APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee and Fletcher JJ.

UDAICHAND PANNA LALL

v.

DEBIBUX JEWANRAM.*

1920
Feb. 16.

Arbitration—Agreement to refer to—Award made ex parte—*Notice of arbitrator's intention to proceed* ex parte—*Non-appearance of party—Validity of award—Filing of award—Arbitration Act* (*IX of 1899*), *ss. 11* (*2*) *and 15* (*1*).

Sub-section (*2*) of section 11 read with sub-section (*1*) of section 15 shows that the moment an award has been filed in Court by the arbitrator, it becomes enforceable as if it were a decree of the Court, even before the arbitrator has notified to the parties the fact of its filing under section 11 (*2*).

Baijnath v. *Ahmed Musaji Saleji* (1), referred to.

There is no statutory rule that if an arbitrator proceeds *ex parte* without giving notice of his intention to proceed in that manner, the award made by him must be set aside. In the absence of such a procedure, it is advisable, only as a rule of prudence and convenience, to give notice in writing to each of the parties or their solicitors, and the notice should express the arbitrator's intention clearly, otherwise the award may be set aside.

Where an arbitrator has proceeded *ex parte* without giving notice of his intention to proceed in that manner, the true test is, has the complainant who takes exception to the validity of the award been in fact prejudiced by the omission of the arbitrator to serve the special notice on him. If it is established that notwithstanding such warning he would not have appeared before the arbitrator, he has really no grievance and cannot invite the Court to set aside the award on account of the alleged defect in procedure.

Gladwin v. *Chilcote* (2), *Waller* v. *King* (3), *Wood* v. *Leake* (4), *In the matter of Hall* v. *Anderson* (5) and *Scott* v. *Van Sandau* (6) referred to.

* Appeal from Original Civil, No. 85 of 1919.

(1) (1912) I. L. R. 40 Calc. 219.
(2) (1841) 9 Dowl. 550.
(3) (1724) 9 Mod. 63.
(4) (1806) 12 Ves. 412.
(5) (1840) 8 Dowl. 326.
(6) (1844) 6 Q. B. 237.

1920

UDAICHAND PANNA LALL v. DEBIBUX JEWANRAM.

APPEAL by Udaichand Panna Lall, the petitioner, from the judgment of Greaves J.

On the 22nd October, 1918, Messrs. Udaichand Panna Lall, a firm of piece-goods merchants and bankers, agreed to sell to Messrs. Debibux Jewanram, also a firm of piece-goods merchants, 100 tons of up-country small grain linseed, delivery to be given within April and May, 1919. The contract was in writing and contained, *inter alia*, a clause for arbitration, whereunder any dispute arising out of the contract was to be finally settled by two European arbitrators appointed, one by the buyers and the other by the sellers, and in case of a difference of opinion between them the dispute would be referred to an umpire. Prior to the date of the contract the Government of India in order to regulate the use and supply of wagons for the carriage of commodities including linseed from up-country to Calcutta had appointed a Controller, who, under the rules made by the Government for this purpose was to issue priority certificates only to shippers of such commodities for the purpose of being exported to such ports as the Government permitted. In consequence of the failure of the sellers to deliver the requisite amount of linseed in terms of the contract the purchasers alleged that they had sustained a loss of Rs. 16,879-8 being the difference between the contract and market rates. On the 2nd June, 1919, they wrote to the sellers claiming the amount of their loss and in case the sellers disputed the amount of the claim, they nominated one Mr. Appollonato of Messrs. E. D. Sassoon & Co. as arbitrator and requested the sellers to nominate another arbitrator on their behalf and on failing to do so within 7 days they informed the sellers that Mr. Appollonato would proceed with the arbitration *ex parte*. In reply to this the sellers wrote stating that owing to the

