

(1947) 11 MAD CK 0032
In the Madras High Court

Penukonda Rathakrishnamurthy

APPELLANT

Vs

Ganamukala Chengalraya Chetty Chalamayya Chetty and Co.
and Others

RESPONDENT

Date of Decision : 17-11-1947

Acts Referred:

Citation : AIR 1948 Mad 365 : (1948) 61 LW 157 : (1948) 1 MLJ 164

Hon'ble Judges : Frederick William Gentle, C.J.; Bell, J

Bench : Full Bench

Judgement

Frederick William Gentle, C.J.—This appeal arises out of an application by the appellant, u/s 30 of the Arbitration Act, 1940, to set aside an award of an umpire to whom matters in controversy in an arbitration had been referred, upon disagreement by two arbitrators. The arbitration related to five contracts between the appellant, as seller and the first respondent (hereinafter called the respondent), as buyer, of various quantities of yarn. The arbitrators agreed regarding two contracts of December 1941 vaida or delivery. They disagreed with regard to three remaining contracts, which were for January 1942 vaida. The arbitrators made two awards (1) with respect to the two contracts upon which they agreed and (2) respecting the three contracts upon which they disagreed. The matters relating to the three contracts, where there had been disagreement, were referred for decision to the umpire who was the second respondent in the application and who is the second respondent in the appeal. Kunhi Raman, J., dismissed the application to set aside the award and, against his decision, the appellant seller has preferred this appeal.

2. The appellant and the respondents respectively the seller and the buyers under the contracts, carry on business in Madras as dealers in yarns. Each is a member of the Yarn Merchants Association (hereinafter called "the Association"). The objects of the Association include (a) to form a code or codes of practice to simplify and facilitate transactions, for which purposes there are bye-laws in its articles or regulations. Article or bye-law 44 provides as follows:

Notwithstanding anything contained herein, the Committee shall have power only for the purpose of dealing with cases which the Committee in its absolute discretion considers emergent, to alter or supplement any of the bye-laws herein abovementioned.

3. Article 33 [c] of the Association's articles provides that the Committee shall have power

to make, vary and repeal bye-laws or rules for the regulation of the business of the Association.

4. The seller and the buyers, when becoming members of the Association, agreed in writing upon the application form for membership, to act in accordance with the rules and regulations of the Association.

5. The three contracts, with respect to which the arbitrators disagreed and the matters relating to them, which were referred to the umpire, were made on 27th November, and 1st and 5th December, 1944. It was a term in each of those contracts that

the bye-laws of the Madras Yarn Merchants Association in force now and that may hereafter come into force shall be binding on both the buyers and sellers in regard to the deliveries and payments, etc., of the abovesaid goods.

6. While the three contracts were current and before the time for performance of them had expired, the executive committee of the Association passed a resolution on 30th December, 1941, called resolution No. 159 the relevant provisions of which are the following:

(1) In all Indian Mill yarn contracts pending fulfilment in the vaida month, each seller shall demand the despatching instructions from his buyer within the 20th of each calendar month, and each buyer shall give despatching instructions to his sellers on or before 24th of each month before 12 noon.

(2) Parties failing to submit their despatching instructions as per Clause No. 1 on or before 24th before 12 noon of each vaida month, the seller shall complain to the Association and the parties who have not received or tendered the despatching instructions on or before 24th of each month, shall assemble in the Association Hall on the 25th at 3 p.m. and shall arrange amongst themselves regarding the despatching instructions.

(3) If the buyer fails to give despatching instructions as provided for in Clause 1 or 2, the seller shall book the contracted goods to Madras Salt Cottars in time on buyer's risk and shall tender the railway receipt as provided for in Clause No. 5. If the buyer refuses, fails, evades or neglects to receive such railway receipt, the seller shall claim damages as provided for in Clause No. 15 or shall resell the goods on buyer's risk and account at Madras and claim or hand over residuary balances if any.

7. Paragraphs 4, 5, 6, 7 and 8 deal with methods of delivery being made and

means by which that is to be effected.

