
(1969) 12 CAL CK 0004
In the Calcutta High Court

R.N. Jhunjhunwalla and Co. (P) Ltd.

APPELLANT

Vs

Alliance Jute Mills Co. Ltd.

RESPONDENT

Date of Decision : 17-12-1969

Acts Referred:

Citation : 74 CWN 510

Hon'ble Judges : S.K. Mukherjea, J;B.C. Mitra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Mr. B.C. Mitra, J.—This appeal is directed against a judgment and order dated August 4, 1966, dismissing the Appellant's application for setting aside an award made by The Bengal Chamber of Commerce and Industries.

2. The Appellant entered into a contract with the Respondent for the purchase of 4 lacs heavy cess cement bags at Rs. 130/- per bags. Delivery at the rate of 1,00,000 pieces was to be given on four different dates namely March 7, 1962, March 15, 1962, March 22, 1962 and with regard to the last instalment no date was fixed but it was to be made in March, 1962. The Appellant dispatched for shipping instructions on February 28, 1962, March 1, 1962, March 5, 1962 and the last one being dated only March 1962 for dispatch of the goods. By three letters dated March 9, 1962, the Appellant cancelled the shipping instructions, and applied for supply for lorry passes. On April 2, 1962, the Appellant wrote to the Respondent alleging failure on the latter's part to tender the goods on the stipulated dates. On April 11, 1962, he Respondent issued inspection challans for the entire consignment of 800 bales. The Appellant accepted the inspection challans but accepted only 267 bales. On June 19, 1964, the Respondent referred the dispute to the arbitration of the Bengal Chamber of Commerce & Industries who on July 11, 1964 informed the Appellant that the Respondent had referred the dispute. By three letters dated July 18, 1964, July 31, 1964, and August 11, 1964, the Appellant requested The Bengal Chamber of Commerce to extend the time to submit its statement. On December 9, 1964, the Tribunal of

Arbitration held a meeting, and on the same date an award was made. The copy of the award was forwarded to the Appellant on December 14, 1964, and the award was filed in Court on April 21, 1964. On May 31, 1965 the Appellant made an application for setting aside the award, which was dismissed with costs by an order dated August 4, 1966. It is this order which is the subject-matter of this appeal.

3. The principal ground of attack on the award in this appeal was that under the terms of the agreement between the parties there were four separate contracts, and therefore there should have been separate references and that four different Courts should have been constituted and four awards made on the basis of the four references. Mr. B. N. Sen counsel for the Appellant contended that as The Bengal Chamber of Commerce failed to treat the dispute between the parties as disputes arising out of four separate contracts and also failed to constitute four different Courts and as the Arbitrator made only one award, there was misconduct in the proceedings, and the award should for that reason, be set aside. In order to appreciate this contention it is necessary to refer to the relevant terms in the contract which is as follows:

4. Delivery of the said goods is to be given and taken as follows:

7th March, 1962 10,000 pcs.

15th March, 1962 100,000 pcs.

22nd March, 1962 1,00,000 pcs.

8 March 1962 1,00,000 pcs.

Each delivery under this contract shall be treated as separate contract.

4. Mr. Sen argued that having regard to Sub-rule (5) of Rule 1 of the Rules of the Tribunal of Arbitration of The Bengal Chamber of Commerce, there being separate contracts between the parties, the agreement between the parties should have been treated to be an agreement to refer each dispute arising out of separate contracts and on that basis, the Respondent should have made four separate references and four separate courts should have been constituted by the Bengal Chamber and four awards made. I shall refer to the relevant rule later.

5. Counsel for the Appellant submitted that in the counter-statement filed before the Arbitrators the Appellant had contended that the Arbitrators had no jurisdiction to adjudicate upon the reference, and that the reference itself was incompetent, as under the terms of the contract between the parties each delivery was to be treated as a distinct and separate contract, and the claim of the Respondent was in respect of more than one delivery. It was argued that this point was taken in paragraphs 16 and 26 of the petition. It was submitted that under the contract each of the four deliveries was to be treated as a distinct and separate contract and as disputes had arisen, there should have been a reference under each of the contracts; four different Tribunals should have been

constituted to adjudicate upon the four awards should have been made. As this was not done, it was argued, the Arbitrator had misconducted the arbitration proceedings.

