

ORIGINAL CIVIL.

Before Buckland J.

SUNDERMULL PORESHRAM

v.

TRIBHUBAN HIRACHAND & Co. *

1924

Feb. 8.

Arbitration—Election of one party to have private arbitration—Authority of Bengal Chamber of Commerce to arbitrate—Arbitration Act (IX of 1899), s. 9 (b).

Where a submission provided for arbitration under the rules of the Bengal Chamber of Commerce, or, at the option of the sellers, by two European sugar importers, and the sellers exercised such option but did not appoint their arbitrator or take any further step :—

Held, (i) that the buyers should have proceeded under section 9(b) of the Arbitration Act ; and

(ii) that the buyers were not entitled to have recourse to arbitration by the Tribunal of Arbitration of the Bengal Chamber of Commerce.

THE plaintiffs were sellers and the defendants were buyers of white Java sugar. The contract contained an arbitration clause of which the terms appear from the judgment. Disputes arose between the parties and the defendants referred the matter to the Bengal Chamber of Commerce. Thereupon the plaintiffs exercised their option under the arbitration clause in the contract. Correspondence ensued and eventually the Tribunal of Arbitration of the Bengal Chamber of Commerce made an award *ex parte*. The plaintiffs sued the defendants to set aside the award.

Mr. S. N. Banerjee (with him *Mr. S. C. Bose*), for the plaintiffs. According to clause 18 of the Contract, the plaintiffs had option to go to arbitration by two

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European sugar importers. Section 9 of the Arbitration Act provides that if the plaintiffs were in default in nominating an arbitrator, the defendants could have nominated an arbitrator with due notice. In this case, however, the plaintiffs having elected to have private arbitration, I submit, the Bengal Chamber of Commerce had no authority to arbitrate.

Mr. L. P. E. Pugh (with him *Mr. S. Ghose*), for the defendants. The clause says that there shall be an arbitration either by the Bengal Chamber of Commerce or by two European merchants and if the defendants are in default, for three days, the plaintiffs can proceed to nominate an arbitrator. For the purpose of making an election the plaintiffs should have nominated their arbitrator, and they made no proper election. Section 9 of the Arbitration Act has no application to this case. The arbitration by European merchants will not oust the jurisdiction of the Bengal Chamber of Commerce. The plaintiffs' right to substitute one tribunal in place of another is not to be arbitrarily exercised. The plaintiffs have neither given any notice to the defendants to constitute nor have they constituted any tribunal for the purpose of arbitration. Therefore the defendants were entitled to go to the Bengal Chamber of Commerce for arbitration.

BUCKLAND J. This is a suit to set aside an award of the Bengal Chamber of Commerce made on the 19th January 1922.

The parties on the 14th April 1920, entered into a contract whereby the plaintiffs sold and the defendants bought white Java sugar.

The contract contains, among others, an arbitration clause in the following terms:—

"Any disputes to be settled by arbitrations under the rules of the Bengal Chamber of Commerce, or, at the option of the sellers by the

“arbitration of two European sugar importers of Calcutta, one to be appointed by the sellers and one by the buyers, with powers to appoint a European merchant as Umpire. The decision of the Chamber, Arbitrators or Umpire shall be final and binding on both parties either of whom may make the same a rule or order of Court. If the buyers shall fail to join in such arbitrations or to appoint an arbitrator within three days after being required to do so, the arbitration may, at the option of sellers, proceed *ex parte* and the award thereon shall be binding on the buyers, and the sellers may make the same a rule or order of Court.”

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Disputes arose and form the subject of correspondence but no letter is relevant earlier than that of the 6th September 1921, from the Registrar of the Tribunal of Arbitration of the Bengal Chamber of Commerce to the plaintiffs and the solicitors for the defendants. That letter stated that the defendants had applied for arbitration and requested the parties to send their statements of the case to the Registrar. The plaintiff's solicitors on the 29th September, wrote to the Registrar, saying:—

“Our clients as sellers, have, under the above contract, option of claiming arbitration either of the Bengal Chamber of Commerce or of two European sugar importers of Calcutta. They elect to have the arbitration of two European sugar importers and they decline to go to the arbitration of the Bengal Chamber of Commerce.”