9. If any of the contracting parties either fails to deliver the goods or fails to accept them, where deliveries are ex-godowns, or fails to accept R/R or deliver the R/R, where the deliveries are for F.O.R. station, the party who is responsible shall be deemed to have made breach of the contract and the party shall pay damages as provided for in Clause No. 15.

8. Paragraph 15 specifies the method of ascertaining the amount of damages.

9. It is convenient to make one or two observations regarding the Association and the above resolutions. A perusal of the memorandum and articles of association reflects that all members are traders or dealers in yarn and the substantial object of the association is to facilitate, as far as possible, dealings between the members, to prevent disputes arising out of transactions from progressing into law suits, and, also, in the event of disputes being unsettled, for their decision by arbitration. Each member, as pointed out, agrees to abide by the rules and regulations, and the contracts between members are subject to the provisions for the time being in force relating to the members and their contracts, whether extant at the date of the contract or subsequently arising before performance. In that respect, in my view, all the relevant rules, bye-laws, or whatever they may be called, including those which came into force during the subsistence of a contract, form part of the terms of it. Resolution No. 159 is called "a resolution", but it is clear upon a reference to bye-law 44 and article 33 (c), that upon a resolution being passed it became a bye-law of the Association. Whilst emphasis has been placed upon the word "resolution" and it was argued that that word reflected that its contents were not a bye-law, it must be borne in mind that the committee could not amend, add or vary any bye-law without passing a resolution to that effect. It is clear, in my view, that the resolution in question is a bye-law of the Association and as such its terms form part of the three contracts which were referred to the umpire, by virtue of the provision in the contract itself in that behalf.

10. The seller did not demand of the buyers despatching instructions, as required by paragraph 1 of resolution No. 159, by the 20th January, the date specified in that paragraph. He did write a letter making a request, but it was not delivered to the buyers until the 25th of January, which fell on a Sunday in the year 1942. It would seem that the parties did not meet in the Association Hall, which paragraph 2 of the resolution No. 159 suggests. No goods were tendered by the seller either in kind or by way of a railway receipt, he consigned none to or to the order of the buyer by railway and nothing further was done. In the arbitration, he claimed damages for failure by the buyers to give despatching instructions which was tantamount to refusing to accept delivery of the goods.

11. During the course of the arbitration, the arbitrators stated a case, pursuant to Section 13 of the Arbitration Act, for the opinion of this Court upon a point of law. It related to resolution No. 159. Kunhi Raman, J., answered the questions

put to him expressing the opinion that, if the arbitrators took the view that the three contracts of January 1941 vaida were governed by the terms of the resolution, the seller had committed a breach of the contract by not asking for despatching instructions on or before January 20th, 1941, and the buyer had not committed any breach by failing to give instructions for despatch on or before January, 1924. As abovementioned, the arbitrators published one award in favour of one or other party, upon which they had agreed, in regard to the December vaida contracts. They each published a separate award expressing their respective views regarding the other three contracts. These are the matters to which reference was made to the umpire and upon which he published his award. At the time of the umpire's award, he had before him the opinion of this Court on the points of law stated in the case referred to it. The umpire's award is dated 19th October, 1944, in which the following appears.

I...do hereby adjudge and award as follows : I have come to the conclusion that all contracts are governed by the resolutions of the Executive Committee of the association) that the provision contained in Clause 1 of resolution No. 159 dated 30th December, 1941, is a very important? one, and it is, therefore, a mandatory provision and that non-compliance of this by the seller will amount to a breach of contract. I, therefore, hold that the plaintiff/seller Mr. Penugonda Radhakrishnamurthi by not asking for despatching instructions by the aoth January, 1942, has committed a breach of the contracts.

12. And, following upon that finding, the umpire disallowed the plaintiff-seller's claim for damages in respect of those three contracts.

13. In the application before Kunhi Raman, J., and in this appeal, the seller raised three grounds upon which he sought to have the award of the umpire set aside. They are the following:

(1) The umpire was wrong to have taken up the reference with regard to the three January contracts alone, he should have taken cognizance of the whole of the matters of the arbitration, including the other two contracts;

(2) The umpire erred in holding that the contracts were governed by the bye-laws of the association, and in particular, by the terms of resolution No. 159;

(3) Assuming the applicability of resolution No. 159, the umpire was wrong in the construction which he placed upon it and his error is one which is patent on the face of the award.

