APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee and Fletcher JJ.

1920

Feb. 16.

RAM PROSAD SURAJMULL

v.

MOHAN LAL LACHMINARAIN.*

Arbitration—Agreement to refer to—Reference made before suit—Award given during the pendency of the suit—No application for stay of suit—Validity of award—Jurisdiction of the Court.

Where an action has been commenced upon a contract which contains a provision for reference to arbitration, even if a reference to arbitration has been made before the commencement of the suit, the award is of no effect, unless the suit has been stayed pending the 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 decision, and by its decision alone, that the rights of the parties are settled.

Doleman & Sons v. *Ossett Corporation* (1), *Dinabandhu Jana* v. *Durgaprasad Jana* (2) and *Appavu Rowther* v. *Seeni Rowther* (3) referred to.

APPEAL by Ram Prosad Surajmull, the defendant firm, from the judgment of Greaves, J.

On the 16th August, 1918, Messrs. Mohan Lal Lachminarain sold to Messrs. Ram Prosad Surajmull 100 bales of Japanese grey shirtings on the terms and conditions set out in an agreement between the parties. In consequence of the buyers failing to take delivery, the sellers resold the goods and thereby suffered loss. On the 3rd May, 1919, the buyers referred the disputes

* Appeal from Original Civil No. 82 of 1919.

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

(2) (1919) I. L. R. 46 Calc. 1041; 29 C. L. J. 399; 23 C. W. N. 716.

(3) (1916) I. L. R. 41 Mad. 115.

regarding quality of goods between themselves and the sellers to the arbitration of the Bengal Chamber of Commerce under the terms of the said agreement and notice of the reference was thereafter given by the Registrar of the Chamber to the sellers who were requested to state what their case was. On the 21st May, 1919, the sellers instituted a suit against the buyers for recovery of the amount of the difference between the contract and the market prices of the goods in question. On the 10th June, 1919, the sellers wrote to the Registrar as follows:—

"The *sowda* in question is to be governed by the "terms and conditions of sale between us and the "original sellers Messrs. The Japan Cotton Trading "Company, Ld. We are mere middlemen and the "arbitrators' attention is drawn to this important fact "as the verdict whatever it might be, would ulti-"mately fall on Messrs. The Japan Cotton Trading "Company, Ld., with whom will lie all responsibility "for the proper fulfilment of such verdict and we "pray that an expression of the nature might be "embodied in the award.

"The terms for arbitration in case of dispute are "subject to sellers' option and in this particular "instance the sellers, Messrs. The Japan Cotton "Trading Co. have exercised that option and have "refused to proceed with the arbitration by the Bengal "Chamber of Commerce. Hence our statement to this "effect in your letter of the 13th ultimo and as such "our buyers, Messrs. Ram Prosad Surajmull have "no right to refer the matter to the Chamber. The "exercise of the option by the Japan Cotton Trading "Company, Ld., has already invalidated the reference and any *ex parte* award would be out of order."

On the 20th June, 1919, the Tribunal made an *ex parte* award against the sellers and on the following

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day notice of the award was forwarded to them. On the 9th July, 1919, the award was filed in Court. On the 22nd July, 1919, the sellers applied to the Court for an order to set aside the award or to have it taken off the file; and for an order to restrain the purchasers from executing the same. The grounds on which the application was made were that under the agreement between the parties disputes as to damage, difference inferiority, short quantity, or measure, or defect, or amount of allowance, could be referred to the said Chamber only at the sellers' option; that the Chamber had no jurisdiction to entertain any reference on the part of the purchasers and that the said award was bad pending the trial of their suit. Mr. Justice Greaves granted the application. The buyers thereupon appealed.

Sir B. C. Mitter (with him *Mr. B. L. Mitter*), for the appellants, referred to *Doleman & Sons* v. *Ossett Corporation* (1). The present case was not one where the respondents had done nothing. By their letter of the 10th June, 1919, they submitted to the arbitration and consequently the award made was binding on them. They could not now be heard to say that the award was invalid as the arbitrators had no jurisdiction.

Mr. Langford James and *Mr. S. C. Bose*, for the respondents, were not called upon.

MOOKERJEE, J. This is an appeal from a judgment of Mr. Justice Greaves, whereby he has, on an application by the respondents, directed an award made by the Bengal Chamber of Commerce Arbitration Tribunal on the 20th June, 1919, to be taken off the file as of no effect.

The events which led to the award are not in controversy and may be briefly recited. On the 16th

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August, 1918, the respondents sold to the appellants 100 bales of Japanese grey shirtings which had been purchased by them from the Nippon Munka Kabushiki Kaisa (Japan Cotton Trading Co.). The respondents allege that the appellants failed to take delivery, with the result that they had to resell the goods at a loss. On the 3rd May, 1919, the buyers made a reference to the Arbitration Tribunal of the Bengal Chamber of Commerce under the arbitration clause contained in the contract. On the 21st May, 1919, the sellers instituted a suit for damages for breach of contract. On the 20th June, 1919, the award was made, and on the 9th July following, it was filed in Court. On the 22nd July, the sellers applied to set aside the award. Mr. Justice Greaves has granted that application on the ground that where an action has been commenced upon a contract which contains a provision for reference to arbitration, even if a reference to arbitration has been made before the commencement of the suit, the award is of no effect unless the suit has been stayed pending the arbitration. In support of this view, reliance has been placed upon the decision of the majority of the Court of Appeal in *Doleman & Sons* v. *Ossett Corporation* (1) which has been applied in this country in *Dinabandhu Jana* v. *Durgaprasad Jana* (2) and *Appavu Rowther* v. *Seeni Rowther* (3).

In *Doleman & Sons* v. *Ossett Corporation* (1) Fletcher Moulton, L. J. explained the position of the parties, when notwithstanding an arbitration clause in the contract between them, a suit has been instituted by one of them. The law will not enforce the specific performance of an agreement to refer to

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arbitration, but if duly appealed to. it has the power, in its discretion, to refuse to a party the alternative 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 decision, and by its decision alone, that the rights of the parties are settled. It follows 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 arbitration and that the action itself shall be referred. There cannot be two tribunals, each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. This is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted. The same view was adopted by Farwell, L. J., when he stated that the plaintiffs cannot be deprived of their right to have recourse to the Court when the agreement is a mere agreement to refer, unless the Court makes an order to that effect under section 4 of the English Arbitration Act, 1889 (corresponding to section 19 of the Indian Arbitration Act, 1899). They can, of course, deprive themselves of such rights by their own act after writ, as for example, by going on with the arbitration and obtaining an award; but when nothing has been done by them since writ, and the only matter relied upon is an award made since writ, without their knowledge or consent, under an agreement antecedent to the action, the plea is in fact and in truth a plea of the agreement and is bad, because there is no act of the plaintiffs subsequent to the writ on which reliance can be placed. It is not a question of revoking the submission; it is

a question of construction of section 4 of the Act. The appellants have contended before us that the present case falls within the exception formulated by Farwell, L.J., by reason of the letter, dated the 10th June, 1919, written by the respondents to the appellants. The letter, in our opinion, has no such effect; but we must not be taken to endorse the view that the respondents could deprive themselves of their right of suit by their own acts, a position which may be difficult to reconcile with the view taken by Fletcher Moulton, L. J., namely, that as soon as a suit is instituted the private tribunal becomes *functus officio*. Our conclusion therefore is that the view taken by Mr. Justice Greaves is right and that this appeal must be dismissed with costs.

FLETCHER J. I agree.

O. M. *Appeal dismissed.*

Attorney for the appellants: *Priya Nath Sen.*

Attorney for the respondents: *Charu Chandra Bose.*