that behalf. The said several transactions passed through the clearings in accordance with the bye-laws of the East India Cotton Association, Ltd., for July 1944 and September 1944 settlements, and the statements of the respective clearings were sent by the defendants to the plaintiff at the said address. Disputes, however, arose between the plaintiff and the defendants because towards June 30, 1944, there was a considerable sum owed by the plaintiff to the defendants as a result of the

clearings which the transactions had passed through up to that date, and the defendants intimated to the sub-broker that if the plaintiff did not make payment of the moneys due by him to the defendants in respect of the several transactions up to that date, the defendants would not keep the outstanding transactions of the plaintiff outstanding any further and would close the same. By June 30, 1944, all transactions for July 1944 settlement had been squared and the only transaction which was outstanding was the transaction in respect of the sale of 1,000 bales of cotton for September 1944 settlement which had as afore-stated passed through the various clearings up to June 30, 1944. The defendants say that on June 30, 1944, they intimated to the sub-broker that they were not going to allow that outstanding transaction to remain outstanding any further: until and unless the plaintiff made payment of the moneys which he owed to the defendants. The sub-broker, however, pressed the defendants not to immediately close the outstanding transaction of the sale of 1,000 bales of cotton for September 1944 settlement but gave instructions to the defendants to close the same if the rate reached Rs. 431 per candy. The defendants say that the rate was reached that day and accordingly in the exercise of their right of closing the outstanding transaction by reason of the default of the plaintiff in paying off their dues they closed the outstanding transaction on June 30, 1944, and sent the relevant contract note in respect of the closing transaction to the plaintiff together with a statement of account which they also rendered unto the plaintiff in due course. As a result of the transactions of July 1944 and September 1944 settlements, there was a sum of Rs. 11,112-8-0 due by the plaintiff to the defendants which the defendants claimed from the plaintiff, and in the default of payment of that sum by the plaintiff to the defendants the defendants claimed a reference to arbitration by arbitrators appointed under the bye-laws of the East India Cotton Association, Ltd. The said arbitration is yet pending.

2. The plaintiff in the meantime, pending the reference to arbitration, filed this suit against the defendants claiming an account in respect of the transactions entered into by the defendants as his brokers for July 1944 settlement and also for September 1944 settlement except in so far as there was a dispute according to the plaintiff in respect of the unauthorised closing of the outstanding transaction of 1,000 bales of September 1944 settlement which according to him had been closed by the defendants contrary to his instructions conveyed to them through the sub-broker. He stated that after June 30, 1944, he had given instructions to the defendants on August 9, 1944, to close the outstanding transaction of a thousand bales of September 1944 settlement which instructions however the defendants declined to carry out, falsely contending that there was no outstanding transaction of the plaintiff remaining outstanding at that date. The plaintiff therefore claimed from the defendants as and by way of damages sustained by him by reason of the defendants not carrying out those instructions of his a sum of Rs. 11,250. The plaintiff also claimed in the alternative a sum of Rs. 8,250. being the damages which he says he sustained at the rates of Jarila cotton prevailing on the due date in respect of September 1944 settlement.

