APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and C. C. Ghose J.

RADHA KANTA DAS

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v.

Feb. 16.

BAERLIEN BROTHERS, LTD.*

Arbitration—Submission to arbitration, if it must be signed by all parties—Indian Arbitration Act (IX of 1889), s. 19.

A submission to arbitration under the Indian Arbitration Act need not be signed by both parties. All that is required is a written agreement to submit and acting upon it.

John Batt & Co. (London) Ltd. v. *Kanoolal & Co.* (1) dissented from.

Case law considered.

APPEAL from a judgment of Pearson J.

The facts briefly were that the defendants, Baerlien Brothers, Limited, of Manchester, applied, under section 19 of the Indian Arbitration Act, for stay of the suit instituted against them by the plaintiff, Radha Kanta Das of Calcutta. The plaintiff claimed Rs. 40,700, as damages for alleged breach of contract between the parties.

The case of the defendant-company was that the contract, which was for the supply of cotton yarn, contained an arbitration-clause to the effect that, in case of any dispute with regard to this order, the defendants or their agents were to have the option of cancelling the order or submitting the matter to the Bengal Chamber of Commerce or to two European merchants residing in Calcutta for arbitration.

Disputes did eventually arise and these were referred to the Bengal Chamber of Commerce in terms of the above arbitration clause and the defendant-company prayed for stay of this suit.

The plaintiff, in opposing the application for stay, contended that there was no agreement between the parties to refer the matter to arbitration and, even

* Appeal from Original Civil, No. 118 of 1927, in Suit No. 1607 of 1927.

(1) (1925) I. L. R. 53 Calc. 65.

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if there was such an agreement, the same did not amount to a valid submission, on the grounds, viz., (1) that the indent was not signed by the defendant or his agent and (2) that the clause gave an option only to the defendants going to arbitration and appointing arbitrators.

Pearson J., who heard the application, ordered a stay of the suit, holding that the substance of the matter had to be looked at, and from that point of view, the arbitration clause in the indent was unexceptionable.

The plaintiff, thereupon, appealed.

Mr. J. Langford James (with him *Mr. S. K. Gupta*), for the appellant. There was no agreement to refer to arbitration. Section 19 does not apply, because the suit was not against a party, viz., Mr. Dutta, and the matter was agreed, as between the plaintiff and the defendant, to be referred. Assuming, in the next place, that there was an agreement, there was no valid submission, as, in the first place, it was not signed by Baerlien Brothers or Dutt as his agent: *Caerleon Tinplate Co.* v. *Hughes* (1), *Ram Narain Gunga Bissen* v. *Liladhur Lowjee* (2) *John Batt & Co. (London) Ltd.* v. *Kanoolal & Co.* (3). In the second place, the clause gives option to one party only to go to arbitration and to appoint arbitrators. My client cannot go to arbitration if he so choose or appoint arbitrators. It is all one-sided: *Wadsworth* v. *Smith* (4).

Mr. S. N. Banerjee Sr. (with him *Mr. S. Ghose*), for the respondents, dealt with the terms of the indent.

Mr. James in reply.

RANKIN C. J. This is an appeal from an order made by a learned Judge on the Original Side, whereby he stayed the plaintiff's suit under section 19 of the Indian Arbitration Act.

It appears that the suit was brought by the plaintiff for breach of an agreement to supply certain

(1) (1891) L. J. Q. B. 640.
(2) (1906) I. L. R. 33 Calc. 1237, 1240.
(3) (1925) I. L. R. 53 Calc. 65.
(4) (1871) L. R. 6 Q. B. 332

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goods, one term of agreement being that the goods which the plaintiff was to receive were to be goods of which he would have in some sense a monopoly so far as India was concerned, and the plaintiff's suit was for damages for the defendant's wrongful conduct in sending other goods of the same kind to other ports in India in breach of their agreement.

The defendants are a limited company—Baerlien Brothers, Limited—incorporated in the United Kingdom and carrying on business at Manchester in England.

The plaintiff, Radha Kanta Das, who carries on business in Calcutta, being minded to get goods from England, approached a person called M. N. Dutta and signed what is called an indent form. This is a common method of doing business when purchase of goods from abroad is desired and in all these forms, which are very badly drafted as a rule, one gets complicated questions as to whether the person to whom the indent is addressed is an agent for the buyer, an agent for the seller or whether the seller is his agent and so on.