6. In the statement of claim filed by the Respondent before the Arbitrators, it claimed Rs. 61,926.34 nP. Together with interest on account of 202 bales of goods sold and delivered to the buyer. In the counter-statement filed on behalf of the Appellant it made a counter claim for Rs. 66,511.98 together with interest and costs. The Arbitrators made an award in favour of the Respondent for the amount claimed and rejected the Appellant's counter claim mentioned above.

7. The Court below came to the conclusion that although under the contract each delivery was to be treated as a separate contract, the contract became one. It was also held that acceptance of 267 bales took place after the due date of delivery, and therefore the Appellant's contention regarding instalment delivery was no longer available, and that the deliveries made by the Respondent and accepted by the Appellant were not either on the due dates or in stipulated instalments. It was further held that the parties treated the contracts as one contract. The Court below relied on the Appellant's conduct in asking for extension of time to submit statements and papers, and it appears that such conduct on the part of the Appellant was taken into consideration in dismissing the Appellant's application. It is also to be noticed that the Court below held that the Appellant, in the counter-statement filed on its behalf, before the Arbitrators did not take the point that there could not be one reference and that there should have been two references. We must at once point out that the Court below was in error in coming to this conclusion as it is clear from paragraph 3 of the counter-statement filed on behalf of the Appellant, that the point that the Arbitrators had no jurisdiction to arbitrate and adjudicate upon the matters, as under the terms of the said contract each delivery was to be treated as a distinct and separate contract, and the claim of the Respondent was in respect of more than one delivery, was specifically taken.

8. Counsel for the Appellant argued that the Court below should have held that the constitution of one Tribunal and the making of one single award in four different contracts was bad, and the Arbitrator in making one award, in four different disputes, which should have been the subject-matter of four separate references, misconducted the proceedings. In support of this contention reliance was placed by counsel for the Appellant on a decision of this Court reported in (1) Prabartak Commercial Corporation Vs. Ramsahaimull More Ltd., . In that case a contract was entered into by exchange of Bought and Sold Notes. As there was failure to deliver the goods, the liabilities of the parties under the contract were settled by two Settlement Contracts, again evidenced by Bought and Sold Notes. Under the contracts each month's delivery was to be treated as a distinct and separate contract and in each contract there was an arbitration clause for arbitration of the disputes by The Bengal Chamber of Commerce and Industries. A dispute having arisen two claims were advanced on the basis of the two

Settlement Contracts, but one application was made to The Bengal Chamber for arbitration. One statement of claim was filed for the two claims arising out of the two Settlement Contracts. The application by the claimant was treated as a single reference comprising two different claims. Statement of claim was filed by the claimant and in the counter-statement filed by the buyers a point was taken that the counter-statement was filed without prejudice to the rights and contention of the buyers, and particularly that the Arbitrators had no jurisdiction to adjudicate upon the dispute between the parties. It was also contended before the Arbitrators that each month's delivery was to be treated as a separate contract and accordingly two separate references should have been made by the seller. A request was made to the Tribunal to state a special case for the opinion of the Court on the question of law as to whether there should be separate references. The tribunal, however, did not comply with this request, and made two separate awards in respect of the two settlement contracts. Law J. following a decision of S.R. Das Gupta J. in Award Case No. 253 of 1953 held that the Arbitrators made the award in breach of the agreed procedure as laid down in the Rules of The Bengal Chamber, and had therefore misconducted the proceedings, and for that reason the award was liable to be set aside. It is to be noticed that although in this case the question whether one reference could be made in a case where there were two separate contracts was raised, the facts in this case are somewhat different from the facts with which we are concerned in this appeal. In this case there was only one written contract between the parties but there was a clause in this contract that each delivery under the contract was to be treated as a separate contract. But in the decision mentioned above there were two distinct settlement contracts, each containing an arbitration clause and there was only one application for adjudication followed by constitution of one Tribunal for adjudication of the two disputes, and two different awards were made. The decision of Law J. must in the first instance be treated to be confined to the facts of that case. Secondly having regard to the Bench decision of this Court in (2) Bharat Handicrafts Ltd. V. Standard Brands, and the decision of the Supreme Court in (3) J. Agarwalla & Sons Ltd. V. Kanoria General Dealers Ltd. to both of which I will refer later in this judgment, the views of Law, J., cannot in my opinion be regarded as good law.