Government control of linseed the contract was impossible and void from the beginning. Thereafter, on the 16th June, 1919, Mr. Appollonato wrote to the sellers giving them notice of the arbitration to be held by him on the 25th June, 1919, and asking them to send in their written statement before that date and to be present at the arbitration with their witnesses and documents. On the 25th June, 1919, the sellers' attorney wrote in reply to the arbitrator submitting the facts of his clients' case and questioning the jurisdiction of the arbitrator to deal with the matter. The arbitrator, however, proceeded with the arbitration and made an award of the amount claimed in favour of the purchasers The award was subsequently filed in Court by the arbitrator without notice to the sellers. On the 5th July, 1919, the sellers in execution of the award against them paid the amount claimed together with costs to the Sheriff's officer. On the 7th July, 1919, the sellers' attorney wrote to the Registrar, Original Side, giving notice that his clients would take legal steps to have the award set aside and requesting that the amount paid by his clients to the Sheriff's officer be not paid out of Court without notice to his clients. On the 21st July, 1919, the sellers filed their petition for a declaration that the award was void and inoperative and for an order that the amount paid by the sellers to the Sheriff's officer be refunded, and further that the purchasers be restrained by an injunction from withdrawing the said amount. In their petition the sellers alleged as follows:—that when the contract was entered into the parties were fully aware that a Controller had been appointed by the Government of India to regulate the use and supply of wagons for the carriage of linseed and other commodities from up-country to Calcutta; that the

1920

UDAICHAND PANNA LALL v. DEBIBUX JEWANRAM.

Controller would not issue priority certificates for wagons to anyone except to shippers who would export the said commodities to such ports where export of same was permitted by the Government; that the appointment of the Controller was of a temporary nature and the parties to the contract expected that when the time for delivery of the linseed contracted for arrived under the contract, the Controller would be removed and there would be no difficulty for the supply of wagons; that both the sellers and the purchasers were non-shippers and were fully aware that unless the Controller was removed by the time the said goods became deliverable, the said contract would become impossible of performance and would in consequence thereof become void and inoperative; that contrary to the expectation of both parties the Controller was not removed when the time for the delivery of the linseed under the contract arrived and it became impossible for the sellers to deliver the linseed in question; and finally that the contracts were merely speculative and gambling transactions. The grounds upon which they relied to set aside the award were as follows:—

(*1*) That the said arbitrator having no jurisdiction to proceed with the said arbitration, the said award was a nullity and unenforceable; (*2*) that the appointment of the said arbitrator was bad inasmuch as he was not appointed the sole arbitrator; (*3*) that the said arbitrator was a person who was unfit to become the sole arbitrator and his award was vitiated with partiality, (*4*) that the said arbitrator failed to decide the said question of jurisdiction which was one of the disputes between the parties; and (*5*) that the said award was improperly procured by the said firm of Debibux Jewanram. At the hearing of the application the sellers abandoned the grounds set out in their

petition and relied on two new grounds, *viz.*, *firstly*, that the arbitrator should not have proceeded *ex parte* without giving notice to the sellers that he was going to do so, and *secondly*, that the provisions of the Arbitration Act with regard to notice of the filing and with regard to the signing of the award, which were set out in section 11 of that Act, had not been complied with. Mr. Justice Greaves dismissed the application. The petitioners, thereupon, appealed.

The Advocate General (*Mr. T. C. P. Gibbons*, *K. C.*) (with him *Mr. H. C. Mazumdar*), for the appellants. No notice was given to the appellants that the arbitrator would proceed *ex parte* if they did not attend. One of the conditions was that such notice should be given to the sellers and they were entitled to it under the provisions of the Act. The award, therefore, could not be enforced as a decree. Had such notice been given there would have been nothing to say. The arbitrator was not in a position to declare what the appellants would have done had they received the notice. He could not, therefore, proceed without notice of his intention to do so *ex parte*. It was not open to the Court to determine whether at the time of the arbitration proceedings the appellants had or had not made up their mind to join in them. Sections 11 and 15 of the Arbitration Act referred to and *Gladwin* v. *Chilcote* (1) relied on.

