APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee and Fletcher JJ.

CHATTURBHUJ CHANDUNMULL

v.

BASDEODAS DAGA.*

1920

Feb. 27.

Contract—Arbitration clause—Right to go to arbitration—Splitting.

B entered into a contract with C for sale of 30 bales of *dhoties* with a condition stating, "We sold the goods as were bought by us of L. J. *batta*, chafage, all other terms according to *Bahar* (importing) firms." The contract between B and L. J had a clause for arbitration embodied in it. B filed a suit in respect of 27 bales out of 30 for non-delivery and referred the matter to arbitration in respect of 3 bales on similar dispute ;

Held, that the arbitration clause was not incorporated into the contract between B and C, and the reference to the arbitration was completely *ultra vires*.

Held, further, that B having filed a suit in respect of the 27 bales was not competent to make a reference to arbitration in respect of the remaining 3 bales.

Thomas & Co., Ld., v. *Port Sea Steamship Co., Ld.* (1), *Hamilton & Co.* v. *Mackie & Sons* (2), *Bilasiram Thakurdas* v. *Gubbay* (3) and *Dinabandhu* v. *Durgaprasad* (4) referred to.

Temperley Steamship Co. v. *Smyth & Co.* (5) distinguished.

APPEAL from a judgment of Greaves J.

ON 29th July, 1918, Basdeodas Daga, the respondent, purchased 30 bales of *dhooties* from a firm of importers named Lakshmichand Jagannath, shipment May and June. The contract contained the following clause :—

"No claims will be entertained by the sellers unless made in writing or entered into a book that the sellers keep in their office for this purpose.

* Appeal from Original Civil No. 106 of 1919.

(1) [1912] A. C. 1.
(2) (1889) 5 T. L. R. 677.
(3) (1915) I. L. R. 43 Calc. 305.
(4) (1919) I. L. R. 46 Calc. 1041.
(5) [1905] 2 K. B. 791.

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Any dispute or claim under this contract is to be settled by the Bengal Chamber of Commerce or at the option of the sellers by two merchants on the Bengal Chamber's list, one to be chosen by each party. If the buyers fail to nominate any arbitrator, within three days after being required to do so the sellers will be at liberty to appoint both arbitrators or to refer to the Chamber at their discretion. The arbitrators, if such are appointed, shall in case of dispute appoint an umpire. The decision of the arbitrators or of the umpire or that of the Chamber shall be borne by the losing party."

On 4th August, 1918, Basdeodas Daga sold the identical 30 bales to Chatturbhuj Chandunmull, the appellants. Thereafter disputes having arisen between Basdeodas Daga and Chatturbhuj Chandunmull, on 7th January 1919, Basdeo filed a suit (No. 7 of 1919) against Chatturbhuj Chandunmull in respect of 27 out of 30 bales on the allegation that the firm of Chatturbhuj Chandunmull has wrongfully refused to take delivery of the said goods, and in the plaint asked for leave under O. II, r. 2, of the Civil Procedure Code to reserve his rights in respect of the remaining 3 bales (in respect of which there was some dispute between the original sellers and Basdeo). He further asked for liberty to add to his claim in the said suit any sum he may be entitled to recover in respect of the said 3 bales. Thereafter on 11th January, 1919, Basdeo referred the matter in respect of the 3 bales to the arbitration of the Bengal Chamber of Commerce and on 29th July, 1919, an award was made in his favour. The award was filed. Thereupon Chatturbhuj Chandunmull made an application for the award to be set aside and taken off the file. The application was dismissed and on that this appeal was preferred.