9. Reliance was placed by counsel for the Appellant on another decision of this Court reported in 59 CWN 715. In that case it was held that where there were two separate contracts between the same parties, and each contained an arbitration clause, the agreement conferred jurisdiction upon the Arbitrator to adjudicate upon the disputes with regard to the subject-matter of the two contracts and the Arbitrator had jurisdiction to entertain one reference and to make one award in respect of disputes relating to the two contracts. It was further held that the procedure of the Tribunal with regard to both disputes being the same, a joint trial of the two disputes was legal, and that assuming that the absence of separate references, appointment of separate courts and separate hearings were irregularities, such irregularities did not result in any miscarriage

of justice. In that case also it is to be noticed however that there were two distinct contracts and not one contract stipulating that each delivery was to be treated as a separate contract. But in so far as it was held in that case that one reference, one joint trial and one award in two disputes arising out of two contracts was valid, this decision is against the contention of the applicant. This decision was upheld by the Supreme Court and I shall refer to the decision of the Supreme Court later in this judgment.

10. Counsel for the Appellant next relied upon a Bench decision of this Court reported in (4) AIR 91958) Cal. 501. In that case there was a dispute and a reference to The Bengal Chamber followed by the constitution of a Court. But the Court failed to make an award within time, and thereupon a second Court was constituted which made an award. This award was set aside by this Court on the ground that the second Court was not properly constituted. One of the parties wrote to the Registrar of The Bengal Chamber submitting a fresh statement of claim on the ground that the arbitration had not been superseded. A Court was constituted, but this Court again failed to make an award within time, and thereupon a second Court was constituted and this Court made an award. It was held that the award was not bad as the arbitration agreement was subsisting and the agreement had not been superseded. The facts in this case entirely different from the facts in the present appeal. But relying upon some of the observations of S.R. Das Gupta J. which were dealt with by Chakravarti C.J. in the appeal counsel for the Appellant argued that the reference was not to the Tribunal of Arbitration of The Bengal Chamber, but it was a reference to The Bengal Chamber of Commerce and Industries, which was a corporate body, and as such was governed and controlled by its Rules. It was submitted that the Rules of The Bengal Chamber must be strictly followed and that if the Rules were not so followed in constituting a tribunal was liable to be set aside, as it would be altogether illegal. The Bengal Chamber of Commerce in dealing with a dispute referred to it, it was submitted, must proceed strictly according to its Rules. Quite apart from the fact that The Bengal Chamber is a corporate body, the parties had entered into the arbitration agreement on the basis of the Rules of The Bengal Chamber, and such Rules it was submitted became part of the agreement between the parties. This argument, though attractive, cannot be accepted. The question is if in constituting one Court, which made one award, the Rules of The Bengal Chamber had been violated. In support of this contention reliance was placed on a decision of this Court reported in (5) Rajputana Trading Co. Ltd. Vs. Jute and Gunny Brokers, . In that case it was held that the method of appointment of Arbitrator as laid down in the rules of The Bengal Chamber must be strictly followed in appointing Arbitrators. But it is to be noticed that it was held in that case that the rules had been complied with and secondly in that case the constitution of the Tribunal of Arbitration was the subject-matter of challenge by the Petitioner. In the appeal before us there is no challenge to the constitution of the Tribunal. On this question counsel for the Appellant also relied on another decision of this Court reported in (6) ILR

1950(2) Cal. 105. In that case also the challenge to the award was based on the constitution of the Tribunal and exclusion of material evidence and for that reason I do not think that this decision is of any assistance to the Appellant.

11. There is nothing in Rule 1(5) of the Rules of the Bengal Chamber which requires that in respect of separate disputes under one contract (even assuming each delivery is to be treated as a separate contract for all purposes) separate references must be made, separate tribunals appointed, separate trials held and separate awards made, even in a case where there is in fact only one contract with stipulation that each delivery is to be treated as a separate contract.

