APPEAL FROM ORIGINAL CIVIL

Before Mookerjee and Fletcher JJ.

1920

March 9.

JOKIRAM KAYA

v.

GHANESHAMDAS KEDARNATH.*

Arbitration—Subsequent institution of suit—Position of arbitrators—Award—Stay of suit—Arbitration Act (IX of 1899), s. 19—Appeal—Discretionary order.

One of the parties to an arbitration to the Bengal Chamber of Commerce under a clause in a contract, instituted a suit, pending the arbitration, on the same contract. After the institution of the suit an award was made but was set aside. Subsequently the defendant made an application for stay of the suit :

Held, that the institution of the suit, though it made the arbitrators *functii officio*, could not affect the validity of the reference, which, when made, was in exact conformity with the agreement between the parties ; and that portion of the arbitration proceedings which took place before the institution of the suit was not affected.

Held, further, that when the suit is stayed it would be competent to the Chamber of Commerce to substitute and appoint new arbitrators and the Court so re-constituted will then be able to proceed with the arbitration.

Doleman & Sons v. *Ossett Corporation* (1), *Dinabandhu Jana* v. *Durga Prasad Jana* (2), *Freeman* v. *Chester Rural District Council* (3), *Vawdrey* v. *Simpson* (4), *Barnes* v. *Youngs* (5), *Willesford* v. *Watson* (6), *Law* v. *Garrett* (7), *Lyon* v. *Johnson* (8), *Clegg* v. *Clegg* (9), *Kitchen* v. *Turnbull* (10), *Mason* v. *Haddan* (11), *Hodgson* v. *Railway Passengers' Assurance*

* Appeal from Original Civil, No. 7 of 1920, in Suit No. 2067 of 1919.

(1) [1912] 3 K. B. 257.
(2) (1919) I. L. R. 46 Calc. 1041.
(3) [1911] 1 K. B. 783.
(4) [1896] 1 Ch. 166.
(5) [1898] 1 Ch. 414.
(6) (1873) L. R. 8 Ch. App. 473.
(7) (1878) 8 Ch. D. 26.
(8) (1889) 40 Ch. D. 579.
(9) (1890) 44 Ch. D. 200.
(10) (1871) 20 W. R. (Eng.) 253.
(11) (1859) 6 C. B. N. S. 526.

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Company (1), *Fox* v. *Railway Passengers' Assurance Company* (2), *Denton* v. *Legge* (3), *Clough* v. *Country Livestock Insurance Association* (4) referred to.

APPEAL from an order of Greaves J. refusing to stay a suit.

By a contract dated the 14th August, 1918, Jokiram Kaya, the appellant, sold to the firm of Ghaneshamdas Kedarnath, the respondents, 150,000 yards of hessian cloth. The contract contained a clause providing for all disputes under the contract to be decided by arbitration under the Rules of the Bengal Chamber of Commerce. Pursuant to that Jokiram referred the dispute under the contract to arbitration on 24th April, 1919. On 24th August, when the arbitration proceedings had fairly advanced, the firm of Ghaneshamdas Kedarnath filed a suit in the High Court on the same contract; and summons in the suit was served on Jokiram on the 26th September. Then, on 16th October, the arbitrators made their award which was, on the application of the respondent, set aside on the 17th November. Thereafter the appellant made an application for stay of the suit, which was refused. On that this appeal was preferred.

Sir Binod Mitter (with him *Mr. S. N. Banerjee*), for the appellant. The submission remained in full force and the appellant was entitled to apply for stay of suit. *Doleman & Sons* v. *Ossett Corporation* (5) only decided that upon filing of a suit, in respect of matters referred to arbitration, the arbitrators became *functii officio*. Their powers were suspended and not extinguished. Otherwise any party could make the arbitration proceedings infructuous by filing a suit at the

(1) (1882) 9 Q. B. D. 188.
(2) (1885) 54 L. J. Q. B. 505.
(3) (1895) 72 L. T. 626.
(4) (1916) 85 L. J. K. B. 1185.
(5) [1912] 3 K. B. 257.

last moment. Only when a valid and effective award is made the powers of the arbitrators are exhausted. The award in this case is mere waste paper since it is common case that the arbitrators had no power to make an award.

