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Calcutta Series.

PRIVY COUNCIL.

E. D. SASSOON AND CO. (DEFENDANTS),

v.

RAMDUTT RAMKISSEN DAS (PLAINTIFF).

°P. C. 1922.

July 24.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Arbitration—Award—Absence of jurisdiction—Suit to avoid award—Failure to appoint arbitrator—Award by sole arbitrator—Indian Arbitration Act (IX of 1899) s. 9 (b)—Submission excluding s. 9—Specific Relief Act (I of 1877) ss. 42 and 56.

A contract for the sale of jute by the respondent to the appellants provided that any dispute should be referred to arbitration in accordance with the rules and by-laws of the Calcutta Baled Jute Association. By by-law 15, where either party should make default in appointing an arbitrator the Chairman of the Association could appoint one on his behalf; the contract further provided that the Arbitrators and the umpire should be members of the trade, and that an appeal should lie from an award to the Committee of the Association. The respondent having made default in appointing an arbitrator in place of one who had retired, the appellants purported to appoint their arbitrator to act as sole arbitrator in pursuance of s. 9 (*b*) of the Indian Arbitration Act, 1899. That section applies only "unless a different intention is expressed" in the submission. The sole arbitrator made an award in favour of the appellants, who filed it under s. 11, and enforced it by execution under s. 15 of the Act. The respondent sued for a declaration that the award was void, on the

°*Present*: VISCOUNT HALDANE, VISCOUNT CAVE AND LORD PARMOOR.

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ground that the appointment as sole arbitrator was invalid, for an injunction, and the return of the sum levied by execution.

Held, (*i*) that the respondent could maintain the suit, since (*a*) the award was objected to on the ground of want of jurisdiction in, not misconduct or irregularity by the arbitrator, and accordingly an application under s. 14 of the Act to set aside the award was not the only remedy open to the respondent; (*b*) s. 15 does not provide that an award on being filed is to be deemed to be a decree, but merely that it is to be enforceable as a decree, and accordingly the execution was no bar to the suit; and (*c*) the Specific Relief Act, by ss. 42, 56 was no bar, having regard to the relief sought; and (*ii*) that by by-law 15, which applied upon a failure to appoint an arbitrator in place of one who died or retired, and the other agreed terms as to arbitration, an intention different from s. 9 (*b*) was shown; and (*iii*) that accordingly, the sole arbitrator had no jurisdiction, and the award was invalid.

Judgment of the High Court affirmed.

APPEAL (No. 78 of 1921) from a judgment and decree of the High Court in its appellate jurisdiction (December 13, 1920) reversing a decree of that Court in its Original Civil Jurisdiction (March 15, 1920).

The respondent firm brought a suit in the High Court against the appellant firm claiming (*a*) a declaration that eleven awards of an arbitrator dated September 28, 1916, purporting to be made under eleven contracts for the sale of jute by the respondent firm to the appellants were void; (*b*) an injunction restraining the appellants from withdrawing the sum of Rs. 68,574, or any part thereof, from the Sheriff; (*c*) a declaration that the respondent firm was entitled to a refund of the said sum. There was also a claim to damages, which was given up.

The circumstances in which the suit was brought fully appear from the judgment of the Judicial Committee.

The suit was tried by Ghose J. and was dismissed.

On appeal that decision was reversed, the learned Judges (Sanderson C. J. and Richardson J.) being of

opinion that the appellants were not entitled to proceed under section 9 (*b*) of the Indian Arbitration Act, since the submission contained in the contracts showed an intention differing from that section.

A decree was made declaring the awards to be void and inoperative, and it was further ordered (by the consent of the parties) that the respondent firm should pay to the appellants Rs. 68,574 received by them from the Sheriff, the appellants undertaking to return the said sum if the awards were held by the Judicial Committee to be valid.

Sir John Simon, *K. C.*, and *S. Hyam*, for the appellants. It was too late to contend that the awards were invalid since they had been filed in Court, thereby acquiring the character of decrees, and had been executed under s. 15. The matter thereafter was in the hands of the Court. Secondly, the letters in July 1916 amounted to an agreement, or raised an estoppel, that the Association's by-law 15 was not to apply, but that the procedure should be according to the Act. Thirdly, by-law 15 applies only where a party has wholly failed to appoint an arbitrator, not where an arbitrator has been appointed but has died or has withdrawn. Fourthly, the suit was not maintainable, since by s. 56 (*a*) and (*b*) of the Specific Relief Act, 1877, no injunction could be asked for, the suit became therefore one simply for declarations and was therefore invalid under s. 42 of that Act. The awards were not out of time, since the period allowed runs only from the time when the arbitrators enter upon the reference.