Sir Binod Mitter (with him *Mr. S. C. Bose*), for the appellant. The clause relating to arbitration in the contract between Basdeo and Lakshmichand cannot be incorporated in the contract between the parties here. If that clause be read into this contract it

becomes meaningless: *Thomas and Company, Ld.*, v. *Port Sea Steamship Company, Ld.* (1), *Hamilton and Company* v. *Mackie and Sons* (2). Assuming the arbitration clause is incorporated in the contract in suit, the respondent, having instituted a suit in respect of 27 bales, could not refer the dispute as regards the remaining 3 bales to arbitration. The 3 bales were part of one instalment of 15 bales. In the absence of evidence to the contrary, goods are to be delivered in equal instalments: *Bilasiram Thakurdas* v. *Gubbay* (3). In the plaint in suit No. 7 of 1919 leave was asked under O. II, r. 2, to reserve his rights in respect of the 3 bales. That shows he did not have the right to refer to arbitration.

Mr. B. L. Mitter (with him *Mr. S. N. Banerjee*), for the respondent. The arbitration clause in the importer's contract is incorporated in the contract in suit: *Temperley Steamship Company* v. *Smyth and Company* (4). The contract was a separate contract in respect of each instalment of goods, and 3 bales formed one instalment. The institution of the suit (No. 7 of 1919) is no bar to referring the disputes in respect of 3 bales to arbitration.

MOOKERJEE J. This is an appeal from a judgment of Mr. Justice Greaves, whereby he has refused to set aside an arbitration award. The events which led up to the award in question lie in a narrow compass and may be briefly recited.

On the 4th August, 1918, the plaintiffs-appellants bought from the defendant-respondent 30 bales of *dhoti*. The defendant himself had purchased the goods from an importer Lakshmichand Jagannath under a contract dated the 29th July, 1918. The terms

(1) [1912] A. C. 1.
(2) (1889) 5 T. L. R. 677.
(3) (1915) I. L. R. 43 Calc. 305.
(4) [1905] 2 K. B. 791.

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of the contract between the plaintiffs and the defendant were as follows:—"We sold the goods as were "bought by us of Lakshmichand Jagannath, *Batta* "(allowance), chafage, all terms according to *Bahar* "(importing) firms, godown due according to *Bazar* "interest, cooly hire, according to *Bhitor* (*Bazar*)." On the 7th January, 1919, the defendant instituted a suit in this Court in respect of 27 out of the 30 bales on the allegation that the plaintiffs had wrongfully refused to accept delivery. On the 11th June, 1919, the defendant referred to arbitration by the Bengal Chamber of Commerce a similar dispute in respect of the remaining three bales. On the 29th July, 1919, an award was made in his favour and it was filed on the 12th August, 1919. The plaintiffs thereupon instituted the present proceedings and applied for cancellation of the award. Mr. Justice Greaves has refused the application. On the present appeal the validity of the award has been questioned on two grounds: *first*, that the arbitration clause embodied in the contract between the defendant and the importers was not incorporated into the contract between the plaintiffs and the defendant, and, *secondly*, that even if the arbitration clause be deemed to have been incorporated, the defendant, by reason of the institution of the suit in respect of 27 bales, was not competent to make a reference to arbitration with regard to the three remaining bales. In our opinion, both these contentions are well founded and the award must be set aside, as made without jurisdiction.

As regards the first point, we have to consider the terms of the arbitration clause contained in the contract between the defendant and the importers. The fourth clause of that contract was in these terms: "Any dispute or claim under this contract is to be "settled by the Bengal Chamber of Commerce, or, at