On the 4th October 1921, Messrs. Khaitan & Co., solicitors for the defendants, wrote two letters, one to the Registrar, which it is not necessary to read, as it merely informs the Registrar of the contents of the other, and another to the plaintiffs. That letter, after making allegations which may or may not be justified, concludes:—

“You should therefore nominate an arbitrator without any further delay. We are therefore instructed to call upon you which we hereby do to nominate an arbitrator within seven days from receipt hereof failing which please note our clients will have the matter decided by the Bengal Chamber of Commerce as provided for in clause 18 of the Contract.”

The plaintiffs did not nominate an arbitrator and took no further steps in that behalf. The Tribunal of

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Arbitration of the Bengal Chamber of Commerce entered upon the reference and in due course made its award, which was against the plaintiffs.

The short point which has been argued is whether or not under clause 18 of the Contract, after the plaintiffs had elected to go to the arbitration of two European sugar importers, it was open to the defendants to have the dispute arbitrated upon by the Tribunal in question.

The plaintiffs contend that, having exercised their election, the Tribunal of the Chamber of Commerce had no authority to arbitrate. On the other hand, it has been argued on behalf of the defendant that the election was not properly exercised or that having been exercised but not pursued, the defendants were entitled to have recourse to arbitration by the Tribunal of the Chamber of Commerce.

First, it is to be observed the right of election is given to the sellers. It is submitted that merely writing and saying that they elect to have arbitration by two European sugar importers is not sufficient and that to make a proper election they should have appointed an arbitrator. The latter part of the clause is relied upon for this purpose; it says:—

“If the buyers shall fail to join in such arbitrations or to appoint an arbitrator within three days after being required to do so, the arbitration may, at the option of sellers, proceed *ex parte*.”

Now, there is nothing in this part of the clause about the sellers appointing an arbitrator. The sellers have the election, but how they shall make the election is not provided for by this clause. I do not consider that for the purpose of such election the sellers have to appoint their arbitrator, and in my judgment a statement such as they made, following the words of the clause, that they did so elect is sufficient.

That being so, what then is the position when the election has been made and what follows ?

Section 9 of the Arbitration Act says what shall be done where a submission provides that the reference shall be to two arbitrators, and sub-section (b) provides for a case of this kind. It says :—

“ If, on such a reference, one party fails to appoint an arbitrator, . . . for seven clear days after the other party, having appointed his arbitrator has served the party making default with a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator”

Excluding the latter part of clause 18 of the Contract the effect of which I shall consider immediately the position is very clear. When it came to the knowledge of the buyers that the arbitration was to be in the manner stated, the sellers not having already appointed their arbitrator, what the buyers should have done was to have appointed their arbitrator and, as they did, given the sellers seven days' notice to appoint their arbitrator, in default of which the buyers might have proceeded in accordance with the section. If the sellers had not then duly appointed an arbitrator, the buyers might have appointed their arbitrator to act as sole arbitrator.

Default on the part of the sellers in appointing an arbitrator did not entitle the buyers to revert to arbitration by the Chamber of Commerce as they purported to do by the letter of the 4th of October. That was not in accordance with the Act nor is it contemplated by the latter part of clause 18 of the Contract.

The latter part of this clause deals with conditions which do not arise in this case, viz., where the seller has appointed his arbitrator, but the buyer has not. In these circumstances it follows the Act but with this difference, that the notice is reduced from seven days to three.

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This part of the clause appears to me, if I may say so, to be somewhat indifferently worded, because it does not make provision for default on the part of the seller in making an appointment and it only deals with the case of failure on the part of the buyers to appoint their arbitrator. But if the Act is followed, no difficulty need arise in practice.

In the circumstances of this particular case however the latter part of clause 18 has no application, and its object is limited to the purpose which I have indicated.

The election having been made and there being a procedure laid down by the Arbitration Act, which could and should have been followed in the absence of a different intention expressed in the submission, that is, clause 18 of the Contract, it was not open to the defendants to revert to arbitration by the Tribunal of Arbitration of the Bengal Chamber of Commerce.

In my judgment, the Bengal Chamber of Commerce had no authority to arbitrate and the award must be set aside, with costs of the suit on scale No. 2.

Award set aside.

Attorneys for the plaintiffs : *Pugh & Co.*

Attorneys for the defendants : *Khaitan & Co.*

B. M. S.