Mr. B. L. Mitter (with him *Mr. B. N. Basu*), for the respondent. The first question is whether the arbitrators have power to go on if the suit is stayed. When the arbitrators once make an award the submission spends itself. There must be a submission *de novo* to give the arbitrators jurisdiction: *Doleman & Sons* v. *Ossett Corporation* (1). If the matter is remitted back to the same arbitrators the respondents might not have a fair chance. The Court below has exercised its discretion and in a question of this kind the Appeal Court should not readily interfere. The appellants should have applied much earlier.

Sir Binod Mitter, in reply. The summons was served during the long vacation.

Cur. adv. vult.

MOOKERJEE J. We are invited in this appeal to consider the propriety of an order of dismissal made by Mr. Justice Greaves on an application for stay of a suit under section 19 of the Indian Arbitration Act. The material facts which led up to the order are not in dispute and may be briefly narrated for our present purpose.

On the 14th August, 1918, the appellant sold to the respondent 150,000 yards of hessian cloth, to be delivered in three equal instalments in January, February and March, 1919. The contract was not carried out; the seller contends that the breach was due to default on the part of the buyer; the buyer asserts, on the other hand, that the default was on

(1) [1912] 3 K. B. 257, 269.

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the part of the seller. The contract contained an arbitration clause in the following terms:

"Any dispute whatsoever arising on or out of this "contract shall be referred to arbitration under the "Rules of the Bengal Chamber of Commerce, applic- "able for the time being, for decision, and such "decision shall be accepted as final and binding on "both parties to this contract. The award may, at the "instance of either party and without any notice "to the other of them, be made a Rule of the High "Court of Judicature at Fort William."

On the 24th April, 1919, the seller referred the dispute to the arbitration of the Bengal Chamber of Commerce in terms of the submission just set out, and his letter gave a detailed account of what, according to his version, had taken place between the parties. The statement of the seller was forwarded by the Registrar of the Chamber to the buyer for his remarks. The buyer sent a reply in due course; this was transmitted by the Registrar to the seller who submitted his final reply on the 17th July, 1919. On the 14th August, 1919, the purchaser instituted a suit on the Original Side of this Court for recovery of damages from the seller on the allegation that the seller was in default. The seller received intimation of this suit on the 24th August, 1919, but the writ of summons was not actually served on him till the 26th September, 1919. On the 16th October, 1919, the arbitration tribunal of the Chamber made an award in favour of the seller. On the 17th November, 1919, the buyer made an application to this Court to set aside the award, on the ground that by reason of the institution of the suit, the arbitrators were *functii officio* and that consequently the award was void for want of jurisdiction. This application was granted, and the award was set aside by Mr. Justice Ghose on

the 28th November, 1919. On the 1st December, 1919, the seller applied for stay of the suit under section 19 of the Indian Arbitration Act. On the 11th December, 1919, Mr. Justice Greaves dismissed the application. We have now to examine whether the order of dismissal was, in all the circumstances of the case, appropriately made.

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, "commences 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 after appearance and before filing a "written statement 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 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, may make an "order staying the proceedings."

This section corresponds to section 4 of the English Arbitration Act, 1889, which was interpreted in the judgment of the Court of Appeal in *Doleman & Sons* v. *Ossett Corporation* (1). The principle enunciated in this decision was held applicable to a case under paragraph 18 of the second schedule of the Civil Procedure Code, by this Court in *Dinabandhu Jana* v. *Durga Prasad Jana* (2) and is of fundamental importance in this class of cases. Where, for the

(1) [1912] 3 K. B. 257. (2) (1919) I L. R. 46 Calc. 1041.