The first step was that the plaintiff signed and sent to Dutta an indent, in one case on the 15th of February, 1927. That indent refers to Messrs. Baerlien Brothers, Limited. It begins "I/We request your "Agents/Suppliers Principal Messrs. Baerlien Brothers, "Limited, to buy for me/us and ship on my/our account "and risk" and so forth. There are a great many clauses of the indent which refer to how the goods are to be paid for, the liability of M. N. Dutta, the rights of Mr. M. N. Dutta and, indeed, other matters.

The arbitration clause is the seventh clause: "In "case of any dispute with regard to this order, you or "your agents are to have the option of cancelling this "order or submitting the matter to the Bengal "Chamber of Commerce or to one or two European "merchants resident in Calcutta for arbitration "as between us and your agents and his/their decision "or that of his/their referee shall be binding upon "both parties." This clause after further provisions ends up by saying: "It is hereby expressly agreed

"that you will in no way be held responsible for the "payment of any allowance, etc., that may be awarded "at the survey or that may otherwise be due to us "until fully realised from your agents or suppliers "and that the provisions made in this paragraph shall "in no way affect the relation between us as between "principal and principals and shall in no way affect "any of the terms herein stated."

There are in all 16 clauses containing somewhat elaborate terms and these indents having been signed by the plaintiff, it would appear that Dutta telegraphed to Manchester and that Baerlien Brothers accordingly sent certain sale-notes to the plaintiff. Those sale-notes are as follows:—"We are in receipt of your "esteemed order sent by Mr. M. N. Dutta and have "booked the same with thanks as specified hereunder." Accordingly a description of the goods is given and a reference to the monopoly arrangement is included and the terms of payment are set out. Upon that the plaintiff replied to Messrs. Baerlien Brothers at Manchester as follows:—"We duly received your "favour of the 16th February confirming our order "for 120 bales, 60/1, Turkey Red John Orr Ewing & "Co., Sein & Lion quality at 461/4 per lb. Shipment "10 B/S monthly commencing September 1927 to "August 1928 which we find correct."

Now the first thing to consider is whether the contract between the plaintiff and the defendants is a contract of which clause 7 of the indent is a part or whether, as is contended by Mr. Langford James, the contract between the plaintiff and the defendants does not include that term at all. Mr. Langford James contends that as Dutta merely telegraphed the effect of the plaintiff's order to Manchester and as the sale note contains no express reference to the indent which the plaintiff signed, it is not shown that clause 7 of the indent was any part of the contract between the plaintiff and the defendants. If that can be made out, then of course Mr. James' client is entitled to resist this application to stay the suit.

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I am not, however, of opinion that it can be said that this particular clause of the indent or, indeed, any other clause of the indent was no part of the bargain between the plaintiff and the defendants. It seems to me that the mere circumstance that this man Dutta who carries on an indenting business does not repeat to Manchester the whole of the indent clauses has no effect upon the question. The plaintiff's offer was an offer upon all the terms of this indent and although the words "agents", "suppliers" and "principals" are used in a confusing and, indeed, rather absurd manner, they are used in this case with reference to and are demonstrative of Messrs. Baerlien Brothers, Limited. The intention was that Messrs. Baerlien Brothers, Ltd., should have the right of cl. 7 and, in my judgment, when that order was booked by telegram, it is not right to say that Baerlien Brothers were contracting with the plaintiff independently of the indent form. In my judgment, the indent form signed by the plaintiff is a part of the offer which Baerlien Brothers accepted. It is the only order which the plaintiff gave and, in my judgment, it is not correct to say that the order which is referred to in the sale-note is the telegraphic order sent by Mr. M. N. Dutta. The order referred to in the sale-note "your esteemed order sent by Mr. M. N. Dutta" does not mean the telegram or cablegram of Mr. Dutta. It means the order given to Mr. Dutta which Mr. Dutta repeats to Manchester.

In the same way when the plaintiff comes to finally close the matter he says:—"We duly received your "favour of the 16th February confirming our order "for 120 bales" and so on. It does not seem to me possible to construe this contract by assuming that the whole of this indent is left out as between the plaintiff and the actual suppliers. The purpose of the indent would be entirely nugatory if that was the case. That being so, I am of opinion that this clause is a submission clause and a part of the bargain. It is a clause in writing and, therefore, the question arises whether, as it has not been signed by Baerlien

Brothers, it is a submission within the meaning of the Indian Arbitration Act.

