## APPEAL FROM ORIGINAL CIVIL.

*Before Mookerjee and Fletcher JJ.*

1920

Feb. 17.

KEDARNATH BABULAL

*v.*

SUMPATRAM DOOGUR.*

*Arbitration—Motion to stay proceedings—Submission—Jurisdiction of Court—Discretion of primary Court—Interference of Court of appeal—Arbitration Act (IX of 1899) s. 19.*

Before the jurisdiction of the Court to make an order for stay under section 19 of the Indian Arbitration Act can be invoked, it must be established beyond all doubt that there is a valid submission.

Where there is a submission, before an order can be made the Court must be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration. This is manifestly a matter largely in the discretion of the Court, which, no doubt, must be judicially exercised. But when the discretion has been exercised by the primary Court, a strong case must be made out to justify the interference of a Court of appeal.

*Freeman & Sons* v. *Chester Rural District Council* (1), *Vawdrey* v. *Simpson* (2) and *Barnes* v. *Youngs* (3) referred to.

APPEAL by Kedarnath Babulal, the petitioners, from the judgment of Mr. Justice Greaves.

By a contract dated the 8th August, 1918, the firm of Sumpatram Doogur sold to the firm of Kedarnath Babulal 50 bales of Japanese grey shirting and sheeting on the same terms and conditions as those under which the said goods had been purchased from the importers, the Japan Cotton Trading Co., Ld., that is

* Appeal from Original Civil No. 94 of 1919 in Suit No. 1868 of 1919.

(1) [1911] 1 K. B. 783. (2) [1896] 1 Ch. 166.

(3) [1898] 1 Ch. 414.

to say, with the exception of the terms relating to discount and coolie charges, which were to be according to the custom of the market, all the other terms and conditions were to be according to the importing firm's contract. The contract of the Japan Cotton Trading Co., Ld., contained, *inter alia*, a clause for arbitration which was as follows :—

"Any dispute as to damage, difference, inferiority, short quantity or measure or defect or amount of allowance to be referred to at the seller's option, to the Bengal Chamber of Commerce or to two European or Japanese merchants or European or Japanese Assistants in Mercantile firms, one to be named by each party, if either party shall fail to nominate an arbitrator within 3 days after being required to do so, the other party shall be at liberty to appoint both arbitrators or to refer to the Bengal Chamber of Commerce at his discretion."

Disputes and differences having arisen between Sumpatram Doogur and Kedarnath Babulal in respect of their contract abovementioned, the latter refused to accept delivery and on the 13th January, 1919, cancelled the said contract. Thereafter, correspondence passed between the parties. Sumpatram Doogur repeatedly refusing to submit to arbitration and reselling the goods mentioned in the contract. On the 2nd May, 1919, exception was taken by Messrs. Kedarnath Babulal to the goods being resold and on the 19th May, 1919, they submitted their case to the arbitration of the Tribunal of Arbitration of the Bengal Chamber of Commerce. On the 28th May, 1919, Sumpatram Doogur wrote to the Registrar of the Tribunal of Arbitration stating that as there was no submission by which they could be compelled to refer the matter to arbitration the Tribunal had no jurisdiction and they declined to abide by its decision. The Registrar on the 2nd June, 1919, forwarded a copy of that letter to Kedarnath Babulal. On the 13th June, 1919, Kedarnath Babulal wrote to the Registrar of the Tribunal enclosing an authenticated copy of the judgment of

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Mr. Justice Rankin of the High Court, dated the 30th May, 1919, and passed in suit No. 1833 of 1919, Japan Cotton Trading Co., Ld. *v.* Chandmull Goneshmull, as a complete and indisputable answer to the objections raised. On the 17th June, 1919, the Registrar forwarded a copy of Kedarnath Babulal's letter to Sumpatram Doogur and gave them notice to send in their statement and papers on or before the 24th June, 1919, failing which the arbitration would be proceeded with *ex parte*. On the 18th July, 1919, while the said arbitration was pending, Sumpatram Doogur filed a suit against Kedarnath Babulal for recovery of damages on the basis of the resale. On the 8th August, 1919, the defendants made an application for an order of stay of proceedings in the said suit until the abovementioned award was made and published. The application was heard and dismissed by Mr. Justice Greaves on the 20th August, 1918. The petitioners, thereupon, appealed.

*Mr. B. L. Mitter*, for the appellants.

*Mr. M. N. Bose*, for the respondents.

MOOKERJEE J. We are invited in this appeal to consider the propriety of an order made by Mr. Justice Greaves whereby he has refused an application for stay of a suit under section 19 of the Indian Arbitration Act, 1899.

On the 8th August 1918, the appellants agreed to purchase from the respondents 50 bales of Japanese grey shirting and sheeting. The material portion of the contract provided as follows: "All conditions "according to *bahar* (that is, importing firm), interest, "cooly charges, according to the custom of bazar, the "goods being of Japan Cotton Company's office." It has been argued that this implies the incorporation of an arbitration clause contained in the form of contract

used by the Japan Cotton Trading Company. That arbitration clause is in these terms:—"Any dispute as "to damage, difference, inferiority, short quantity or "measure or defect or amount of allowance to be re- "ferred, at seller's option, to the Bengal Chamber of "Commerce or two European or Japanese merchants "or European or Japanese Assistants in mercantile "firms, one to be named by each party; if either "party shall fail to nominate an arbitrator within "three days after being required to do so, the other "party shall be at liberty to appoint both arbitrators "or to refer to the Bengal Chamber of Commerce at "his discretion."