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determination of the controversy between the parties, two competent tribunals are available, the Court and the arbitrators, and one of them chooses the latter but in fact has recourse to the former, it is not open to his opponent to enforce specific performance of the contract or to plead the contract as a conclusive bar to the suit; but he may apply to the Court to stay the suit in the exercise of its judicial discretion, so as to leave the plaintiff in the suit no other remedy than to proceed by arbitration. It is consequently plain that a Court invited to exercise its judicial discretion to deprive a party of the remedy by suit, must be satisfied that the remedy to proceed by arbitration is really available.

Now, in the case before us, there was a valid reference to arbitration on the 24th April, 1919. What then was the effect of the institution of the suit on the 14th August, 1919? The position is best expressed in the words of Fletcher Moulton, L. J. in *Doleman & Sons* v. *Ossett Corporation* (1):

"The law will not enforce the specific performance "of such agreements (that is, agreements to refer to "private tribunals), but, if duly appealed to, it has the "power in its discretion to refuse to a party the alter- "native of having the dispute settled by a Court of "law, and thus to leave him in the position of having "no other remedy than to proceed by arbitration. If "the Court has refused to stay an action, or if the "defendant has abstained from asking it to do so, the "Court has seisin of the dispute, and it is by its deci- "sion, and by its decision alone, that the rights of the "parties are settled. It follows, therefore, that in the "latter case the private tribunal, if it has ever come "into existence, is *functus officio*, unless the parties "agree *de novo* that the dispute shall be tried by

(1) [1912] 3 K. B. 257, 268.

"arbitration, as in the case where they agree that the "action itself shall be referred."

Consequently, when a reference to arbitration has been made and the private tribunal has come into existence, the effect of the institution of the suit is that, from that very moment, the arbitrators become *functii officio*, that is, their authority to deal further with the matter becomes extinguished. The institution of the suit cannot, however, retrospectively affect the validity of the reference which, when it was made, was in exact conformity with the agreement of the parties. If this view were not adopted, the result would follow that a party to a submission, who had appeared throughout and had taken his chance before the arbitrators, might, at the very last moment, when the award, possibly an adverse award, was about to be made, and when there would be no time left for his opponent to obtain a stay order, institute a suit and thereby render infructuous the entire proceedings. Such a conclusion cannot, in our opinion, be defended, either on principle or on the authorities. We are not concerned here with a case where, after the institution of a suit by one of the parties, his opponent makes a reference to arbitration and obtains an award without stay of the suit. There it might possibly be contended, with some approach to plausibility, that the arbitration proceedings were void from their very inception. It might also be a question of nicety in a case of that description, whether when an award so made had been set aside, a fresh reference to arbitration was permissible on the hypothesis that the agreement to refer was not exhausted by a reference which had proved ultimately infructuous because initially incompetent. In the case before us, on the other hand, the arbitration proceedings were properly instituted and carried on, till up to the moment of the institution

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of the suit; that suit could not, on any conceivable principle of law, relate back to the date of reference and affect the validity of the proceedings which had followed thereon. We must hold accordingly that the effect of the cancellation of the award on the 28th November, 1919, did not affect that portion of the arbitration proceedings which had taken place before the 14th August, 1919, when the suit was instituted.

The question next arises, whether, if the suit were now stayed, the bar to the continuance of the arbitration proceedings would be so effectually removed as to allow their termination in a valid award. In our opinion, the answer must be in the affirmative in view of Rule VIII of the Rules of the Tribunal of Arbitration, adopted by resolution of the Bengal Chamber of Commerce on the 16th January, 1912, and confirmed on the 27th February, 1912:

"If any arbitrator or umpire decline or fail to act, "or if he die or *become incapable of acting*, the Regis- "trar may substitute and appoint a new abitrator or "umpire in manner aforesaid (that is, in the manner "stated in Rule V) and the Court so reconstituted "shall proceed with the arbitration, with liberty to act "on the record of the proceedings as then existing "and on the evidence, if any, then taken in the arbitra- "tion, or to commence the arbitration *de novo*."