3. The defendants have taken out this notice of motion in order that the suit filed by the plaintiff against them for accounts in respect of the transactions of July 1944 and September 1944 settlements and for recovery of damages either in the sum of Rs. 11,250 or in the alternative in the sum of Rs. 8,250 alleged to be the damages sustained by the plaintiff by reason of the defendants not having carried out his instructions given by him to the defendants on August 9, 1944, on the ground that the said transactions up to June 30, 1944, which were entered into by the defendants in accordance with the instructions conveyed by the plaintiff through the sub-broker were subject to the bye-laws of the East India Cotton Association and contained an arbitration agreement within the meaning of the Indian Arbitration Act. The plaintiff opposes this motion of the defendants on the grounds that there is no arbitration agreement within the meaning of the Indian Arbitration Act, that there is a dispute as to the factum of the transaction of purchase of 1,000 bales of September 1944 settlement alleged to have been entered into by the defendants on June 30, 1944, the transaction having been entered into by the defendants either contrary to the instructions conveyed by the plaintiff to the defendants in that behalf or without any authority from the plaintiff and that there are various transactions which were entered into between the plaintiff and the defendants in respect of most of which there are no arbitration agreements within the meaning of the Indian Arbitration Act, 1940. Reliance has been placed on the decision of B.J. Wadia J. in 34 Bom. L.R. 697 where the learned Judge held that to give arbitrators jurisdiction to make an award, it is incumbent on the party claiming arbitration to show (a) that there are disputes between him and the opposing party arising out of or in relation to contracts entered into between them, and (b) that there is an agreement between them in writing to submit those disputes or differences to arbitration within the meaning of the term "submission" as defined in Section 4(6) of the Indian Arbitration Act, 1899, in order to give effect to the arbitration clause. It is necessary to observe that the Indian Arbitration Act, 1940, which governs the present application, defines "arbitration agreement" as a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not, and is substantially in the same terms as the definition of "submission" contained in Section 4(b) of the Indian Arbitration Act of 1899. Reliance has also been placed on a decision of Kania J. in 41 Bom. L.R. 12932," where the learned Judge held that the fact that a contract or submission in writing exists between the parties should be established by the person who comes to the Court and applies for a stay u/s 19 of the Indian Arbitration Act of 1899 (corresponding to Section 34 of the Indian Arbitration Act of 1940), and that where the fact of the contract itself is in dispute, it is not open to the arbitrators to decide the point and the Court in normal course will refuse a stay. The learned Judge further held in that case that the mere sending of contract notes containing an arbitration clause by one party to another without confirmation signed by the other party does not amount to a submission in writing as required by the Indian Arbitration Act of 1899. It has not been contended before me that in order to constitute an arbitration agreement within

the meaning of the definition thereof in the Indian Arbitration Act of 1940, it would be necessary to have a confirmation note signed by the plaintiff in favour of the defendants, it being conceded that if the Court on the materials before it came to the conclusion that the contract notes having been sent by the defendants to the plaintiff were accepted by the plaintiff either by signing the confirmation notes or by his conduct, it would be a sufficient arbitration agreement within the meaning of the definition thereof in the Indian Arbitration Act, 1940.

4. On the materials before me in the plaint as well as the affidavits of the parties, it is clear that the defendants sent to the plaintiff contract notes in accordance with the bye-laws of the East India Cotton Association, Ltd., at the address given by the plaintiff to the defendants in that behalf and that the contract notes incorporated therein bye-law 38 of the bye-laws of the East India Cotton Association, Ltd., which runs as under:

All unpaid claims whether admitted or not, and all disputes (other than those relating to quality) arising out of, or in relation to (a) contracts (whether forward or ready and whether between members or between a member and a non-member) made subject to these bye-laws, or (b) the rights and or responsibilities of commission agents, Muccadams and brokers not parties to such contracts, shall be referred to arbitration of two disinterested persons, one to be chosen by each party. The arbitrators shall have power to appoint an umpire and shall do so if and when they differ as to their award.

It is also clear that up to June 30, 1944, and some time later there was no dispute whatever" raised by the plaintiff as regards the transactions effected by the defendants for and on behalf of the plaintiff in accordance with the instructions conveyed by the plaintiff through the sub-broker and in effect the plaintiff accepted the contract notes. It was only when the contract note in respect of the closing transaction of June 30, 1914, was sent by the defendants to the plaintiff and a demand for the sum of Rs. 11,112-8-0 was made by the defendants upon the plaintiff by their letter dated July 18, 1944, that the plaintiff came out by his letter in reply of July 20, 1944, stating that the amount shown as due by him to the defendants, Viz, Rs. 11,112-80 was not correct inasmuch as it did not show the statement of his sale of 500 bales of September 1944 delivery. It is admitted that this statement as regards 500 bales of September 1944 delivery was a mistake on the part of the plaintiff and that really it ought to have been a sale of 1,000 bales of September 1944 delivery which according to the plaintiff was outstanding on that date. The plaintiff by his letter called upon the defendants to send to him a complete statement of his account with the defendants showing separately the transactions for the month of July and September settlements after which he stated that he would settle the account of the defendants. It is significant to note that in that letter the plaintiff did not state that he had not received all the contract notes or all the statements of account in respect of the several transactions which the defendants entered into

