
(1931) 07 BOM CK 0021
In the Bombay High Court
Case No : O.C.J. Award No. 56 of 1931

Mahomed Haji Hamed

APPELLANT

Vs

Pirojshaw R. VakHaria and Co.

RESPONDENT

Date of Decision : 20-07-1931

Acts Referred:

Arbitration Act, 1899 — Section 4(b)

Citation : AIR 1932 Bom 341 : (1932) 34 BOMLR 697

Hon'ble Judges : Wadia, J

Bench : Single Bench

Judgement

Wadia, J.—[His Lordship after stating the facts proceeded:] Section 3 of the Bombay Cotton Contracts Act empowers the board of directors of the Association to make, subject to the sanction of the Governor-in- Council, by-laws for the regulation and control of transactions in cotton, and amongst other things for providing u/s 3(1) for arbitration and appeals against awards. It is provided by by-law 38(A) framed under the Act that disputes (other than those relating to quality) arising out of or in relation to contracts between members of the Association or between a member and a non-member made subject to the by-laws shall be referred to arbitration. Under the old by-law 82 the cotton contracts had to be either in writing in a prescribed form and signed or there must be an agreement by the constituent to sign a contract in the prescribed form when tendered. In place of this old by-law a new by-law, also No. 82, came into effect from July 21, 1930. It provides inter alia that contracts between members acting as commission agents on the one hand and their constituents on the other shall be made subject to the by-laws, and a contract note in the form given in the appendix (pages 65, 66, 67 and 68) shall be tendered in respect of every such contract. It is enough under the new by-law if the commission agent tendered a contract note to his constituent in the form given in the appendix. It was no longer called a contract form but only a contract note. The form of the contract notes used by the respondents in respect of the alleged purchase of 800 bales and sale of 100 bales is the form given in the appendix at page 66. The last but

one line in the contract form states that in the event of any dispute arising out of the transaction the matter shall be referred to arbitration as provided by the by-laws. The last line in the form states that the annexed confirmation note should be signed and returned. The form of the confirmation note is at p. 68 of the appendix. Section 5 of the Bombay Cotton Contracts Act provides that contracts which are not in the prescribed form are void. The new by-law 82 was in force at the date of the transactions referred to in the petition. There is no dispute about the sale of 700 bales, but admittedly the petitioner refused to sign the contract notes in respect of the purchase of 800 bales and the sale of 100 bales referred to above. Counsel for the respondents argued that the old by-law was altered in order to dispense with the necessity of getting the signature of the constituent on the contract, and that as the signature was no longer necessary for the validity of the transaction, it was immaterial whether the petitioners signed the confirmation notes in respect of the disputed transactions or not. He argued that it was a matter of great hardship for the commission agent, when the constituent turned round after giving instructions for the transaction, and refused to sign the contract form, and that is why the old by-law was changed. But this argument regarding hardship cuts both ways. It is as much a hardship for the commission agent to be told that there is no contract when there is one, as it is for the constituent to be saddled with a contract when he has not entered into any.

2. It is, therefore, necessary to consider the effect of the old and the new by-law 82. It is clear that under the old by-law 82 a suit could not be maintained in a Court of law by a commission agent against his constituent on a contract which was not in compliance with the prescribed form, unless there was an agreement to sign the prescribed form of contract when tendered. In order, therefore, to maintain a suit it was obligatory upon the commission agent either to produce the written contract in the prescribed form duly signed or to prove an agreement to sign a contract in such form. It may be here mentioned that under the old by-law No. 82 the agreement had to be in writing. It is not necessary under the new by law No. 82 to have either the contract signed or an agreement to sign, because all that it enjoins is that a contract note in the prescribed form shall be tendered in respect of every contract. If, therefore, a constituent has given instructions for a transaction in cotton and has also verbally agreed expressly or by conduct to sign the contract note and then refuses to sign the same when it is tendered, it may be argued that a suit may be maintained on the contract by the commission agent against him. That, however, is not a point for me to decide in this case as there is no question before me of the validity or otherwise of such a transaction in law. The question before me is really whether the arbitrators had jurisdiction to make the award in dispute. In order to have the jurisdiction 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 cotton 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(b) of the

Indian Arbitration Act of 1899 in order to give effect to the arbitration clause. "Submission" is defined by Section 4(b) as meaning "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