In the present case, we may hold, without unduly stretching the language of the Rule, that the arbitrators "became incapable of acting," when the suit was instituted, and their authority lost all life and power. No doubt, they themselves did not at the time realise this, and proceeded to discharge their duties as if they were still capable of acting under an authority yet unimpaired and in full operation. That cannot, however, affect or alter the true legal position. Consequently, if the suit is stayed, it would be com-

petent to the Chamber to substitute and appoint new arbitrators, and the Court so reconstituted will then be able to proceed with the arbitration.

This view furnishes a satisfactory solution of the difficulty apprehended by the respondent, that if the matter were remitted for arbitration to the same arbitrators as had acted before, he might not have a fair chance. We desire to add, however, that the respondent has not laid the foundation for a real grievance in this respect; he had, so far as may be gathered from the materials on the record, ample opportunity to place his case before the arbitrators, and there is no shadow of a suggestion that they had acted unfairly or improperly. But we need not elaborate that aspect of the matter, for, if the suit is stayed, the arbitration proceedings will be revived and carried on to a conclusion before a tribunal reconstituted under Rule VIII. We hold accordingly that if the application for stay of the suit under section 19 of the Indian Arbitration Act is granted, though the respondent will thereby be deprived of his remedy by suit, the remedy to proceed by arbitration will be still available. In this view of the matter, we must next consider, whether, in the circumstances of this case, the discretionary power vested in the Court under section 19 should be exercised in favour of the appellant.

On behalf of the respondent, it has been forcibly argued that a Court of Appeal should not readily interfere with the decision of the primary Court on a question of this description. The appellant has not disputed this position, which is, indeed, supported by high authority: *Freeman* v. *Chester Rural District Council* (1), *Vawdrey* v. *Simpson* (2), *Barnes* v.

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

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Youngs (1). It is clear, however, that the discretion must be judicially exercised, and an erroneous exercise of the discretionary power is capable of correction by a Court of Appeal; otherwise, a statutory provision would have been made that the order was final and not liable to be challenged by way of appeal. We must, consequently, examine the circumstances of the case and form our own conclusion, attaching due weight to the view adopted by the Court below. Now, it is firmly settled that where parties have agreed to refer a dispute to arbitration, and one of them, notwithstanding that agreement, commences an action to have the dispute determined by the Court, the *primâ facie* leaning of the Court is to stay the action and leave the plaintiff to the tribunal to which he has agreed. As Lord Selborne L. C., observed in *Willesford* v. *Watson* (2), if parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then a *primâ facie* duty is cast upon the Courts to act upon such an agreement. This expression of opinion was adopted with approval in *Law* v. *Garrett* (3), *Lyon* v. *Johnson* (4) and *Clegg* v. *Clegg* (5). Lord Hatherly L. C. emphasised the same point of view, when in *Kilchen* v. *Turnbull* (6), he said that the parties having come to an agreement to refer, such agreement must be considered binding between them and ought not lightly to be overturned. Hence, it has been ruled that the burden of showing cause, why the agreement to submit should not be given effect to, is upon the party opposing the application for stay, and it is for him to induce the Court to exercise its

(1) [1898] 1 Ch. 414, 417.
(2) (1873) L. R. 8 Ch. App. 473, 480.
(3) (1878) 8 Ch. D. 26, 37.
(4) (1889) 40 Ch. D. 579.
(5) (1890) 44 Ch. D. 200.
(6) (1871) 20 W. R. (Eng.) 253.

discretion in his favour with a view to allow the action to proceed : *Mason* v. *Haddan* (1), *Hodgson* v. *Railway Passengers' Assurance Company* (2), *Fox* v. *Railway Passengers' Assurance Company* (3), *Denton* v. *Legge* (4), *Vawdrey* v. *Simpson* (5), *Doleman* v. *Ossett Corporation* (6), *Clough* v. *County Livestock Insurance Association* (7). This view has been followed in this Court in the case of *Dinabandhu Jana* v. *Durga Prasad* (8).