Sir B. C. Mitter, for the respondents. The filing was done at the instance of the arbitrator and was enforceable as a decree of Court. The true test was whether the appellants under the circumstances of the case had been prejudiced. Looking at the facts, they never intended to appear. Section 14 of the

(1) (1841) 9 Dowl. 550.

1920

UDAICHAND PANNA LALL v. DEBIDUX JEWANRAM.

Arbitration Act relied on and Russell on Arbitration, p. 396, last edition, and *Scott* v. *Sandau* (1) referred to.

The Advocate-General, in reply. It was not the appellants' contention that the award was a nullity. What they contended was that the award in question could not be enforced as a decree of Court. If the respondents wished to take advantage of the Arbitration Act they must bring their case within the provisions of that Act. Section 15 of the Arbitration Act referred to.

MOOKERJEE J. This is an appeal from a judgment of Mr. Justice Greaves dismissing an application to set aside an award.

The contract between the parties provided for a reference to arbitration in the following terms : "Any "dispute under the contract was to be finally settled "by two European arbitrators appointed by buyers "and sellers respectively or by an umpire in case of "difference." The respondent appointed Mr. Appollonato as arbitrator and requested the appellant to nominate another arbitrator. The appellant did not respond, with the result that the arbitrator proceeded to deal with the matter in controversy. He gave notice that he would hold the arbitration on the 26th June, 1919, and requested that any written statement intended to be sent should be sent before the date, and that the parties should be present on the appointed day with witnesses and documents. It was not till the day previous, that is, the 25th June, 1919, that the appellant, through his attorney, forwarded to the arbitrator his case ; but on the date fixed there was no appearance on his behalf. The arbitrator, thereupon, made an *ex parte* award in favour of the respondent, which is now impeached on two grounds : first,

(1) (1844) 6 Q. B. 237.

that no notice that the award had been filed was given under sub-section (*2*) of section 11 of the Indian Arbitration Act, 1899, and that till such notice had been given, the award could not be enforced as a decree of Court; and secondly, that the arbitrator could not have proceeded *ex parte* without express notice given of his intention to do so. Mr. Justice Greaves has overruled these contentions; in our opinion, there is no substance in either of them.

As regards the first point, sub-section (*2*) of section 11 provides that the arbitrator shall cause the award to be filed in the Court and the notice of the filing shall be given to the parties by the arbitrator. This provision imposes a duty on the arbitrator, after the award has been filed, to give notice of the fact of filing to the parties: *Baijnath* v. *Ahmed Musaji Saleji* (1). Sub-section (*1*) of section 15 then provides that an award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to the reconsideration of the arbitrators or umpire or sets it aside) be enforceable as if it were a decree of the Court. The appellant has argued that an award which has been filed in Court but the filing of which has not been notified to the parties is not enforceable as if it were a decree of the Court. We cannot accept this contention, because we are invited, in substance, to read into sub-section (*1*) of section 15 the words "and its filing notified to the parties" after the words "filed in the Court." In our opinion, sub-section (*2*) of section 11 read with sub-section (*1*) of section 15 shows that the moment an award has been filed in the Court by the arbitrator, it becomes enforceable as if it were a decree of the Court, even before the arbitrator has notified to the parties the fact of its filing under section 11 (*2*).

(1) (1912) I. L. R. 40 Calc. 219.

1920

UDAICHAND PANNA LALL v. DEBIBUX JEWANRAM.

MOOKERJEE J.

Consequently, it is not necessary, before the award is enforced, to show that notice of the fact of filing has been given by the arbitrator to the parties concerned. The provisions of the Indian Arbitration Act in this respect are substantially different from the provisions of the English Arbitration Act, 1889, and we see no reason why we should not give effect to the plain language of section 15. We may observe that section 11 contemplates notices by the arbitrator to the parties at two stages, namely, *first*, notice of making and signing the award, and, *secondly*, notice of the filing of the award in Court. In the present case, we are concerned only with the effect of an alleged omission to give the second notice; such omission, as we have seen, does not destroy the operative character of the filed award. The first contention of the appellant accordingly fails.