Dunne, *K. C.*, and *J. K. Roy*, for the respondent firm. The submission in the contracts, especially having regard to by-law 15 of the Association, shows a "different intention" from s. 9 of the Act,

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consequently the section is by its terms applicable; the appointment of the sole arbitrator was therefore wholly inoperative. The appellants should have followed the procedure provided by by-law 15. Under s. 15 of the Act an award filed under s. 11 is not a decree, but only enforceable as a decree. The proceeds of the execution are no longer in the hands of the Sheriff but were dealt with by consent. The suit was maintainable, although no steps had been taken under the Act to set aside the awards, because the awards were not merely irregular, but made without jurisdiction: *Oppenheim & Co.* v. *Mahomed Haneef* (1). The contention as to the letters in July, 1916, was not advanced in the Courts below, in any case those letters do not amount to an agreement or give rise to any estoppel. Having regard to the relief prayed, s. 42 of the Specific Relief Act did not preclude the suit being maintained.

S. Hyam replied.

July 20. The judgment of their Lordships was delivered by VISCOUNT CAVE. This is an appeal from a decree of the High Court of Judicature at Fort William in Bengal, in its Civil Appellate Jurisdiction, reversing a decree of the same Court in its Ordinary Original Civil Jurisdiction.

The appellants and respondents are merchants in Calcutta. By eleven contracts in writing, bearing various dates between September, 1913, and December, 1914, the appellants agreed to buy from the respondents a number of bales of jute of certain specified standards of quality. The contracts were all in a form approved by the Calcutta Baled Jute Trade Association, most of them containing what is called a "home guarantee" (that is to say, a guarantee as to quality,

(1) (1921) L. R. 49 I. A. 174, 180.

condition and weight on terms contained in the London Jute Association contract), and all of them containing an arbitration clause in the following terms:—"15. In the event of any dispute whatever arising out of, or in any way relating to, this contract or to its construction or fulfilment between the parties hereto, and whether arising before or after the date of expiration of this contract, the dispute shall be referred to arbitration in accordance with the Rules and By-laws endorsed on this contract. Each party to the dispute shall appoint one arbitrator, and such arbitrators shall have the power to appoint an umpire. Both arbitrators and umpire must be persons engaged in the baled jute trade, and their award shall be final, subject only to right of appeal to the Committee. The Association's Rules and By-laws as printed on the reverse, form part of this contract."

The Rules and By-laws referred to in the above clause include the following:--Rule 27. "The Committee may, at their discretion, and upon payment of the prescribed fees, hear appeals against arbitration awards, provided they proceed in conformity with the By-laws of the Association" By-law 15. "Where one of the parties to a dispute shall fail to appoint an arbitrator within 48 hours after having been called upon to do so, the Chairman of the Association shall appoint an arbitrator whose appointment shall be as lawful and binding upon the defaulting party as though he himself had appointed such arbitrator."

The Association referred to in the contract, Rules and By-laws is the Calcutta Baled Jute Trade Association, and the Committee referred to is the Committee of that Association.

The jute, when delivered under the contracts, proved not to be of the specified quality, and a considerable part of it was "invoiced back" to the

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appellants and resold by them at lower prices, with the result that the appellants claimed to have suffered damages to the amount of Rs. 83,623, and demanded payment of this amount from the respondents. The demand having been refused, the appellants in July, 1915, appointed Mr. G. C. Allan to act as their arbitrator in the matter in accordance with the contracts, and the respondents after some delay, viz., in September, 1915, appointed Babu Sarat Chandra Gossain to act as arbitrator on their behalf. Mr. Allan endeavoured to arrange a meeting with Babu Gossain with a view to entering on the reference, but without success; and ultimately, on the 7th March, 1916, Mr. Allan retired from the reference. Thereupon, the appellants appointed Mr. S. H. Singleton to be an arbitrator in his place, but Mr. Singleton was equally unsuccessful in his efforts to get Babu Gossain to meet him; and after many excuses, the latter, on the 30th June, 1916, withdrew from the matter. On the 27th July, 1916, the appellants wrote to the respondents a letter referring to the retirement of Babu Sarat Chandra Gossain and adding:—

"We, therefore, call upon you to appoint an arbitrator to act on your behalf, in the place of Babu Gossain, within 48 hours, failing which we shall apply to the Baled Jute Association to make an appointment in your behalf in accordance with By-law 15 of the Association"

To this letter, the respondents replied on the 31st July, as follows:—

"Yours of the 27th July, 1916. The time limit under the Indian Arbitration Act is over, and we regret that we can not agree to further extension of time. Regarding your suggestion that you will ask the Chairman of the Association to appoint an arbitrator, we beg to point out that the Chairman has no authority to override the provision of the Indian Arbitration Act. Further, we hold that the dispute to settle which this arbitration was agreed upon does not come under the terms of the Calcutta Baled Jute Association Contract, so the Chairman cannot exercise his rights under the contract."