for July 1944 and September 1944 settlements as he seems to have done in the subsequent correspondence. The defendants wrote to the plaintiff on July 21, 1944, expressing their surprise at the attitude taken up by the plaintiff and referred the plaintiff to the contracts and weekly statements which had been submitted by them to the plaintiff as usual. The defendants stated that on perusing the same the plaintiff would be convinced that there was no outstanding business in his account and that the total amount of Rs. 11,112-8-0 shown by the defendants to his debit was correct. The plaintiff replied by his letter dated July 25, 1944, where he disingenuously stated that he had not been receiving the defendants' contracts and weekly statements regularly and that he had to rely upon verbal information from the sub-broker who he considered was the agent and sub-broker of the defendants for information regarding his position. The plaintiff, therefore, called upon the defendants to send to him a complete statement of account showing separately the July and September transactions. He further expressed his astonishment to learn that he had no outstanding business with the defendants and called upon the defendants to let him know under whose instructions the outstanding sale of 1,000 bales of September had been cut off, again repeating the mistake as to 500 bales instead of 1,000 bales of September 1944 settlement. It is significant, however, to note that in this letter also he did not deny that he had received the contract notes and the weekly statements of account which the defendants alleged they had been sending to him as usual, the only allegation made by him being that he had not been receiving the same regularly. The statements made by Jivatlal Partapshi, the partner of the defendants' firm in paragraph 3 of his affidavit in support of this notice of motion dated September 30, 1944, in that behalf were also denied in that affidavit of the plaintiff dated October 11, 1944, in the same vague and indefinite manner by stating:

I further deny that the defendants had submitted all the contract notes and statements of accounts as falsely alleged in the said affidavit or that I have acknowledged receipts in respect of contract notes and statements of accounts in respect of all my transactions in the office despatch book of the defendants.

5. This denial, in my opinion, is not honest and leads me to the conclusion that the plaintiff in fact received all the contract notes and the statements of accounts as alleged by the defendants in the usual course at the address given by the plaintiff to the defendants in that behalf and in effect accepted the contract notes which had been so sent by the defendants to him. I am satisfied on these materials that the contract notes in respect of all the transactions except the last disputed one of the purchase of 1,000 bales of September 1944 settlement on June 30, 1944, were sent by the defendants to the plaintiff and were in effect accepted by the plaintiff by his conduct, with the result that in respect of all of the contracts except the last disputed one which I have mentioned above there were arbitration agreements within the meaning of the Indian Arbitration Act of 1940. The judgment of Kania J. in 41 Bom. L.R. 12932 does not militate against this position. I hold that under the circumstances I have mentioned above, the

fact of acceptance or the retaining of the contract notes cannot be disputed in this case, as it was before Kania J., and that there were arbitration agreements in respect of the contracts within the meaning of the Indian Arbitration Act of 1940.

6. This leaves the question whether, even though there were arbitration agreements in respect of all the contracts except the disputed one of the purchase of a thousand bales of September 1944 settlement on June 30, 1944, it can be argued that under the circumstances there was a dispute between the parties as to the factum of the said contract dated June 30, 1944, which would exclude or oust the jurisdiction of the arbitrators which otherwise they have by reason of my holding that there were arbitration agreements within the meaning of the Indian Arbitration Act of 1940. Reliance was placed in support of this argument by Mr. Desai on the judgment of B.J. Wadia J. in 34 Bom. L.R. 6971 and the judgment of Kania J. in ILR (1941) Bom. 2003. Mr. Desai argued that this transaction of the purchase of a thousand bales of September 1944 settlement on June 30, 1944, was an independent transaction and was in any event, on the contention of the defendants themselves, a transaction entered into by them under instructions of the sub-broker to close the outstanding transaction of the sale of 1,000 bales of September 1944 settlement if the rate of Jarila cotton for September 1944 reached the rate of Rs. 431 per candy. On either of these grounds, he urged that the dispute with regard to that transaction was not a dispute arising out of or in relation to the transaction for the sale of 1,000 bales of September 1944 settlement which I have held contained an arbitration agreement within the meaning of the Indian Arbitration Act of 1940 and that therefore the defendants were not entitled to an order for stay of this suit.

7. In the case before B.J. Wadia J. in 34 Bom. L.R. 6971 there had been a transaction for the sale of 700 bales of cotton of April-May 1931 delivery which was not disputed. The dispute between the parties, however, related to a transaction of 800 bales of Broach cotton of April-May 1931 delivery which the petitioners alleged was to have been a transaction for sale of further 800 bales but which the respondents, contrary to their instructions, had effected as a transaction of purchase of 800 bales with the result that on setting off 700 bales out of the said 800 bales against the admitted transaction of sale of 700 bales of cotton there remained outstanding, according to the respondents, a transaction of purchase of 100 bales which the petitioners squared or closed by a further transaction of sale of 100 bales. In that case there was a genuine dispute between the parties as to the factum of the two contracts of the purchase of 800 bales and the sale of 100 bales of Broach cotton of April-May 1931 delivery by the petitioners. The contract notes in respect of the same had been sent by the petitioners to the respondents but were at once returned unsigned by the respondents, and, on the facts there and on the construction of the bye-laws of the East India Cotton Association, Ltd., B.J. Wadia J. held that the dispute between the parties with regard to those transactions of the purchase of 800 bales and the sale of 100 bales of Broach cotton of April-May 1931 delivery could by no stretch of imagination be called "disputes in relation to the admitted