12. Reliance was also placed by counsel for the Appellant on another Bench decision of this Court reported in (7) *The Baranagore Jute Factory Co. Ltd. Vs. Hulaschand Rupchand*, in which it was held that if the words of the agreement were wide enough to embrace all dispute concerning the contract, there could be successive references of different disputes. This decision, to our mind, is of no assistance to the Appellant in this case. Reliance was also placed on another Bench decision of this Court reported in (8) *Tons Jute Co. Ltd. Vs. Kissenlal Bangur*, . In that case the agreement was to refer disputes to The Bengal Chamber. Disputes arose between the parties and an application was made to The Bengal Chamber. The application dealt with the deliveries of May and June separately. But one application was made for both the deliveries. An objection was raised that the two claims were to be treated as under two separate contracts and could not be lumped together. The claimant thereupon deleted the June portion so that the reference was for May delivery only. An award was made and an objection was taken that the original application being not in accordance with the Rules, the appointment of the Arbitrators was invalid, and therefore they could not proceed to deal with the matter, as if only one claim was preferred originally. It was held that the defect was one of mere irregularity and not want of jurisdiction, and therefore the arbitration proceedings were not vitiated. The facts in this case were entirely different but to the extent it was held that the defect was a mere irregularity, this decision is against the contentions of the Appellant.

13. In support of the contention that each delivery under the contract was to be treated as a separate contract and therefore one reference and one award by the same Tribunal was bad, reliance was placed on a Bench decision of this Court reported in (9) ILR 41 Cal. 825. In that case there was a contract for the supply of goods by two monthly shipments. The relevant term in the contract was: "This indent is to be deemed and construed as a separate contract in respect of each item and instalment of goods and your rights and liabilities and ours respectively shall be the same as if a separate indent has been made out and signed in respect of each instalment."

14. The purchaser failed to take delivery or pay for the goods in respect of two shipments, and thereupon the vendor brought two separate suits for re-sale damages. It was held that in view of the intention expressed in the contract, the

vendor was entitled to institute a separate suit for damages in respect of each shipment. On the same question reliance was placed by counsel for the Appellant on a Bench decision of the Madras High Court reported in (10) ILR 19 Mad. 304. In that case also the contract provided for delivery of goods in two monthly instalments, and each shipment was to be treated as a separate contract. The buyer refused to accept delivery and thereupon the seller instituted separate suits for damages in respect of each shipment. It was held that the buyers was entitled to file separate suits in respect of each shipment as the contract provided that each shipment was to be treated as a separate contract. Relying upon the two decisions mentioned above, counsel for the Appellant contended that there were four separate contracts in respect of each delivery, and therefore there should have been four separate references followed by constitution of four Courts of arbitration and an award should have been made in respect of the disputes arising out of each of the contracts. To our mind, these decisions do not throw any light on the questions with which we are concerned in this appeal. The ratio of the two decisions was whether separate suits were maintainable and the questions considered by the Courts were whether the Plaintiffs had separate causes of action for maintaining separate suits.

15. Before proceeding any further I should refer to the relevant Rules of The Bengal Chamber of Commerce. Rule 1(5) of the Rules as set out under paragraph 26 of the petition is as follows: "Reference means any agreement to refer a difference or dispute (present or future) to the Tribunal. Any agreement to refer more than one difference or dispute between the same parties which arise under separate contracts shall be treated as a separate reference in respect of each contract."

16. It was pointed out by counsel for the Appellant that the Rule quoted above was the Rule which was in force prior to 1956 and this Rule was not the Rule which was in force at the time when the contract was entered into between the parties. The Rule was amended in 1956 and again in 1961. In this appeal we are not concerned with the 1956 amendment but we are concerned with the Rule as it stood in 1961 and this is as follows: " "Reference" shall bear the same meaning as has been assigned to the expression by the Arbitration Act, 1940. In the case however of more than the same parties which arise under separate contracts, there shall be a separate reference in respect of each contract."

17. It seems, however, that the Rule referred to and relied upon by the Court below was in fact the Rule as it stood amended in 1961, though the Appellant had set out in the petition, the Rule as it stood in 1956. We were told by counsel for the Appellant that the amended Rule of 1961, which governed the contract between the parties, was made over to the learned Judge, who accordingly relied upon and referred to the same in his judgment. In any event, to our mind, the omission on the part of the Appellant to set out the 1961 Rule in the petition, is of no consequence in this appeal as the learned Judge had in fact relied upon the 1961 Rule, which admittedly governed the contract between the parties.

