
(1912) 02 CAL CK 0033
In the Calcutta High Court

The Bombay Company Ltd.

APPELLANT

Vs

The National Jute Mills Co. Ltd.

RESPONDENT

Date of Decision : 13-02-1912

Acts Referred:

Arbitration Act, 1940 — Section 15
Stamp Act, 1899 — Section 36

Citation : (1912) ILR (Cal) 669

Hon'ble Judges : Chitty, J

Bench : Single Bench

Judgement

Chitty, J.—This is a petition by the Bombay Company, Limited, that an award made in their favour under the rules of the Bengal Chamber of Commerce relating to arbitrations may be filed in Court u/s 15 of the Indian Arbitration Act (IX of 1899). The application is opposed by the National Jute Mills Company, Limited, who were the other party to the arbitration proceedings. There is no dispute as to the facts. By a contract, dated 1st December 1910, the Bombay Company agreed to buy from the National, Jute Mills Company 15,000 A twill bags of National Mills, standard make, in 50 bales of 300 pieces each. The goods were for export to South Africa. They were duly shipped and taken to Delagoa Bay. Some of the bales (the petitioners allege) were despatched to various places in South Africa, while other bales remained unsold at Delagoa Bay. It is said that all the bales were in bad condition, and, though externally perfect, the contents were rotten and unmerchantable. Seven bales were returned to Calcutta. The Bombay company made a claim on the National Jute Mills company which they declined to pay. The Bombay company claimed an arbitration. Two arbitrators were appointed by the Registration under the rules, who on 31st August 1911 made the award now before the Court. The National Jute Mills Company refused to accept that award, and have in this Court raised certain objections as to its legality. I cannot, of course, go into the merits of the case; but before going into the objections raised, I should dispose of one point raised by the petitioners' Counsel. It is stated in the petition, and it is the fact, that the arbitrators ordered

the National Jute Mills Company to take back the seven bales returned to Calcutta, and they were taken back. It is argued that this amounted to an acceptance of the award by the National Jute Mills Company. That is a question of intention, and I may say at once that the National Jute Mills Company never intended thereby to accept the award," nor did the Bombay Company consider that they had done so. If they did, it must surely have been mentioned in the petition. The National Jute Mills Company were throughout, from the date of the award, objecting to it.

2. The legal objections raised in this Court are these: It is said (i) that the submission to arbitration not bearing an agreement stamp of eight annas, the submission was invalid, and the arbitrators had no jurisdiction to enter upon the reference; (ii) that the constitution of the Court, by the nomination not only of two arbitrators but also of an Umpire, was necessary before the arbitrators could legally adjudicate between the parties; in other words the appointment of an Umpire was a condition precedent to the arbitrators entering upon the reference, and (iii) that the names of the arbitrators not being disclosed, there was no opportunity given to the parties to apply for permission to appear before them under Rule VI (g); that no time and place of hearing was fixed; and that the written statement was called for before the Tribunal was constituted; and that these things amounted to legal misconduct on the part of the arbitrators. Reliance has been placed by the opposite party on two cases decided by this Court: *Hurdwary Mull v. Ahmed Musaji Selaji* (1908) 13 C.W.N. 63 and *Chooni Lal v. Madhoram* ILR(1908) Calc. 388. If those decisions be accepted as correct, they dispose of the present petitioners case. But as they are the decisions of a single Judge of co-ordinate powers, while according to them all due weight and respect, I am not debarred from arriving at, and expressing my own conclusions. Indeed, I am bound to do so.

3. First, with regard to the question of stamp, the same objection was taken in *Hurdwary Mull's Case* (1908) 13 .W.N. 63, and the learned Judge stated that he saw no way out of the difficulty; but if it were the only objection, he thought that the Court could remit the matter to the arbitrators. Now the contract in this case, as in that, is comprised in bought and sold notes, each signed by the brokers and stamped under Article 43 of Schedule I to the Stamp Act with a stamp of two annas. This contract contains a number of printed Clauses or conditions, the last of which (Clause 12) constitutes the submission to arbitration. The petitioners' Counsel made some attempt to argue that the real contract to refer was contained in the subsequent letters of the parties, with a view to applying the ruling of the Bombay High Court in the case of *Gangaram Kushaba Rangole v. Narayan Babaji Rangole* ILR(1893) 19 Bom. 32 but this was clearly not the case. In my opinion however the agreement to refer any dispute whatever arising out of the contract to arbitration is a part of the contract itself, and not a "distinct matter" within the meaning of Section 5 of the Stamp Act. If this be so, the whole contract clearly falls under the exemption Clause (a) to Article 5, as being an agreement or memorandum of agreement for or relating to

the sale of goods or merchandise exclusively. The only exception to that exemption is where the contract is also a y note or memorandum chargeable under Article 43. This contract is contained in such notes or memoranda, and these are duly stamped. This view of the matter does not appear to have been before the mind of the learned Judge in Hurdwary Mull's Case (1908) 13 C.W.N. 63, but it is the view taken by the Madras High Court: see *Kyd v. Mahomed* ILR(1891) 15 Mad. 150. I may say that in the many hundreds of similar contracts which have come before the Courts I have never seen one that bore a stamp of 8 annas as "a submission," nor have I ever till now heard it suggested that it was so chargeable. I hold, therefore, that the documents together making the contract were not chargeable with duty otherwise than as broker's notes.