contract" of the sale of 700 bales of Broach cotton of April-May 1931 delivery which was an admitted transaction between the parties and which contained a submission within the meaning of the Indian Arbitration Act of 1899 by reason of the incorporation of bye-law 38 of the bye-laws of the East India Cotton Association, Ltd., in the contract note in respect thereof. That reasoning was sufficient to decide the case. B.J. Wadia J., however, dealt with a further argument which was advanced by counsel for the respondents that the contract for the sale of 700 bales being admitted the other two transactions were merely a method of quantifying the respondents' damages, and observed that he could not accept that argument, because the respondents had themselves alleged that instructions were given to them for the transaction of purchase of 800 bales and that they entered into the said transaction in pursuance of the said instructions. B.J. Wadia J. further observed that it could not, therefore, be said that a transaction alleged to have been entered into on instructions was only a method adopted by the respondents of quantifying their damages. The point for decision before B.J. Wadia J. was whether the transactions which were disputed between the parties were and could by any possible argument be said to be transactions arising out of or in relation to the admitted transactions of the sale of 700 bales and the remarks of B.J. Wadia J. with reference to this argument as regards instructions having been given and the transaction having been entered into in accordance with the instructions should also be understood with reference to that point. B.J. Wadia J. could not have intended to lay down a proposition as wide as this, that even though the instructions given by the respondents would have been to liquidate the outstanding transaction, which was an admitted transaction and the contract note in respect of which incorporated bye-law 38 and therefore contained a submission within the meaning of the Indian Arbitration Act of 1899, the fact of such instructions having been given and having been carried out by the petitioners would have taken the transaction out of the purview of the arbitration clause. If, however, those observations of B.J. Wadia J., are capable of that meaning, I respectfully dissent from the same. The real point for decision could only be and was whether the transaction which was alleged to have been entered into by the broker was a transaction which could be said to be arising out of or having relation to an admitted transaction of sale or purchase as the case may be which was recorded in a contract note incorporating bye-law 38 of the bye-laws of the East India Cotton Association, Ltd., and therefore contained a submission within the meaning of the Indian Arbitration Act of 1899, because if the disputed transaction arose out of and in relation to that admitted transaction, it would be merely a question of adjudicating how and in what manner the admitted transaction was dealt with, or squared or closed, or adjusted between the parties, and that would be well within the purview of the arbitration clause as a dispute arising out of or having relation to the admitted transaction.

8. In the case before Kania J. in ILR (1941) Bom. 2003 the defendants who acted as *pacca adatias* had sold under instructions from the plaintiffs 200 bales of cotton for April-May 1940 delivery. The contract note which had been rendered