18. The next contention of counsel for the Appellant was directed against the finding of the Court below that having asked the Arbitrators to make an award, and having participated in the arbitration and having taken a chance of the award, the Appellant, after the award had been made against, could not turn round and ask for the award to be set aside on a ground not suggested before the Arbitrators. Mr. Sen submitted that this finding of the trial Court was based on the rule of waiver. He argued that the learned Judge proceeded on the basis that the Appellant had waived its right to object to the award, on the ground that it participated in the arbitration, and asked the Arbitrators to make an award which went against it. It was argued that there was no waiver of the Appellant's right to object to the award, as in the counter-statement filed on its behalf, the Appellant clearly stated that it was appearing in the reference under protest, and without prejudice to its contention that the Arbitrators had no jurisdiction to adjudicate upon the reference. Waiver, it was argued, was an intentional relinquishment of a known right and in this case there was no such relinquishment; on the other hand, the Appellant had distinctly raised the question of jurisdiction of the Arbitrators and contended that it was participating in the proceedings under protest. In support of the contention reliance was placed on a decision of the Supreme Court in (11) *Orient Weaving Mills (P) Ltd. Vs. The Union of India (UOI)*, . In that case it was held that an agreement for arbitration was the foundation of the Arbitrator's jurisdiction to act and where that was not in existence the proceedings must be held to be wholly without jurisdiction and such defect was not cured by the appearance of the parties in those proceedings, even if such appearance was without protest as it was settled that consent could not confer jurisdiction. We do not think that this decision is of any assistance in this appeal, as in this case the question is not one of initial and inherent lack of jurisdiction on the ground that there was no agreement at all. But the objection as to jurisdiction arose from the reference itself. Reliance was also placed on another decision of the Supreme Court in (12) *Bashesar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, for a definition of waiver.

19. While in the facts of this case we cannot hold that the Appellant waived its right to challenge the award on the ground that it participated in the arbitration proceedings and invited the Arbitrator to make an award. We are of the opinion that the rule of waiver has no application to this case. There is no dispute that there was a contract between the parties with an arbitration clause. It is also common case that a dispute had arisen between the parties and this was followed by a reference to arbitration. The question in this case is whether one reference, followed by appointment of one Tribunal and that again followed by one award is open to challenge having regard to the terms of the contract that each delivery under the contract shall be treated as a separate contract. If the Arbitrator had no jurisdiction to make one award in this case, waiver by the Appellant of its right to challenge the proceedings could not confer jurisdiction upon him to make the award. If on the other hand the failure to make more than

one reference was a procedural defect, it was a mere irregularity, and such irregularity, unless there was miscarriage of justice, does not make the award liable to be set aside on that ground.

20. On the question of waiver counsel for the Appellant referred to another decision reported in (13) 144 English Reports 207 (*Hans Ringland v. Joseph Lowndes*). In that case it was held that a party who attended before an Arbitrator under protest, cross-examined his adversary's witnesses and called witnesses on his own behalf did not thereby preclude himself from afterwards objecting that the Arbitrator was proceeding without authority. The decision again is of no assistance to the Appellant as I have said earlier that inherent lack waiver. I shall proceed to consider later if this is a case of irregularity arising from failure to make more than one reference and more than on award, or if it is a case of inherent lack of jurisdiction.

21. The Appellant's grievance before the trial Court, and also in this appeal, was that the four deliveries under the contract should have been held to be the subject-matter of four distinct and separate contracts, each containing an arbitration clause. Secondly, and on the basis that there were four distinct contracts, it was contended that there should have been four distinct references, in which four Tribunals were to be appointed, and four awards made. But as only one reference was made, and one tribunal was appointed, who made only one award, this award was challenged on the ground of lack of jurisdiction and misconduct in proceedings. The contract between the parties is headed: "Transferable Specific Delivery Contract for Jute Goods" and Clause 6 of the contract is as follows: "The foregoing terms and conditions as well as other terms and conditions applicable to this contract are as per the terms and conditions of the Transferable Specific Delivery Contracts of the East India Jute and Hessian Exchange Ltd., Calcutta, in jute goods for the time being in force".

22. It is thus plain that the contract between the parties incorporated the terms of the standard form of Transferable Specific Delivery Contract of the East India Jute and Hessian Exchange Limited. Clause 16 of this contract runs as follows: "All matters, questions, disputes, differences and/or claims arising out of and/or concerning and/or in connection and/or in consequence of or relating to the T.S.D. Contracts, including the validity thereof whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed shall be referred to arbitration, as provided for in these Bye-Laws".