Tested in the light of these principles, how do the parties stand? The burden lies on the respondent to show that some sufficient reason exists, why the matter should not be referred to arbitration, and not on the appellant to show that no such reason exists. The respondent has not brought forward any substantial reason why the agreement between him and the appellant, to refer matters in dispute to arbitration, should not be acted upon. It has not been suggested that the arbitrators are likely to be biassed or interested persons ; nor has it been said that the matters in dispute involve solely or chiefly such questions of law as must ultimately be decided by the Court. On the other hand, the main question in controversy is, whether the breach of contract was due to the default of one party or the other, a matter which the arbitrators would presumably be well qualified to investigate. A doubt, however, was expressed on behalf of the respondent, whether even if the suit were stayed, the arbitration proceedings could be legally revived and carried on so as to terminate in a valid award. This was a perfectly

(1)(1859) 6 C. B. N. S. 526, 535 ; 120 R. R. 256.
(2) (1882) 9 Q. B. D. 188.
(3) (1885) 54 L. J. Q. B. 505.
(4) (1895) 72 L. T. 626.
(5) [1896] 1 Ch. 166.
(6) [1912] 3 K. B. 257.
(7) (1916) 85 L. J. K. B. 1185.
(8) (1919) I. L. R. 46 Calc. 1041.

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legitimate question to raise, and we have already decided that the proceedings can be revived and carried on before a reconstituted tribunal. The only other objection which has been taken by the respondent is that the application for stay should have been made earlier, that is, immediately after the appellant was served with the writ of summons, if not shortly after he had notice of the suit. The appellant, however, has explained that at the time the law on the subject as expounded in *Dinabandhu* v. *Durga Prasad* (1) was not very clearly appreciated, and that as the summons was served during the long vacation, it was not easy to make the requisite application for stay and to obtain an order before the award could actually be made. The appellant has further urged that the conduct of the respondent has by no means been such as would entitle him to sympathy or indulgence from the Court. The respondent had full notice of the arbitration proceedings and submitted his case to the tribunal; it was only after the arbitration proceedings had continued for nearly four months that he suddenly changed his front and instituted the suit. No reason has been assigned, no explanation has even been attempted, to justify this action of the respondent. We must further take this along with the fact that the respondent has made no endeavour to discharge the burden which lay upon him to satisfy the Court that the matter in dispute should not be decided by arbitration. The cumulative effect of all this leads to the conclusion that the respondent has failed to establish sufficient grounds for the exercise of our discretion in his favour so as to allow his action to proceed. The inference is thus inevitable that the application for stay cannot rightly be refused.

(1) (1919) I. L. R. 46 Calc. 1041.

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The result is that the appeal is allowed with costs both here and in the Court below. The order of the lower Court is set aside and the suit is stayed. The parties will be at liberty to proceed with the arbitration in the Chamber of Commerce with the Tribunal reconstituted under Rule VIII in the manner indicated above.

FLETCHER J. I agree.

N. G.

Attorneys for the appellant: *O. C. Gangoly & Co.*
Attorney for the respondent: *A. K. Rudra.*

APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee and Chaudhuri JJ.

D. N. SHAHA & Co.

v.

THE BENGAL NATIONAL BANK, LTD.*

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March 16.

Promissory Note—When overdue—Negotiable Instruments Act (XX of 1882), s. 118.

Where a promissory note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title, of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

The analogy of the rules applicable to questions of limitation is not to be followed in such cases.

Norton v. *Ellam* (1), *Rowe* v. *Young* (2) *Maltby* v. *Murrels* (3), *Brooks* v. *Mitchell* (4), *Barough* v. *White* (5), *Glasscock* v. *Balls* (6) referred to.

* Appeal from Original Civil, No. 48 of 1919, in Suit No. 1003 of 1915.

(1) (1837) 2 M. & W. 461.
(2) (1820) 2 B. & B. 165.
(3) (1860) 5 H. & N. 813.
(4) (1841) 9 M. & W. 15.
(5) (1825) 4 B. & C. 325.
(6) (1889) 24 Q. B. D. 13.