## ORIGINAL CIVIL.

*Before Roy J.*

1934

*March* 5, 6, 7.

# RAMLAL MURLIDHAR

*v.*

# HARIBUX PURANMULL.*

*Arbitration—Written submission to arbitration, if must be signed by both parties—Contract for sale of goods—Arbitration clause—Incorporation into a subsequent contract between the original purchaser and a third party—Construction—Indian Arbitration Act (IX of 1899), ss. 4, 19.*

It is clear law that it is not necessary that there should be signatures of both the parties to a written submission. For the purposes of the Indian Arbitration Act, it is sufficient, if one of the parties signs the document and the other accepts it.

*Radha Kanta Das* v. *Baerlien Brothers Ltd.* (1) and *Shankar Lal Lachhmi Narain* v. *Jainy Brothers* (2) referred to.

Where, in a contract between the two firms of P and R for sale of goods by P to R, there is a clause for referring all disputes between the parties to arbitration, and subsequently R sell the same goods to another firm, H, by a *sowdâ* or contract made between R and H, which contains the words: "As we bought the goods of P we sold to you in the same way. All the terms and conditions are the same as there."

*held* that whether the arbitration clause in the contract between P and R was incorporated into the later contract between R and H was really a question of construction.

*Held* further, that the language of the *sowdâ* (the later contract) was not such as to make it clear that the parties ever intended to exclude the jurisdiction of the Court.

*Chatturbhuj Chandunmull* v. *Basdeodas Daga* (3) and *Haji Vali Mahomed Ayoob* v. *Shamdeo Gopiram* (4) referred to.

*T. W. Thomas & Co., Limited* v. *Portsea Steamship Company, Limited* (5) and *Kedarnath Babulal* v. *Sumpatram Doogur* (6) applied.

APPLICATION.

*S. R. Das* for the applicants.

*S. C. Ray* for the respondents.

*Application in Original Suit No. 49 of 1934.

(1) (1928) I. L. R. 56 Calc. 118.
(2) (1930) I. L. R. 53 All. 384.
(3) (1920) I. L. R. 47 Calc. 799.
(4) (1930) 34 C. W. N. 447.
(5) [1912] A. C. 1.
(6) (1920) I. L. R. 47 Calc. 1020.

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The facts of the case and arguments of counsel appear sufficiently from the judgment.

Roy J. This is an application on behalf of the defendant firm under section 19 of the Indian Arbitration Act for an order that all proceedings in this suit be stayed.

It appears that, on the 28th of June, 1932, the defendant firm entered into a *sowdâ* or contract with the plaintiff firm for the purchase of thirty bales of *sârhis*. The *sârhis* were to be 10 yards by 44 inches in measure and of *hâti* border of two colours; shipments were to be made in July, August and September 1932. An entry was made in the plaintiff firm's *sowdâ* book, setting out the terms of the contract between the plaintiff firm and the defendant firm which was signed by or on behalf of the defendant firm. The entry contains the following words :—

> As we bought the goods of Pannalal Sagoremull we sold to you in the same way. All the terms and conditions are the same as there.

There was, it is admitted, an arbitration clause in the plaintiff firm's contract with Pannalal Sagoremull, by which the plaintiff firm had bought the goods which they subsequently sold to the defendants. The applicants rely on the words I have just quoted from the entry in the plaintiff firm's book relating to the *sowdâ* in suit, as having the effect of incorporating the arbitration clause in the contract or *sowdâ* in suit. It is on the strength of that arbitration clause that is alleged to have been incorporated in the *sowdâ* in suit that the present application is sought to be maintained.

It appears that the goods, the price of which is the subject matter of the present suit, were delivered to the defendant firm on the 11th of January, 1933. On the 5th of December, 1933, the plaintiff firm, through their solicitors, made a demand on the defendants for payment of what they claim to be due to them for the price of goods delivered. On the 11th of December, 1933, the defendant firm replied

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to the letter of the plaintiff firm's solicitors. In the letter of the 5th of December, the plaintiff firm's solicitors had threatened that, failing payment within 24 hours from the receipt of their letter, they would, according to their instructions, take steps against the defendant firm. In their reply, through their solicitors Messrs. P. D. Himatsingka & Co., on the 11th of December, 1933, the defendant firm, in the last paragraph of their letter, wrote thus:

> Please note that if, inspite of what is aforesaid, your clients take any steps they will do so at their own risk as to costs.