23. The arbitration clause is in the widest possible terms, and embraces within the ambit all disputes and differences arising out of or concerning or relating to the contract between the parties. One of such disputes, as set out in the counter-statement filed by the Appellant before the Tribunal, was that the Arbitrator had no jurisdiction, as under the terms of the contract each delivery was to be treated as a distinct and separate contract, and the claim of the seller was in

respect of more than one delivery. Thus the jurisdiction of the Arbitrators was challenged on the ground that there were four contracts between the parties and instead of four references only one reference was made. Quite plainly the disputes raised on the question of jurisdiction was within the scope of the arbitration clause, and the Tribunal of arbitration had ample jurisdiction under the agreement between the parties to adjudicate upon the question of jurisdiction, based, as it was, on the ground that one reference only was made although four such should have been made in respect of four different contracts. It was plainly for the tribunal to decide if this contention of the Appellant was to be upheld or rejected. The Appellant raised the contention and submitted before the Arbitrators that the Respondent's reference should be rejected. The tribunal of arbitration rejected the Appellant's contention and made an award in favour of the Respondent. In our view having regard to the terms of the contract between the parties, there can be no doubt that the questions raised by the Appellant before the trial Court has also before us, was entirely within the jurisdiction of the tribunal of arbitration. There is no dispute with regard to the terms of the contract, and it was at no stage contended by the Appellant that the arbitration clause in the standard form of Transferable Specific Delivery Contracts was not part of the contract between the parties. There is hardly any substance in the Appellant's contention that the Arbitrator had no jurisdiction to adjudicate upon the dispute raised by the Appellant on the question of jurisdiction of the Arbitrators.

24. Turning now to another question which seems to us to be considerable significance in the facts of this case. A counter-claim had been made by the Appellant against the Respondent, although it has not been described as such, in the counter-statement filed on behalf of the Appellant before the Tribunal of Arbitration. In paragraph 20 of this counter-statement it is alleged that a sum of Rs. 66,511.98 is payable by the Respondent to the Appellant, and in paragraph 28 it is submitted that the Respondent's claim should be dismissed and an award made in favour of the Appellant for the said sum of Rs. 66,511.98 and interest thereon and costs. Thus the Appellant not only contested the claim of the Respondent, but went very much further and asked for an award in the sum of Rs. 66,511.98 in its favour. It is significant that the Appellant did not itself apply to the Bengal Chamber for appointment of Arbitrators to adjudicate upon its claim, arising out of what it claimed to be four different contracts. Instead of doing that it preferred to make one claim in its counter-statement in respect of all the four deliveries which according to it formed the basis of four different contracts, with respect to each of which it was contended, a separate reference should have been made by the Respondent. The claim made by the Appellant for an award in its favour in respect of all the disputes arising out of the contract, is an unequivocal indication that it accepted the Tribunal of Arbitration as a validly appointed forum, clothed with the jurisdiction to adjudicate upon the disputes arising out of the contract. It adopted the arbitration proceedings, commenced on the reference made by the Appellant, as a forum for agitating its own claim,

and not merely for resisting the claim of the Respondent. It would have been one thing if the Appellant merely appeared under protest to resist the Respondent's claim. It could then have been contended by the Appellant that it appeared under protest to resist the Respondent's claim, as it had no other option in the matter. But since the Appellant chose to advance its own claim in the same reference, and before the same Tribunal of Arbitration, is it open to the Appellant now to contend, because its own claim has been rejected by the arbitrator and the Respondent's claim has been made in its favour, that the Arbitrator had no jurisdiction to make the award? I think not. There can be no doubt that if the Appellant's contention was accepted by the Arbitrator, and an award made in its favour as claimed by it, it would not have thought of making, and indeed it could not have made an application for setting aside the award, on the ground it has now chosen to advance for setting aside the award. The Appellant in our view cannot be allowed to accept and adopt the proceedings as valid and lawful for one purpose, and then repudiate the same, and challenge the award for another purpose on the ground of want of jurisdiction and misconduct in the proceedings, only because the Arbitrator had held against it. It is clear to us that for the purpose of resisting the Respondent's claim, it was by no means necessary for the Appellant to advance a counter claim in the same proceedings and to pursue and press the same to the end.