4. If they were so chargeable, I am of opinion that Section 36 of the Stamp Act would prevent the objection from being taken at this stage. These documents were admitted and acted upon by the arbitrators, and that admission cannot now be called in question except u/s 61. It was argued by Counsel for the opposite party that this was not a part of "the same proceeding," but I think it may be said to be so, bearing an analogy to an application for execution of a decree. The sections of the Arbitration Act lead on by natural sequence from the submission referred to in Section 5 to the filing of the award in Section 15.

5. The next question is as to the appointment of the umpire being a condition precedent to the arbitrators entering upon the reference. I agree with the view expressed in *Chooni Lal's Case* ILR(1908) Calc. 388 : 13 W.N. 297 that, grammatically speaking, Rule VI requires the Registrar upon the receipt of the application of either party to proceed to constitute a Court consisting of two or more arbitrators, and also, in the case of need, an Umpire to adjudicate on the dispute; and I further agree that the words "in case of need" probably refer to cases where an Umpire may be necessary, i.e., in cases where any even number of arbitrators are nominated, although this is not absolutely clear. On the other hand, the fact that by Rule VI(m) the arbitrators may signify to the Registrar or to the Umpire that they cannot agree, seems to point to the possibility of their being no Umpire at that stage, or to his name not being disclosed to the arbitrators.

6. The necessity which usually arises for arbitrators to nominate an Umpire to adjudicate in the event of their disagreement before entering upon the reference does not exist in arbitrations under the Bengal Chamber of Commerce rules. Ordinarily it would be difficult, if not impossible, for arbitrators nominated by the parties themselves, who have disagreed on the matters referred, to agree upon a person whose umpirage they could accept. This is why the condition of nomination before entering on the reference is so frequently inserted in agreements to refer. In arbitrations under these rules it is the Registrar who nominates both arbitrators and Umpire, and generally acts as go between the Tribunal on the one side and the parties on the other. It may be noted that by Provision II of Schedule I to the Arbitration Act two arbitrators may appoint an

Umpire at any time within, the period during which they have power to make an award. By Rule VI(q) the Act, so far as its provisions are not inconsistent with the rules, applies to all References to the Tribunal. It must be clear, therefore, that the rules strictly require the Umpire to be dominated before the arbitrators enter upon the reference. They certainly do not do so in such clear and unmistakeable terms as appear in the case of *Bright v. Durnell* (1836) 4 Dowl. 745 and that in my opinion is sufficient to distinguish that case from the present. The case of *Bates v. Townley* (1847) 1 Exch. 572 does not appear to have any direct bearing on the present question. There the reference was not to two arbitrators, who were to appoint an Umpire, but to three arbitrators, one chosen by either party, and a third to be chosen by the other two. Obviously the reference could not proceed until the third arbitrator was chosen and the Tribunal was thus complete. The answer, however, to the objection seems to me to be found in Rule VI(o). The Court will, I take it, be averse to setting aside, or pronouncing as illegal, the proceedings of a Tribunal selected by the parties themselves. It certainly should not do so on technical grounds. Here it is conceded that the arbitrators have agreed upon their award. There has therefore been no necessity for the intervention of an Umpire. If one had been nominated, the parties would be in the same position. No further reference could have been made by either side to obtain the Umpire's opinion, or to question the correctness of the arbitrators' award. It may be said, as was said in *Hurdway Mull's Case* (1908) 13 C.W.N. 63 that this is not all application to set aside the award. That is true, but Rule VI(o) does not refer to formal applications made in this Court, but deals in plain English with the attempts of dissatisfied parties to avoid their obligations under the award of the Tribunal. It says: "No award shall be set aside or varied or attempted to be set aside or varied by reason or on account of any informality, omission, or delay or error of the proceedings in or about the same or in relation there to, or on any other grounds, or for any misconduct short of collusion or fraud on the part of the arbitrators." This appears to me to be an informality or omission which ought not to be allowed, to vitiate the proceedings.

7. The third objection also appears to me to be untenable. The fact that the names of the arbitrators were not disclosed to the parties is a state of things contemplated by the rules--See Rule X "The names of the arbitrators shall not ordinarily be disclosed and such non-disclosure shall not affect the award." Rule VI(g) does not in my opinion provide that parties may with the express permission of the arbitrators appear before them; but the converse, namely, that they shall not without the express permission of the arbitrators be entitled to appear. The distinction is important. The arbitrators may if they please invite or permit the parties to appear, but the invitation or permission must come from them; the parties are not entitled to appear or even to ask for such permission. So in the next sentence the parties shall not insist or require the arbitrators to hear or receive evidence. The word "hearing" in Rule IV and Rule VI(f) does not mean more than the consideration by the arbitrators of the matters referred.

Notice has to be given by the Registrar to the parties so that they may be able to submit their written statements in time. This was done in the present case. On 15th August 1911, the Registrar called upon the National Jute Mills Company to submit their statement. This was complied with by the managing agents, Messrs. Andrew Yule and Company, by their letter of 21st August. On 22nd August the Registrar sent them the statement and papers submitted by the Bombay Company for any further remarks they might have to make. These were returned the same day without comment. The present complaint of the National Jute Mills Company that they were not heard upon the reference, appears to me to be without foundation. It is immaterial that the Registrar called upon the parties for their statements before the arbitrators were nominated, or at least had consented to act. It was always open to the arbitrators to require the parties to supply further information, written or verbal. For these reasons I am of opinion that the petitioners are entitled to the order prayed for, and the award must be filed. The National Jute Mills Company must pay to the Bombay Company their costs of this application.