In answer to this letter, the appellants wrote to the respondents as follows :—

"With reference to your letter of the 31st ultimo, we are advised that neither of our arbitrators, Mr. Allan or Mr. Singleton, nor your arbitrator, Babu S. C. Gossain, having entered upon the reference, the question of the period of making their awards having expired does not arise. We, therefore, call upon you to appoint an arbitrator to act on your behalf in the disputes arising out of our claims under each of the above contracts as set out above, within seven clear days from this date, in default of which we shall appoint our arbitrator, Mr. S. H. Singleton, to act as sole arbitrator in the reference, in accordance with the provisions of the Indian Arbitration Act, section 9 (*b*)."

The respondents having made no further appointment, the appellants, on the 4th September, purported to appoint Mr. Singleton to act as sole arbitrator in the reference in pursuance of the Indian Arbitration Act, s. 9 (*b*), and so informed the respondents. The respondents declined to recognise this appointment, but Mr. Singleton, after giving due notice to the respondents, proceeded with the reference *ex parte* and ultimately made eleven awards (one under each contract), by which he awarded to the appellants sums to be paid by the respondents amounting in all to Rs. 68,574. The awards were filed under s. 11 of the Act, and in pursuance of s. 15 a warrant was issued directing the Sheriff to levy the amounts awarded by seizure of the respondents' goods; and this was done.

On the 8th January, 1917, the respondents commenced against the appellants the present suit, in which they alleged (among other things) that the appointment of Mr. Singleton to act as sole arbitrator was illegal, and that the awards were void and inoperative, and claimed a declaration to that effect, an injunction restraining the appellants from withdrawing the sum in the Sheriff's hands and a declaration that the respondents were entitled to a refund of

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that sum. There was also a claim for damages which has not been proceeded with. Under a consent order made in the suit on the 12th January, 1917, the amount in the Sheriff's hands (Rs. 66,477) was paid to the defendants, but it was agreed that for the purpose of the suit, the money should be deemed to be still in the Sheriff's hands.

On the hearing of the suit before Mr. Justice Ghose on 7th April, 1920, the defendants contended, first, that having regard to the provisions of ss. 42 and 56 of the Specific Relief Act, and to the fact that the plaintiffs did not claim to set aside the awards, and the execution proceedings, the suit was not maintainable, and, secondly, that the awards were not made out of time. The learned Judge overruled the first but he upheld the second contention, and held the awards to be valid and accordingly dismissed the suit with costs.

On appeal to the High Court at Fort William, the plaintiffs, while still maintaining that the time for making the awards had expired, relied mainly upon a point which, although open to them upon their pleadings, had not been argued in the Court of first instance. They now contended that the appointment of Mr. Singleton as sole arbitrator was illegal on the ground that the scheme of arbitration contained in clause 15 of the contract, and in the Rules and By-Laws annexed, was inconsistent with s. 9 (*b*) of the Arbitration Act under which that appointment was made, and accordingly that, a "different intention" having been expressed in the contract, s. 9 (*b*) did not apply. The learned Judges who heard the appeal (Sir L. Sanderson, C. J., and Richardson, J.) acceded to this contention and held that the appointment of Mr. Singleton as sole arbitrator was ineffective, and that the awards were void on that ground. Upon the question whether the awards were out of

time, the learned Judges were disposed to take different views; but upon this point they gave no definite decision, as their conclusion upon the other point was sufficient to dispose of the suit. The Court accordingly allowed the appeal and declared the awards void, and with the consent of the parties, ordered the defendants to repay the above sum of Rs. 68,574 to the plaintiffs upon an undertaking by the latter to return the amount if the awards should be found valid by this Board. In view of the fact that the point on which the plaintiffs had succeeded had not been taken in the Court below, the parties were ordered to bear their own costs of the original trial. Against this decision the defendants now appeal to the Board.

On the argument before their Lordships, it was argued, as a preliminary point, that the suit would not lie, as the only remedy open to the plaintiffs was to move to set aside the awards under section 14 of the Arbitration Act, and this could not be done after the awards had been enforced by execution. In their Lordships' opinion, there is no substance in this point. Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought, no doubt, to be taken by motion to set aside the award; but where (as here) it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose. Nor is the fact that the award has been enforced by execution under section 15 a bar to a suit to have it declared void and for consequential relief. Section 15 does not enact that the award, when filed, is to be deemed to be a decree of the Court, but only that it is to be enforceable as if it were a decree.

