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 CHATTUR-  
 BHUJ  
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 MULL  
 v.  
 BASDEODAS  
 DAGA.  
 MOOKERJEE  
 J.

in respect of these 3 bales, and has asked for liberty to add to his claim for the 27 bales such sum as he may be entitled to recover on account of the 3 bales. In these circumstances the conclusion is inevitable that he was not competent to make a reference to arbitration, even if the arbitration clause be deemed to have been incorporated in his contract with the plaintiffs.

The conclusion follows that the arbitration proceedings were held, and the award made, without jurisdiction. The appeal is allowed and the application to set aside the award is granted with costs both here and in the Court below.

FLETCHER J. I agree.

N. G.

Attorney for the appellants : *K. K. Dutt.*

Attorneys for the respondent : *O. C. Gangooly & Co.*

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## APPEAL FROM ORIGINAL CIVIL.

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*Before Mookerjee and Fletcher JJ.*

MATULAL DALMIA

*v.*

RAMKISSENDAS MADAN GOPAL.\*

*Award—Setting aside of award—Arbitration Act (IX of 1899), s. 14—Practice.*

When an award is challenged on the ground that there was no submission to arbitration by the parties, the remedy lies in a regular suit and not in an application under s. 14 of the Arbitration Act (IX of 1899).

APPEAL from the judgment of Greaves J.

\* Appeal from Original Civil, No. 113 of 1919.

ON 6th February, 1919, Ramkissendas Madangopal agreed to purchase from Matulal Dalmia 28,000 D. W. flour bags, through a broker, Lachmi Narain. Bought and sold notes passed between the parties on the ordinary printed forms containing the clause that 'any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the Rules of the Bengal Chamber of Commerce applicable for the time being for decision shall be accepted as final and binding on both parties to the contract.' On the bought note appeared the following condition, written and signed by the broker, which however did not appear in the sold note:—

"The railway-receipt for 2 waggons will be delivered within the 28th February 1919.

(Sd.) Dhaniram  
by Lachmi Narain."

For the performance of the contract the buyers wanted the seller to despatch the goods and send the Railway Receipt. But the Railway Company was not despatching goods at the time without a priority certificate from the Controller, and the seller asked the buyers to get such a certificate. The buyers contended that they purchased the goods with the express contract that the Railway Receipt will be delivered within 28th February, 1919. The seller on the other hand contended that the alleged condition did not form a part of the contract and was an interpolation in collusion with the broker.

The matter was referred to the arbitration of the Bengal Chamber of Commerce, and on the 10th September, 1919, the award was made in favour of the seller and was filed on 19th September, 1919.

Thereafter Ramkissendas Madangopal, the buyers, made an application to have the award set aside and taken off the file on the ground that there was no

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contract between the parties and consequently there was no submission. The application was allowed and the award was set aside. Thereupon Matulal Dalmia, the seller, appealed.

*Mr. S. N. Banerjee* (with him *Mr. S. Ghose*), for the appellant. The Court should not have tried the matter on affidavits before setting aside the award. I never refused to call evidence. If there was no valid contract there was no submission and consequently the application could not be made under s. 14 of the Arbitration Act (IX of 1899).

*Mr. B. L. Mitter* (with him *Mr. H. C. Majumdar*), for the respondents. The appellants elected to proceed with the application on affidavits and cannot complain now. The Court has complete jurisdiction to set aside the award under section 14 of the Arbitration Act (IX of 1899).

MOOKERJEE AND FLETCHER JJ. We are of opinion that the question which arises in this matter should be decided in a regular suit. We, therefore, allow this appeal, set aside the order of the Court below and dismiss the application. The costs of these proceedings will be costs in the suit. *Mr. Banerjee* for the appellant undertakes that the award will not be enforced for a month from this date.

*Appeal allowed.*

N. G.

Attorney for the appellant: *G. C. De.*

Attorney for the respondent: *Sarat Ch. Ghose.*