"the option of the seller, by two merchants on the "Bengal Chamber's list, one to be chosen by each "party." Now if we read the contract between the plaintiffs and the defendant, as also the contract between the defendant and the importers, it is impossible to hold that the arbitration clause contained in the latter has become incorporated in the former by virtue of the expression "all terms according to "the importing firm." Reliance has been placed by the appellants upon the decision of the House of Lords in the case of *Thomas and Company, Limited*, v. *Port Sea Steamship Company, Limited* (1), where the decision of the Court of appeal in *Hamilton & Company* v. *Mackie & Sons* (2) was approved. In the latter case, a bill of lading contained the words "all other terms and conditions as per Charterparty" and the Charterparty contained an arbitration clause. In an action by the ship-owners against the consignees of the cargo and the endorsees of the bill of lading, the Court refused to stay, on the ground that the arbitration clause in the Charterparty was not incorporated in the bill of lading. Lord Esher M. R. said that where in a bill of lading there was such a condition as "all other conditions as per Charterparty," the conditions of the Charterparty must be read *verbatim* into the bill of lading, as though they were there *in extenso*. Then, if it was that any one of the conditions of the Charterparty on being so read, was inconsistent with the bill of lading, they were insensible and must be disregarded. The arbitration clause referred to disputes arising not under the bill of lading but under the Charterparty. The condition was therefore insensible and had no application to the dispute which arose under the bill of lading. This view was approved by the House of Lords. Reference,

(1) [1912] A. C. 1. (2) (1889) 5 T. L. R. 677.

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however, was made on behalf of the respondent to the decision of the Court of Appeal in the case of *Temperley Steamship Company* v. *Smyth & Co.* (1). That case, in our opinion, is clearly distinguishable. The arbitration clause in that case, contained in a Charterparty, was held to apply to a dispute as to delay in the unloading of a ship after the completion of the loading, notwithstanding that the charter party contained the usual cessor clause, providing that the charter's liability should cease upon the shipment of the cargo. The bill of lading, however, incorporated "all the terms and exceptions," contained in the Charterparty and gave the owner or master a lien on the cargo, *inter alia*, for demurrage. But the fundamental point in that case was, that the parties to the bill of lading and the Charterparty were the same. In the case before us, the first contract is between the defendant and the importers and the second between the defendant and his purchasers. The clause sought to be incorporated clearly refers to a dispute or claim "under this contract," that is, the contract between the defendant and the importers, and if that clause were incorporated into the contract between the plaintiffs and the defendant, the result would be, that, to use the language of Lord Esher, the contract would be insensible. We must hold accordingly that the arbitration clause was not incorporated into the contract between the plaintiffs and the defendant, and the reference to the arbitration was completely *ultra vires*.

As regards the second point, we have to examine the effect of the twelfth clause of the contract between the defendant and the importers, assuming that the clause was incorporated by reference in the contract between the plaintiffs and the defendant. The clause

(1) [1905] 2 K. B. 791.

was in these terms : "this agreement is to be deemed "and construed as a separate contract in respect of "each instalment of goods, and the rights and liabili- "ties of the sellers and buyers respectively shall be the "same as though a separate contract had been made "out and signed in respect of each instalment." Now, the goods, under the contract between the plaintiffs and the defendant, were to be delivered according to "shipments May and June." Presumably, in the absence of an indication to the contrary [*Bilasiram Thakurdas* v. *Gubbay* (1)] the goods were to be delivered in two equal instalments of 15 bales each. Consequently, when the defendant instituted a suit with regard to 27 bales, he must be deemed to have sued in respect of the first instalment and a portion of the second instalment. Now, although the defendant might be at liberty [*Dinabandhu* v. *Durgaprasad* (2)] to resile from the arbitration clause (assuming the same to have been incorporated into the contract between himself and the plaintiffs) and to have recourse to a suit in respect of either instalment (treated as the subject-matter of a separate contract), he could not, in respect of one portion of an instalment, institute a suit, and, in respect of the remaining portion of that very instalment, take recourse to arbitration. When he instituted the suit for the 27 bales, he made his election with regard to not only the first, but also the second, instalment ; he cannot now be permitted to resile from the position deliberately taken up by him and to fall back upon the arbitration clause in respect of the remaining 3 bales. We cannot, in this connection, overlook the significant fact that, in his suit, the defendant has obtained leave under Order II, rule 2, of the Code of Civil Procedure, reserving his right against his adversaries

(1) (1915) I. L. R. 43 Calc. 305. (2) (1919) I. L. R. 46 Calc. 1041.

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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.*

APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee and Fletcher JJ.

1920

Feb. 27.

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.