As pointed out, the learned Judge rejected each of these grounds and dismissed the application.

14. In regard to the first contention, it was argued that the parties, including the? seller, had agreed upon the Tribunal, namely, the two arbitrators, and if they disagreed, the umpire should decide all disputes between them, and that upon disagreement between the arbitrators on one part of the matters in the arbitration, the umpire was bound to take cognizance of the whole of those

matters, and it was incorrect and wrong that only the matters upon which the arbitrators disagreed should be referred to him. In support of this argument, reference was made to *Wicks v. Cox* 1. (1847) Q.B. II Jurist 542. There, it was held that if all or any of the matters in difference between the parties, referred to arbitrators who disagreed, but the disagreement was only as to costs, yet it was required that the umpire must adjudicate on the whole question. That ignores the terms upon which the reference in the present case was made. Those terms are contained in the Association's arbitration bye-laws. Term 27 (b) of those bye-laws provides that the arbitrator or arbitrators or umpire shall have power to make an interim award or awards. That provision is identical with that contained in Section 27(1) of the Indian Arbitration Act. In my view, the award which the arbitrators made relating to the subjects upon which they had disagreed, is an interim award as contemplated by the bye-law and by the statute itself. That having been made, then the arbitrators proceeded each to make another award reflecting their differences which required consideration by the umpire. In those circumstances, it was quite unnecessary for the matters upon which the arbitrators had agreed to be referred to the umpire. There had been a decision on those matters, the interim award had been made, and it could have been filed in Court and a decree passed upon it. The umpire is not an appellate tribunal to sit over the arbitrators; he is a tribunal to whom their differences are referred. There was no difference regarding the two December contracts and the matters relating to them had all merged into the award which the arbitrators made.

15. On behalf of the seller reference was made to arbitration bye-law No. 25 (b) which provides that

if any party makes an application to the umpire before he makes his award to hear the case de novo the umpire shall do so.

16. A letter from the seller to the umpire, requesting that the umpire should deal with all matters arising in the arbitration, was put before us; and it was argued that by refusing to go into the matters relating to the two December contracts the umpire acted improperly and misconducted himself as such. Emphasis was placed upon the words " the case " in bye-law 25 (b) which it was contended, meant the whole of the matters in the arbitration. In my opinion, that is quite wrong. The words " the case " relate to the matters referred to the arbitrator and to nothing else. The arbitrators acted perfectly properly in the course which they took of publishing an interim award and then their separate awards upon matters upon which they disagreed. The only matters which could be referred to the umpire were those on which the arbitrators differed, the umpire dealt with those matters properly, and there is nothing which justifies interference with his award on the ground that he did not take up all matters which were referred to him.

17. The next matter for consideration is whether the terms of resolution No. 159 governed or were part of the contracts for January *vaidā*. I have already expressed my views upon that matter. Clearly, the resolution was a bye-law which came into force on the day upon which it was passed, December 30, 1941,

while the three contracts were still current. By the terms of those contracts that bye-law became a term or terms of the contracts and its provisions were binding upon both the buyer and the seller.

18. Lastly, the question arises whether the umpire correctly considered the meaning and effect of resolution No. 159. Incidentally his construction conforms with the opinion relating to it which was expressed by Kunhi Raman, J. It is quite clear that, whilst the learned Judge's opinion was given a long time ago, that can be the subject of the present application, since, it would seem no appeal lay at the time against the opinion expressed by the learned Judge when he considered the case stated to him by the arbitrators.