3. The respondents' claim is based on the footing that there were three transactions between them and the petitioners. There was admittedly a contract for the sale of 700 bales, but the petitioners say that there was no contract for the purchase of 800 bales and no contract for the sale of 100 bales as alleged by the respondents. The last two contracts were repudiated by the petitioners, and the confirmation notes in respect of them were not signed by them. The very factum or existence of these two contracts being denied, there were no disputes arising out of or in relation to them which could be referred to arbitration, Counsel for the respondents argued that the words in by-law 88(A) "disputes... in relation to contracts" were wide enough to cover disputes as to whether in fact there were or there were no contracts between the parties. What the exact distinction, if any, there is between the words "arising out of" and the words "in relation to" in that by-law it is not easy to make out, but in my opinion disputes between parties in relation to a contract the very factum of which is denied are not disputes which the arbitrators have jurisdiction to decide. In other words, the arbitrators have no jurisdiction to decide whether in fact the contracts were or were not entered into. Counsel for the respondents further argued that the contract for the sale of 700 bales being admitted, the other two transactions were merely a method of quantifying the respondents' damages. I cannot accept that argument, because the respondents have themselves alleged that instructions were given to them for the transaction of purchase of 800 bales of Broach cotton, and that they entered into the transaction in pursuance of the said instructions. It also appears that at the ex parte hearing before the arbitrators the respondents called their sub-brokers to prove the said instructions. It cannot, 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.

4. Assuming, however, that there were disputes arising out of the said contracts for the decision of the arbitrators, there must still be a written agreement, within the meaning of the term "submission", to submit those disputes or differences to arbitration. It was held by Blackwell, J. in *Rambaksh Lachhandas Vs. The Bombay Cotton Company*, that the by-laws of the Association coupled with an agreement to abide by those by-laws amounts to a submission within the meaning of Section 4. In that case there was no acceptance by the constituent in writing, but on the evidence on record the learned Judge came to the conclusion that there was an acceptance by conduct, and that consequently there was a written agreement to submit to arbitration, It is common ground that the confirmation notes in respect of the purchase of 800 bales and the sale of 100 bales were not signed by the petitioners, and the petitioners also say that they had repudiated the transactions. Can it then be said that there was an

agreement between them and the respondents in writing to submit to arbitration ? Counsel for the respondents argued that the signatures on the confirmation notes were not necessary, that Section 3(1) of the Act gave power to the board of directors to make by-laws providing for arbitration, that the by-laws which have actually been framed make up a complete, self-contained code of arbitration in respect of transactions in cotton in Bombay, and all that the new by-law 82 required was that the contract notes should be tendered to the constituent. There must be, however, under the Indian Arbitration Act, an agreement between the parties in writing to submit their differences to arbitration. It is of course not necessary in all cases that both parties should sign the written agreement to refer. It was pointed out by Astbury, J. in *Hickman v. Kent or Homey Marsh Sheepbreeders' Association* (1915) 1 Ch. 881 that if the submission is in writing and is binding on both parties as their agreement or as the equivalent in law to an agreement between them, the statute is satisfied. The reference to the statute is the English Arbitration Act of 1889 52 Vic. c 49 and Section 27 of that Act defines "submission" in the same way as Section 4 of the Indian Arbitration Act of 1899 does. In fact the Indian Arbitration Act is almost a verbatim reproduction of the English Act with the exception of the clauses in the English Act dealing with references under the order of the Court with which the Indian Act does not deal. As I have said before, the confirmation notes were sent back by the petitioners as they repudiated the two transactions; nor does it appear in the petition and affidavits that there was any acceptance by conduct. As the contracts have been repudiated, and acceptance is not proved, there was no written agreement to refer any disputes arising out of or in relation to them to arbitration. It would follow, therefore, that the arbitrators had no jurisdiction to enter upon a consideration of matters which could not be referred to them. There was no valid submission in respect of the said transactions, and, therefore, no valid award. A reference was made in the course of argument by counsel to the recent decision of the appeal Court in *Babubhai v. Madhavji Govindji & Co.* (1930) 33 Bom. L.R. 759 in which it was held that the arbitrators had no jurisdiction to decide disputes arising out of contracts in cotton which were not in the prescribed form, and that the whole award was illegal as the portion of it which related to contracts not in the prescribed form could not be separated from the portion relating to contracts which were in such form. That was a decision under the old by-law 81, subsequently altered into the old by-law 82, which has now been altered into the new by-law 82. On the game principle the portion of the award in this case in respect of the admitted contract for 700 bales cannot be separated from the portion in respect of the disputed transactions and the whole award is accordingly void and bad in law. [The rest of the judgment is not material for purposes of this report]