25. This is not a case of inherent lack of jurisdiction of the Arbitrator. Nor is it a case where the award is challenged on the ground that the constitution of the Court is illegal. It is true that in the counter-settlement filed by the Appellant before the Arbitrator it is alleged that the Arbitrator had no jurisdiction to adjudicate upon the reference. But this challenge to the jurisdiction of the Arbitrator was confined to and based on its contention, that each delivery under the contract was to be treated as a distinct and separate contract, and the claim of the Respondent was in respect of more than one delivery. It is clear what the Appellant complained of was and what is still now complains of is, that a reference should have been made and a Tribunal appointed in respect of the breach arising out of each delivery. The defect in the arbitration as alleged is therefore not that there was inherent lack of jurisdiction. It is now well settled that the complaint of the Appellant, such as it is, is an irregularity and if such irregularity has not resulted in miscarriage of justice, the award will not be set aside. It is not possible to hold in the facts of this case that there has been any miscarriage of justice.

26. What I have said above is enough to dispose of this appeal. But since Mr. R. C. Deb counsel for the Respondent canvassed several other points before us, I shall now proceed to deal with the same. But before doing so I should refer to a few other decisions relied upon by counsel for the Appellant in support of his contentions.

27. In support of the contention that the question of jurisdiction of the Tribunal was not a matter for the Tribunal to decide but it was a matter for the Court

reliance was placed on a decision of the Supreme Court reported in (14) Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others, . Reliance was placed on another decision of the Supreme Court reported in (15) Khardah Company Ltd. Vs. Raymon and Co. (India) Private Ltd., for the proposition that in construing a contract it would be legitimate to take into account surrounding circumstances and that if on a reading of the written agreement as a whole, it can be deduced from the words actually used therein that the parties had agreed on a particular term, there was nothing in law which prevented them from setting up that term.

28. The next case relied upon is reported in (16) (1954) 1 QBD 8 in which it was held that where the jurisdiction of the Arbitrator was challenged, he was entitled to make his own inquiries whether he had jurisdiction or not and that the award was in no way affected by the fact that it expressly or impliedly referred to a finding by the Arbitrators to his jurisdiction. None of these decisions have any bearing whatsoever on the questions with which we are concerned in this appeal.

29. It was contended by Mr. Deb that the clause in the contract that each delivery was to be treated as a separate contract did not have the effect of dividing the contract into a number of separate contracts. It was argued that the clause that each delivery was to be treated as a separate contract, was a subsidiary clause, which controlled the performance of the contract, and that such a clause did not have the effect of bringing into existence four separate independent contracts, each having an arbitration clause. In support of this contention reliance was placed on the comments in the Sale of Goods by Schmitthoff 2nd. Ed. P. 130. Reliance was also placed on a decision of the House of Lords (17) (Ross T. Smyth and I Ltd. v. T. D. Vailey Son and I 1940(3) AER 60). In that case with regard to a similar provision for separate contract in respect of each delivery Lord Right observed at p. 73 of the Report: "There is still only one contract and one contract quantity, though, for certain purposes in the way of performance particular instalment or shipment and parcels may be treated in separation from the others".

Reliance was also placed on this question on (18) Berk and I v. Day and White (1896) 13 TLR 475. It seems to us there is good deal of force in this contention of counsel for the Respondent. The provision in the contract that each delivery was to be treated as a distinct and separate contract, to our mind indicated subsidiary purpose such as delivery, inspection, shipping instructions and similar other acts connected with the performance of the contract. That provision did not have the effect of bringing into existence four independent contracts each containing an arbitration clause, so as to require four separate references, in the event of disputes arising between the parties.