A suggestion was also made that the suit was open to objection under sections 42 and 56 of the Specific

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Relief Act, on the ground that no relief was asked other than a declaration; but in their Lordships' opinion this is not the case. The plaint asked not only for a declaration, but also for an injunction, repayment of the amount levied, and other relief. Further, it is difficult to see how any technical objection to the jurisdiction can now be maintained, having regard to the fact that the order appealed from was to some extent a consent order, and contemplated that the question of the validity of the awards should be finally determined by this Board.

Turning now to the substance of the case, the main question is whether the submission to arbitration contained an expression of a "different intention" which had the effect of excluding the operation of of section 9 (*b*) of the Arbitration Act. In their Lordships' opinion, this question must be answered in the affirmative. Each of the contracts provides that any dispute shall be referred to arbitration "in accordance with the Rules and By-laws endorsed on this contract," and that such Rules and By-laws shall form part of the contract; and By-law 15 is to the effect that, where one of the parties to a dispute fails to appoint an arbitrator within the time limited, "the Chairman of the Association shall appoint an arbitrator whose appointment shall be as lawful and binding upon the defaulting party as though he himself had appointed such arbitrator." The contract further provides that both arbitrators and umpire must be persons engaged in the Baled Jute Trade, and that their award shall be final, subject only to a right of appeal to the Committee of the Association. The effect of these provisions is that on a failure by either party to appoint an arbitrator—which includes (in their Lordships' opinion) a failure to appoint a substituted arbitrator on the death or retirement of an arbitrator

originally appointed—the appointment is to be made by the Chairman on behalf of the defaulting party, so that in every such case there are to be two arbitrators, one appointed by one of the parties, and the other by the Chairman on behalf of the other party. Both are to be men engaged in the trade, and the decision of these skilled men or their umpire is subject to an appeal to the Committee of the Association. It is to such a domestic tribunal, so constituted, that the parties have agreed to submit their differences; and this agreement appears to their Lordships to be quite inconsistent with section 9 (*b*) of the Act, under which, if it comes into operation, the decision will be made by a single arbitrator chosen by one party only. Further, it appears to be at least doubtful whether, if the scheme of the By-laws were departed from by the application of section 9 (*b*), the right of appeal to the Committee would continue to be effective. Upon the whole, therefore, their Lordships agree on this point with the judgment of the Appellate Court.

It was contended on behalf of the appellants that the respondents' letter of the 31st July, 1916, above quoted, had the effect of excluding an appointment by the Chairman and evidencing a new agreement to which the Arbitration Act, including section 9 (*b*), would apply; but in their Lordships' opinion that letter cannot have this effect. By the letter, the respondents contended that the time for making the award had expired, and that the Chairman had no authority to override the provisions of the Arbitration Act in that respect; and also that the dispute did not come under the terms of the contract at all. They may have been mistaken in both these contentions; but there was clearly no intention on their part to set up any new form of arbitration different from that to which they had agreed. The appellants,

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erroneously as it now appears, accepted the respondents' view that the Chairman had no authority to appoint, and had resort to s. 9 (*b*) of the Act. In this, unfortunately, they were wrong; and they must now accept the consequences of their action.

As the above considerations dispose of the appeal, it is unnecessary to consider the question raised as to the awards being out of time. Their Lordships will accordingly humbly advise His Majesty that the appeal fails and should be dismissed with costs.

Solicitors for the appellants: *Sanderson & Orr Dignam.*

Solicitors for the respondents: *W. W. Box & Co.*

A. M. T.

ORIGINAL CIVIL.

Before Rankin J.

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April 25.

JITMULL GIRDHARI LAL

v.

RAM GOPAL BOHITRAM.*

Broker—'Principal contract'—Liability of broker, when principal undisclosed—Custom in Calcutta jute market—Arbitration—Indian Contract Act (IX of 1872) s. 230.

In a suit to set aside an award of the Bengal Chamber of Commerce, in favour of a broker on a 'principal contract' for the sale of nessian:—

Held, that the award was good and the broker was entitled to the remedy.

Patiram Banerjee v. *Kankinarra Mills Co. Ld.* (1), *Joylal & Co.* v. *Monmatha Nath Mullick* (2) referred to.

*Original Civil Suit No. 797 of 1919.

(1) (1915) 19 C. W. N. 623. (2) (1916) 20 C. W. N. 365.