

**PRIVY COUNCIL.**

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P. C.<sup>o</sup>  
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May 5.

SALEH MAHOMED UMER DOSSAL

v.

NATHOOMAL KESSAMAL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF SIND.]

*Arbitration—Award—Setting aside award—Error of law—Error not on face of award—Indian Arbitration Act (IX of 1899).*

An award under the Indian Arbitration Act, 1899, can be set aside on the ground of error of law only if the error appears on the face of the award. A statement in the award that the dispute is under a contract between the parties of a certain date, does not so incorporate the contract with the award, as to entitle the Court to refer to its terms and by so doing to find that there is an error of law.

*Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co.* (1) followed.

Order of the Court of the Judicial Commissioner reversed.

APPEAL (No. 7 of 1926) from an order of the Court of the Judicial Commissioner of Sind in its revisional jurisdiction (April 6, 1925) reversing an order of that Court in its District Court jurisdiction.

By a contract in writing dated December 1, 1919, the respondent agreed to purchase from the appellants "600 bales only American old newspapers each bale "of 5 cwts." at a named price. The contract contained a clause referring all disputes to the arbitration of two arbitrators in Karachi with power to them to nominate an umpire in the event of disagreement.

\* *Present* : VISCOUNT SUMNER, \* LORD SINHA, LORD BLANESBURGH \* AND SIR JOHN WALLIS.

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Differences which arose owing to the respondent refusing to take delivery of 400 out of the 600 bales contracted for were referred under the contract to two arbitrators ; upon their disagreeing they nominated an umpire.

On November 8, 1920, the umpire issued his award, which recited that the reference was as to certain disputes arising between the present parties " under " a contract made between them, No. 8/06, dated " December 1, 1919 ". The award contained no further reference to the contract or its terms. It provided that the respondent was to pay to the appellant firm a certain sum, and that upon his doing so the appellant firm should deliver to the respondent " 400 " bales old newspapers, arrived per S.S. ' Kandahar ' " under bill of lading No. E. 118, dated June 23, 1920 ". There were also provisions for the event of a failure to take delivery, also for the costs of the arbitration and for filing the award in Court.

The umpire, at the request of the appellants, applied to the Court of the Judicial Commissioner in its District Court Jurisdiction praying that the award might be filed in Court under s. 11, clause (2) of the Indian Arbitration Act, 1899. An order as prayed was made.

Upon an application to the Court in its revisional jurisdiction the order was reversed and the award set aside.

The learned Judicial Commissioner said that by the terms of the contract each bale was to be 5 cwts. whereas it was admitted that the 400 bales in dispute weighed only 500 lbs. each ; the buyers were consequently entitled to refuse delivery. As the award directed the buyers to take delivery of goods which they had not ordered, it was bad on its face, and could be set aside. The lower Court, in their view, in

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making the order for filing acted illegally, and with material irregularity in the exercise of its jurisdiction, and its order could therefore be reserved in revisional proceedings.

An application by the present appellants for a review of the judgment was dismissed.

*Sir George Lowndes, K. C.*, and *E. B. Raikes*, for the appellant firm, referred to *Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co.* (1), mentioning also *Landauer v. Asser* (2) and *Hirji Mulji v. Cheong Yue Steamship Co.* (3).

The respondent did not appear.

The judgment of their Lordships was delivered by

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VISCOUNT SUMNER. In this case as the respondent did not appear, their Lordships with the very full assistance of counsel for the appellants have examined it with, as they believe, every care to see whether there is any irregularity, or other matter than that which has been fully argued, to which their attention ought to be directed, but they are satisfied that the only question which can reasonably be raised is whether the Court of the Judicial Commissioner, from which the appeal comes, were or were not right in their decision that the award made in the arbitration between the present parties was bad on its face.

Though it was no part of the proceeding now before the Board, it is the case that after the issue was decided, that is now under appeal, the present appellants applied to have it reviewed, and on that occasion one of the members of the Court, whose judgment is under appeal, said, in refusing the application:—"It may be admitted for the present purposes, that our

(1) (1923) I. L. R. 47 Bom. 578 ; (2) [1905] 2 K. B. 184.