30. The next contention of Mr. Deb was based on a decision of this Court reported in (19) ILR 39 Cal. 669. In that case there was a difference to The Bengal Chamber who appointed two Arbitrators. Under the relevant rule The Registrar of The Bengal Chamber was to nominate both the Arbitrators and

Umpire was to be appointed by the Arbitrators before they entered upon the reference. But the Arbitrators in that case failed to appoint an Umpire, and though both the Arbitrators agreed as to the award, it was challenged on the ground of breach of the rule which required the Arbitrators to appoint an Umpire. It was held that the Court would not on technical grounds set aside an award of a tribunal selected by the parties themselves, particularly when both the Arbitrators nominated by the parties, agreed to the award and therefore there was no necessity for the intervention of an Umpire. We do not think that this decision has any application to the facts of this case; nor can we subscribe to the very broad proposition laid down in that decision. The observations that an award should not be set aside on technical grounds must be taken to be confined to the facts of that case. Where both the Arbitrators had agreed to the award, there can be no need for an Umpire to interfere. Breach of the rules of The Bengal Chamber may in some cases, have the effect of making an award void. But it is not necessary for us to embark upon an examination of the effect of breach of the various rules of arbitration of The Bengal Chamber of Commerce. It is enough for us to say that in the facts of this case there was no breach of the Rule 1(5) in making one reference and constituting one Court of Arbitrator. On the same question reliance was placed by counsel for the Respondent on a decision of this Court reported in 98 CLJ 73. In that case also there was failure to appoint an Umpire and the award was challenged on that ground. It was held that the party who failed to follow the procedure permitted by the statute to remedy the breach and stood by while the award was made could not put forward non-appointment of an Umpire as a ground for setting aside the award. We do not think that this decision throws any light on the question with which we are concerned in this appeal.

31. The next decision relied upon by Mr. Deb was an unreported Bench decision of this Court in Appeal from Original Order No. 64 of 1964 (2) *Bharat Handicrafts Ltd. v. Standard brands Ltd.* Questions raised on behalf of the Appellant in this appeal namely that each delivery under the contract was to be treated as a separate contract and a reference should have been made with regard to each contract and separate Courts appointed and separate awards made on each dispute, were also raised in that case. In that case also the contract contained a clause: "Each delivery under this contract shall be treated as a distinct and separate contract".

On the basis of this provision, the award was attacked on the ground that the Arbitrator could not treat three different deliveries together and treat the whole question in a single reference and make a single award and further that since the Arbitrator had done so, he had misconducted the proceedings. The Division Bench relying upon the observations of Bachaath J. in (3) *J. Agarwalla and Sons Ltd. v. Kanoria General Dealers Ltd.* 59 CWN 715 (Supra) and also the decision of the Supreme Court in the appeal arising out of that case, rejected the contention of the Appellant and upheld the award, through it was made on a single reference and only one Tribunal was constituted by The Bengal Chamber of

Commerce and Industries. The last decision relied on by Counsel for the Respondent was an unreported decision of the Supreme Court in Civil Appeal No. 786 of 1957 (21) J. Agarwalla and Sons Ltd. v. Kanoria General Dealers Ltd. (supra). I have already referred to the facts of this case while dealing with the judgment of Bachawat J. reported in (3) 59 CWN 715. In that case also a counter-claim was made and the Supreme Court observed that the Appellant was quite satisfied with the constitution of the Court and had actually made a combined counter-claim of Rs. 40,000/-. On the question of making two references it was held that all that was required to be done even according to the Appellant was that there had to be two letters like the one which the Registrar had already written communicating the appointment of a Tribunal, each of such letter to give a separate case number referring to one of the two contracts. It was held that this was wholly unnecessary and failure to issue two letters could not affect the jurisdiction of the Arbitrators.

32. In our view having regard to the decisions of the Supreme Court and the Division Bench of this Court mentioned above, the Appellant's contention that the award was bad because there was one reference followed by the appointment of one Tribunal, and one award, cannot be upheld and must be rejected. We are of the opinion that in the facts of this case there has been no breach of the Rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce and Industry. We are also of the opinion that even assuming that a breach of those Rules have occurred, such a breach is only an irregularity, which not having resulted in any miscarriage of justice, does not make the award invalid and liable to be set aside on that ground.

33. The arbitration clause in this case is wide enough to embrace within its scope, the question of jurisdiction raised by the Appellant before the Arbitrator. The Arbitrator in making an award in favour of the Respondent and rejecting the Appellant's claim had adjudicated upon the question of jurisdiction. Furthermore the Appellant in advancing its claim and pressing the same before the Arbitrator accepted that tribunal as a properly constituted tribunal, clothed with the jurisdiction to adjudicate upon all the disputes between the parties. The Appellant asked for an award in its favour and that was denied. In these facts and for the reasons mentioned above this appeal must fail and is accordingly dismissed with costs.

S.K. Mukherjea, J.

34. I agree.