It is alleged by the appellants that the goods delivered were not in accordance with the contract and were in fact different and defective goods. They accordingly refused to accept delivery, and, on the 13th January, 1919, cancelled the contract. The respondents thereupon proceeded "to resell the goods," although exception was taken to that course by the appellants on the 2nd May, 1919. On the 19th May, 1919, the appellants referred the matter to the arbitration of the Bengal Chamber of Commerce on the assumption that the arbitration clause contained in the contract form used by the Japanese Cotton Trading Company had become incorporated in the contract between the parties. On the 28th May, 1919, the respondents sellers objected to the arbitration as without jurisdiction and, on the 18th July, 1919, they instituted a suit on the Original Side of this Court for the enforcement of their claim. On the 30th July, 1919, summonses in the suit were served upon the buyers (now appellants), with the result that on the 7th August, 1919, they made an application under section 19 of the Indian Arbitration Act for stay of the suit. This application recited the correspondence between the parties and concluded

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with the following prayer:—"That all proceedings "in the aforesaid suit No. 1868 of 1919 may be stayed "until the said Tribunal of Arbitration of the Bengal "Chamber of Commerce makes and publishes the "award after proceeding with and completing the "said arbitration now pending and that the costs of "and incidental to this application may be reserved." This application was heard by Mr. Justice Greaves. He apparently held that in view of the construction placed by him upon the contract form used by the Japanese Cotton Trading Company in the case of *Chandmull Ganeshmull* v. *Nippon Mankaru Kabusheki Kaisha* (1) the application could not be entertained.

On the present appeal, the buyers have argued that the construction placed upon the contract cannot be supported. On behalf of the sellers, no attempt has been made to support the order on the ground assigned by the learned Judge, and, in our opinion, it cannot be supported, because the facts disclosed in the correspondence make it abundantly clear that the events had not taken such a turn that the arbitration clause (assumed to have been incorporated in the contract between the parties), could be utilised by one of them and a reference made thereunder. But the respondents have contended that the order of the learned Judge may be supported on other grounds, which we now proceed to examine.

Section 19 of the Indian Arbitration Act provides as follows:

"Where any party to a submission to which this "Act applies, or any person claiming under him, com- "mences any legal proceedings against any other party "to the submission, or any person claiming under him "in respect of any matter agreed to be referred, any "party to such legal proceedings may, at any time

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"after appearance and before filing a written state-
"ment or taking any other steps in the proceedings,
"apply to the Court to stay the proceedings; and
"the Court, if satisfied that there is no sufficient
"reason why the matter should not be referred in
"accordance with the submission and that the appli-
"cant was, at the time when the proceedings were com-
"menced, and still remains, ready and willing to do all
"things necessary to the proper conduct of the arbi-
"tration, may make an order staying the proceedings."

The term "submission" is defined in clause (*b*) of section 4 to mean a written agreement to submit present or future differences, to arbitration, whether the arbitrator is named therein or not. It is plain that before the jurisdiction of the Court to make an order for stay under section 19 can be invoked, it must be established beyond doubt that there is a valid submission. This is by no means clear in the case before us, for, it is at least doubtful whether the arbitration clause in the Japanese contract form was or was not incorporated, by reference, as a condition in the contract between the parties. But, let us assume that there was a submission; before an order can be made, the Court must be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. This is manifestly a matter largely in the discretion of the Court, which, no doubt, must be judicially exercised. But when the discretion has been exercised by the primary Court, a strong case must be made out to justify the interference of a Court of Appeal. In this connection, reference may usefully be made to the observations of Buckley L. J.

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in *Freeman & Sons* v. *Chester Rural District Council* (1): "Section 4 of the Arbitration Act, 1889," (which corresponds to section 19 of the Indian Arbitration Act), "gives a discretion, and that in two ways "namely, (*i*) the words are permissive, not imperative, "for the verb is 'may make', not 'shall make', and "(*ii*) the jurisdiction to stay the proceedings arises if "the Court is 'satisfied that there is no sufficient "'reason why the matter should not be referred in "'accordance with the submission.'" The fact that one member of a Court is of opinion that the matter should not be referred to arbitration is sufficient to enable another member to concur, though the latter is satisfied that there is no sufficient reason why the matter should not be referred and if it had rested with himself alone, would have directed a stay. [*See* also *Vawdrey* v. *Simpson* (2), *Barnes* v. *Youngs* (3)]. In the case before us, there is not only a substantial dispute as to whether the contract between the parties includes an arbitration clause, there are abundant indications that the appellants initiated the arbitration proceedings in contravention of the term of the alleged arbitration clause. The first choice rested with the respondents sellers, who were not afforded an opportunity to exercise the option. This clearly does not show a readiness and willingness on the part of the appellants to do all things necessary to the proper conduct of the arbitration.

In this view the order of Mr. Justice Greaves must be confirmed and this appeal dismissed with costs.

FLETCHER J. I agree.

O. M. *Appeal dismissed.*

Attorney for the appellants: *Priya Nath Sen.*

Attorneys for the respondents: *G. C. Chunder & Co.*

(1) [1911] 1 K. B. 783, 791. (2) [1896] 1 Ch. 166, 169.

(3) [1898] 1 Ch. 414, 417.