As regards the second point, reliance has been placed by the appellant upon the decision in *Gladwin* v. *Chilcote* (1). That case is an authority for the proposition that in general the arbitrator is not justified in proceeding *ex parte* without giving the party absenting himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors, and the notice should express the arbitrator's intention clearly, otherwise the award may be set aside: *Waller* v. *King* (2), *Wood* v. *Leake* (3) and *In the matter of Hall* v. *Anderson* (4). There is no statutory rule, however, that if an arbitrator proceeds *ex parte* without giving notice of his intention to proceed in that manner, the award made by him must be set aside. In the absence of such an inflexible statutory provision, the procedure commended in *Gladwin* v. *Chilcote* (1) and the other cases mentioned can be

(1) (1841) 9 Dowl. 550.
(2) (1724) 9 Mod. 63.
(3) (1806) 12 Ves. 412.
(4) (1840) 8 Dowl. 326.

regarded only as a rule of prudence and convenience. As Lord Denman C. J. put it in *Scott* v. *Van Sandau* (1), the law is that if either party, after the arbitrator has given him sufficient notice and proper opportunities of attending, will not appear, the arbitrator may proceed in his absence. There is obvious good sense in the view that notice that the arbitrator will proceed with the reference on a certain day is notice that he will then proceed *ex parte* if one of the parties absents himself without sufficient reason. But, let us assume that when an award has been made *ex parte*, the absent party may *primâ facie* be deemed to have been prejudicially affected thereby; surely, it is open to his adversary to rebut that presumption. If, for instance, it is made fairly clear that notwithstanding the service of notice upon him, that in his absence the arbitration would proceed *ex parte*, he would not have entered appearance, it cannot reasonably be urged that the omission to serve such notice has invalidated the award. The appellant has contended that it is not open to the Court to take into account the subsequent conduct of the appellant, to determine whether at the time of the arbitration proceedings he had or had not made up his mind not to join in them. His argument in substance is that this could not have affected the judgment of the arbitrator, that we must limit ourselves to the facts and circumstances known to the arbitrator when he proceeded *ex parte*, and hold that his omission to intimate to the absent party that the arbitration would proceed *ex parte* is by itself sufficient to invalidate the award. We are clearly of opinion that this is not the proper test to be applied to determine the validity of the award in a case of this description. The true test is has the complainant who takes exception to the

(1) (1844) 6 Q. B 237.

1920

UDAICHAND PANNA LALL v. DEBIBUX JEWANRAM.

MOOKERJEE J.

validity of the award, been in fact prejudiced by the omission of the arbitrator to serve the special notice on him. If it is established that notwithstanding such warning, he would not have appeared before the arbitrator, he has really no grievance and cannot invite the Court to set aside the award on account of the alleged defect in procedure.

In this case, the conduct of the appellant reasonably leads to the conclusion that he was determined not to join in the arbitration proceedings. We have the fact that, notwithstanding the invitation of the respondent, he refused to appoint an arbitrator. This could hardly be attributed to abundant confidence in the gentleman selected by his opponent. But his subsequent conduct unmistakeably shows his true attitude. He disputed the competence of the arbitrator to act in that capacity on the allegation that he was not a European but an Asiatic. He submitted his case to the arbitrator, only the day before that fixed for the hearing and took no further steps. Finally, he has taken no steps to contradict the allegation contained in an affidavit filed on behalf of his adversary, where it is asserted in the plainest possible terms that he never intended to join in the arbitration. In these circumstances, we must hold that he has not been prejudiced by the omission of the arbitrator to notify that the proceedings would be held *ex parte*, and, that the award cannot be impeached on that ground.

The result is that this appeal is dismissed with costs, and the stay order vacated.

FLETCHER J. I agree.

O. M. *Appeal dismissed.*

Attorney for the appellants: *P. N Sen.*

Attorneys for the respondents: *Khaitan & Co.*