19. Paragraph 1 of resolution No. 159 requires the seller to demand despatch instructions from the buyer on or before the 20th of the vaida or delivery month and the buyer to give despatching instructions to the seller on or before the 24th of that month. When construing a document, a meaning must be given to every word in it, when that course is possible. It is presumed that the draftsman of the document and the person who made it did not use words without some object or include words to which no meaning should be given. Learned Counsel for the seller was inclined at one time, to suggest that the provision requiring the seller to demand despatching instructions, was one which the seller might or might not observe as he thought fit and in any event it was contended that the demand for despatching instruction could be given at a date subsequent to that mentioned in the paragraph, namely, the 20th of the delivery month. That was followed by pointing out that, in fact, the seller in this instance had made such a demand by the 25th, the date when his communication reached the buyers. In construing this paragraph particularly, as well as others in resolution No. 159, it is instructive and helpful to bear in mind the conditions and circumstances which existed. The members of the Yarn Merchants Association, who were parties to this contract, carry on business in Madras; the goods which the seller sells are not always, and indeed but seldom, in Madras. They are with mills or with wholesalers. It is incumbent upon the seller to deliver his goods by the last day of the delivery month, delivery can be made by placing the goods on rail on that day. It is not a question of a seller going to his ware-house or godown on the last day of the delivery month and picking out the goods which he is under obligation to deliver to a particular buyer. The seller must know, sometime before the final date of delivery, the place where his goods are to be sent. It may well be, and probably frequently is, the case that his buyer has, in his turn, sold the goods to some one else. Knowledge of destination of the goods must be in the hands of the seller in good time so as to enable him to make his delivery in accordance with his contractual obligations. It is, in these circumstances, that resolution No. 159 came into force. The contract itself is one to which the principle of time being the essence clearly applied. The clear meaning and effect of paragraph 1 of resolution No. 159, to my mind, is manifest. The buyer must give the despatching instructions by the 24th, provided the seller demands those instructions from him. The obligation is first upon the seller to make his demand,

and having done that, as the contract and this particular term provides, then the buyer is obliged to give the despatching instructions. No other meaning can be placed upon the paragraph. If the seller fails to make his demand, then the buyer is under no obligation to give despatching instructions. The first duty to be discharged is that which the seller has undertaken. Emphasis was placed, on behalf of the seller, upon the second paragraph of the resolution which provides for an assembly in the Association Hall on the 25th when despatching instructions have not been received or tendered, so that the parties shall arrange amongst themselves regarding those instructions. It was argued that that paragraph confers a second right upon either the buyer or the seller to make his demand or to supply instructions or to arrange for delivery, and until matters have broken down in discussion in the assembly hall, there is no breach of contract. That argument cannot be accepted. It is clear the object of paragraph 2 is no more than a provision by which the members of the Association, when disputes have arisen regarding instructions for despatch or absence of them, to meet and terminate their disputes there and then. Paragraph 3 was also subject to argument and criticism. At one time, it would appear that the suggestion made was that the seller must either book the goods he contracted to sell to the destination specified or tender a railway receipt or if the buyer refuses or fails to accept the receipt, then to claim damages or to sell the goods. Although the word " shall " appears four times in paragraph 3, it is not in terms of mandatory effect but permissive and optional. The seller, s< when the buyer is in default, is not compelled to take any course at all with regard either to the goods or the buyer. If he likes, he is entitled to keep them in his warehouse or to step them in transit, or, if he likes, he can sell them against the buyer or claim damages without selling them.

20. One other matter was argued, and that was an absence of reference in the several paragraphs of resolution No. 159 of any sanction regarding the obligation of the seller to demand delivery instructions. That may be, but it cannot affect the circumstance that the seller is obliged by the clear and unambiguous language of paragraph 1 to demand delivery instructions to be given to him by the date specified.

21. In my view, the decision which the umpire made, and expressed in his award, was correct. The seller was in default when he failed to, observe the obligation in paragraph i of resolution No. 159 to demand delivery instructions from the buyer. Having failed in that respect, it was not incumbent upon the buyer to give despatching instructions, and his failure to do so did not amount to refusal to accept delivery of the goods. He was not in breach of his contractual obligations; and was not liable to the seller in damages.

22. For the reasons given, in my opinion, this appeal should be dismissed with costs, Rs. 500 the same amount as allowed before the learned Judge who heard the notice of motion.

Bell, J.

23. I agree.