Upon that point the case-law at one time was in some confusion. The first case was the case of *Ex parte Munro; re Lewis* (1), which was followed apparently in *Caerleon Tinplate Company (Limited)* v. *Hughes* (2). So far authority was in favour of the view that it was necessary that the agreement should be signed by both parties. Apparently in the case of *Ram Narain Gunga Bissen* v. *Liladhur Lowjee* (3), Mr. Justice Woodroffe assumed that to be the law, though I do not gather that the exact point was relevant to the case before him. In the case of *Sukhamal Bansidhar* v. *Babu Lal Kedia & Co.* (4), that also was assumed to be the law in the judgment of Mr. Justice Walsh, where he said: "We agree with the view "taken by Mr. Justice Woodroffe in *Ram Narain* "*Gunga Bissen* v. *Liladhur Lowjee* (3), and with the "majority of the English cases on this point, particu-"larly *Caerleon Tinplate Company (Limited)* v. "*Hughes* (2), that that provision involves a submission "signed by both parties or their agents".

Later in India the same has been laid down by my learned brother Mr. Justice Page in *John Batt & Co. (London) Ltd.*, v. *Kanoolal & Co.* (5). Mr. Justice Page notices certain other English cases. He has noticed the case of *Baker* v. *Yorkshire Fire and Life Assurance Co.* (6), the case of *Hickman* v. *Kent or Romney Marsh Sheepbreeders' Association* (7) and the case of *Anglo-Newfoundland Development Co.* v. *The King* (8). He says, however, that these cases are to be distinguished on the ground that the plaintiff was estopped from asserting that he had not assented to the arbitration-clause.

In my judgment, the law is the other way. The Arbitration Act of 1889 and the Indian Arbitration

(1) (1876) 45 L. J. Q. B. 816.
(2) (1891) 60 L. J. Q. B. 640.
(3) (1906) I. L. R. 33 Calc. 1237.
(4) (1920) I. L. R. 42 All. 525.
(5) (1925) I. L. R. 53 Calc. 65.
(6) [1892] 1 Q. B. 144.
(7) [1915] 1 Ch. 881.
(8) [1920] 2 K. B. 214.

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Act for the best of good reasons have not required that the agreement to submit should be signed by by both parties. What has been required is a written agreement to submit and *Baker's case* (1), *Hickman's case* (2) and the case of *Anglo-Newfoundland Development Co.* v. *The King* (3) show that it is illegitimate to import into the statute the requirement of a signature by both parties.

This it seems to me has nothing to do with estoppel. In the case of *Baker* v. *Yorkshire Fire and Life Assurance Co.* (1), the plaintiff brought the suit upon a policy. No doubt he was estopped from asserting that he had not assented to an arbitration-clause but he was not estopped from asserting that he had not signed the arbitration clause. In *Hickman's case* (2), Mr. Justice Astbury lays down the law in the following terms which were afterwards accepted by the Court of Appeal in the *Anglo-Newfoundland Development Case* (3):—"The result of "these decisions is, I think, that if the submission is "in writing and is binding on both parties as their "agreement or as the equivalent in law to an agree-"ment between them the statute is satisfied", and as Bankes L. J. pointed out, following the decision in *Baker's case* (1), "it is not necessary that both parties "should have signed the written agreement: if a "person has accepted a written agreement and acted "upon it, he is bound for this purpose, although he "may not have set his hand to the document."

I am, therefore, of opinion that the law as laid down by Mr. Justice Page in the case cited is not accurate and in the present case I do not think that the mere fact that Baerlien Brothers have not put their signature to the indent form is a matter of any consequence. However, if I am right in thinking that the reference in the sale note to the order of the plaintiff is a reference to the indent which the plaintiff signed, this point does not really give trouble.

It remains only to consider whether there is, in this case, a good ground which would entitle us to

(1) [1892] 1 Q. B. 144. (2) [1915] 1 Ch. 881. 902.
(3) [1920] 2 K. B. 214.

say that the learned Judge has wrongly exercised his discretion in requiring the plaintiff to abide by the arbitration clause. I cannot help observing that such clauses are frequently signed very light-heartedly; but it is absolutely essential that people when they enter into contracts should abide by them although no doubt there is power in court to refuse to stay. When a person in Calcutta is buying goods from another person in Manchester, if the arbitration-clause is a part of the contract it may often be exceedingly unfair to one or other of the parties if the arbitration clause is not insisted upon. I see no reason in this case to think that the learned Judge was wrong in insisting that the parties should abide by the arbitration-clause.

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For these reasons I think that the appeal fails and must be dismissed with costs.

C. C. GHOSE J. I agree.

Appeal dismissed.

Attorneys for the appellant: *Morgan & Co.*
Attorneys for the respondents: *Pugh & Co.*

S. M.