by the defendants in accordance with the bye-laws of the East India Cotton Association, Ltd., incorporated bye-law 38 and thus contained a submission within the meaning of the Indian Arbitration Act of 1899. The plaintiffs failed to pay margin money as and when demanded by the defendants with the result that the defendants on February 3, 1940, closed the transaction by purchasing 200 bales and sent to the plaintiffs the contract note in respect of the closing transaction. On March 19, 1940, the plaintiffs instructed the defendants to purchase 200 bales and settle the contract of November 6, 1939, which according to them was outstanding. The defendants replied stating that there was no outstanding business in respect of that contract and claimed a sum of Rs. 932 as due by the plaintiffs to them. As in the present case the plaintiffs there sued to recover from the defendants the difference between the selling price on November 6, 1939, and the market price on March 19, 1940, on which date they had given instructions to the defendants for purchasing 200 bales which according to them had been then outstanding. The defendants made an application for stay of the suit on the ground that the contract between the parties was entered into subject to the rules, regulations and bye-laws of the East India Cotton Association, Ltd., that under bye-law, 38 the matter should have been referred to arbitration and that they were ready and willing to go to arbitration. While ordering the stay of the suit as applied for by the defendants, Kania J. observed that the claim in his opinion clearly fell within the words of bye-law 38 of the East India Cotton Association, Ltd., subject to which the contract note dated November 6, 1939, was accepted by the plaintiffs and that the words "All unpaid claims whether admitted or not... arising out of or in relation to contracts made subject to these bye-laws" etc., of bye-law 38 were wide enough to cover the dispute in suit. Kania J. further observed that the defendants purported to close the transaction on the footing of the plaintiffs' failure to pay the margin money as they were bound to do, that the plaintiffs' case was that the defendants wrongfully refused to purchase and close the outstanding transaction and that in either view of the matter the case was in respect of an unpaid claim in relation to the admitted contract dated November 6, 1939. Here again, as in the earlier case before B.J. Wadia, J., this reasoning was enough to dispose of the motion. Kania J. however probably because the case decided by B.J. Wadia J. in 34 Bom. L.R. 6971 had been cited before him in the course of the arguments, went on to say that it was nobody's case that instructions were given for the closing of the transactions which were carried out and that the dispute was in respect of such closing, virtually endorsing the statement of B.J. Wadia J. in 34 Bom. L.R. 6971 which I have already commented upon. I have to make the same observations with regard to this passage appearing in Kania J.'s judgment as I have made with respect to that passage occurring in the judgment of B.J. Wadia J. It was not at all necessary to make the said observations for the purpose of deciding the motion, and if necessary I also dissent from the observations of Kania J.

9. Even though I may be wrong in the observations which I have made as to

those passages appearing in the judgments of B. J-Wadia J. and Kania J. referred to above, and it might be held that in those cases where instructions for entering into transactions were given by the constituent to the broker and the broker had entered into the transaction in pursuance of such instructions, the transactions so entered into would be an independent transaction, so that it could not be said of such a transaction that it was a transaction arising out of or in relation to an admitted transaction of an earlier date which contained an arbitration agreement within the meaning of the Indian Arbitration Act of 1940. On the facts of this case, I am satisfied that it was not in pursuance of any such instructions conveyed by the plaintiff through the sub-broker that the defendants entered into the transaction of closing the 1,000 bales of September 1944 settlement on June 30, 1944. Jivatlal Partapshi, the partner of the defendants, has stated in his affidavit dated September 30, 1944, that he told the sub-broker that he would not take any further risk unless moneys due to the defendants were paid to them, that he was unwilling to keep the plaintiff's transaction for September 1944 settlement outstanding and had pointed out to the sub-broker that by reason of the amount remaining due and unpaid by the plaintiff to the defendants they were entitled to close the same, that he would not take further risk unless moneys were paid to them but that the sub-broker had requested him not to do so at once and had told him that in case the rates went above Rs. 431 per candy he should square up the transaction. He further stated that on June 30, 1944, the rates went up beyond Rs. 431 per candy and therefore he squared up the outstanding transaction of the plaintiff for the sale of 1,000 bales of cotton of September 1944 settlement. Under these circumstances, I am not prepared to hold that the transaction of the purchase of 1,000 bales of September 1941 settlement entered into by the defendants on June 30, 1944 was a transaction in pursuance of the instructions given by the plaintiff to them through the sub-broker and it was a transaction entered into by them in exercise of their right to close the outstanding transaction on default committed by the plaintiff in making the payment of the amount due by him to the defendants up to June 30, 1944.

10. Under the circumstances I have come to conclusion that the dispute as regards the transaction of the purchase of 1,000 bales of Jarila cotton for September 1944 delivery which was entered into by the defendants on June 30, 1944, closing the outstanding transaction was and is a dispute arising out of or in relation to the admitted transaction of the sale of 1,000 bales of September 1944 settlement, which as I have already stated was recorded in the contract note which incorporated bye law 38 of the bye-laws of the East India Cotton Association, Ltd., and contained an arbitration agreement within the meaning of the Indian Arbitration Act of 1940. The defendants were always ready and willing within the meaning of Section 34 of the Indian Arbitration Act of 1940 and still remain ready and willing to do all things necessary to the proper conduct of the arbitration, and I am satisfied that there is no sufficient reason why the matter should not be referred in accordance with the terms of the arbitration

agreement. I, accordingly, make an order in terms of prayer (a) of the notice of motion. The defendants' costs of this notice of motion will be costs in the cause. The plaintiff will bear and pay his own costs thereof.