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(3) [1926] A. C. 497.

“decision proceeded largely on the same grounds as those that commended themselves to the High Court of Bombay in *Jivraj Baloo Spinning and Weaving Co. v. Champsey Bhara and Co.* (1). Those grounds did not commend themselves to their Lordships of the Privy Council, and the judgment of the High Court of Bombay was reversed (2). That judgment of their Lordships of the Privy Council was delivered on the 6th March, 1923, and at the time we heard the revisional application in question it had not reached India. It may be assumed for present purposes that, had that judgment been placed before us at the hearing our judgment would not have proceeded on the lines on which it did proceed.”

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It is therefore perfectly plain, that the one point which was in dispute in the Court below was, whether or not under the circumstances of the case there could be said to be an error upon the face of the award, which had been brought before them by the regular process of objection on the part of one of the parties to the award, when filed.

The contract is referred to in the award. It recites a contract made between the parties dated the 1st December, 1919, but it does so for one purpose only, namely, to earmark the disputes which had arisen and which, by a subsequent written reference, had been referred first to the arbitration of two named arbitrators, and then, in the event which happened, of the umpire, who made the award when they differed. The umpire recited that both parties were present on every occasion when he sat; that he considered all the evidence, documents and accounts before him and the arguments of the pleaders, and then made the award. Paragraph 1 of his award adjudged that one party

(1) (1919) I. L. R. 44 Bom. 780

(2) (1923) I. L. R. 47 Bom. 578; L. R. 50 L. A. 324.

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should pay a named sum with interest at a fixed rate, and from dates which were fixed also and then with the costs of the arbitration. Paragraph 2 stated that on receipt of these amounts the other party should forthwith deliver certain goods, which were precisely specified. Paragraph 3 provided for a right to require payment of storage charges, if there was delay in taking delivery, and the amount of the arbitration costs was then specified as well. There was also a clause which stated that in addition to these costs, all costs, if any, incurred in filing the award in Court should be paid. That clause is a severable matter and was treated by the first Judge as a mere indication of opinion for his guidance and not as part of the award, and when afterwards the award came to be questioned before the full Court, no exception was taken to his decision on this ground, which therefore stands. The exception taken to his decision was that the umpire had been guilty of that particular form of judicial misconduct, which consists in making a mistake in law, and letting it be visible on the face of his award.

The argument was that the contract was incorporated into the award by the reference mentioned above, and that, adopting the parties' admission that the bales tendered were of substantially less weight than the bales, whose deliverable weight was specified in the contract, the award must be taken to have disclosed on its face an error in law in construing the terms of the contract, which related to the description of the goods sold and to the law applicable to the sale and delivery of goods by description. Their Lordships, independently of the case of *Jivraj Balloo Spinning and Weaving Co. v. Champsey Bhara and Co.* (1), could not have entertained that view, because

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it appears to them quite plain that this award, the terms of which are very precisely stated, makes its allusion to the contract very guardedly and for the purpose only of earmarking the origin of the dispute in question. It is perfectly consistent with the umpire's having come to conclusions of law or of fact of his own, by which the parties who submitted their disputes to him would be bound.

On looking at the previous decision of the Board, however, it may be observed that that was a stronger case than the present one, because in that case there had been a rejection of the goods altogether, a fact which was referred to in the award. By this and other exceptional references to the contract, the award incorporated their written terms, and the rules and regulations, subject to which they were made ; and the letters between the parties, stating the grounds on which the goods were rejected, were also mentioned and included. It then proceeded to state how the arbitrators got at their conclusion. On these facts the decision of the Board was that there was nothing that could be called error upon the face of the award, and therefore, the appeal succeeded. *A fortiori* this appeal must succeed also.

Their Lordships think it unnecessary to canvass the case any further. They will humbly advise His Majesty that the appeal be allowed with costs, and the decision of the first Judge be restored.

Solicitors for the appellants : *Watkins & Hunter.*

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