The correspondence seems to have ended there so far as the evidence before me goes.

On the 9th of January, 1934, the present suit was filed. This is a suit for the recovery of the price of goods sold and delivered to the defendants. Summons in the suit was served on the defendant firm on the 10th of January, 1934, and, on the 13th of January, 1934, the defendant firm entered appearance. It is admitted that, on the 25th of January, 1934, the time for filing the defendant firm's written statement expired. On the 9th of February, 1934, notice of motion was taken out by the defendant firm for their present application. On the same day, it appears, the plaintiff firm's solicitors took out a summons to compel the defendant firm to file their written statement within a limited time. That application was adjourned at the instance of the defendant firm and it has been suggested by learned counsel for the respondents that the adjournment of that application amounted to a step in the proceedings. Now, the application for stay has been resisted on various grounds, but the main objection of the respondents is founded on the contention that there was no valid or binding submission under which matters could be referred to the arbitration of the Bengal Chamber of Commerce.

There are really two points involved in that contention or objection of the plaintiffs. It is said, first of all, that the *sowdâ* in suit, being in the form

in which we find it, and having been signed only by the defendant firm, there was no submission within the meaning of the Indian Arbitration Act. In my view, there is no substance at all in this point, and I cannot say that this point was very seriously pressed by counsel. To my mind, it is clear law that it is not necessary that there should be signatures of both the parties to a written submission. A document signed by one party and accepted by the other party is enough for the purposes of the Act. Reference may be made to the cases of *Radha Kanta Das* v. *Baerlien Brothers Ltd.* (1) and *Shankar Lal Lachhmi Narain* v. *Jainy Brothers* (2). There is a further point, however, which requires very careful consideration.

It has been submitted that the defendant firm cannot rely on the arbitration clause in the contract between the plaintiff firm and Pannalal Sagoremull, as that clause cannot be said to have been incorporated in the *sowdâ* in suit, having regard to the language of the *sowdâ*. There are two cases of this Court, in which this very point has been considered. In these cases, the *sowdâs* were practically in the same terms as the *sowdâ* in suit. In *Chatturbhuj Chandunmull* v. *Basdeodas Daga* (3), Mookerjee and Fletcher JJ. held that the arbitration clause was not incorporated whereas in the case of *Haji Vali Mahomed Ayoob v. Shamdeo Gopiram* (4), Rankin C. J. and C. C. Ghose J. held that the arbitration clause was incorporated. In the latter case, the learned Judges, though they referred to the case of *Chatturbhuj Chandunmull* v. *Basdeodas Daga* (3), did not say that the judgment of Mookerjee and Fletcher JJ. was wrong. They contented themselves by saying that it was not necessary, for the purpose of their judgment, to go into any discussion as to whether or not the decision in that case was right on the particular facts appearing therein. It does not appear from the reports how the particular facts in

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(2) (1930) I. L. R. 53 All. 384.
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the case of *Haji Vali Mahomed Ayoob* v. *Shamdeo Gopiram* (1) differed from the facts of the case of *Chatturbhuj Chandunmull* v. *Basdeodas Daga* (2). The *sowdâs* seem to have been in the same form and were more or less in the same language. That is the state of the authorities, so far as this Court is concerned, on the very question which has arisen before me for decision.

Counsel have referred to various English cases, in which questions had arisen, as to how far clauses in a charter-party were incorporated in a bill of lading. I do not think that any useful purpose can be served by discussing the English cases. In most of the cases it was held that the arbitration clause was not incorporated in the subsequent contract contained in the bill of lading between the shipowner and the consignee. It is true that in one of the cases, I mean in the case of *Weir & Co.* v. *Pirie & Co. (No. 1)* (3), it was held that the arbitration clause in a colliery guarantee was incorporated into the charter-party. In the volume in which the above case (3) is reported there is another case in which it was held that the arbitration clause was not so incorporated.

It seems to me that the question is really one of construction of the particular *sowdâ* in suit, but the English cases are useful for certain observations made by learned judges in course of their judgments in those cases. I should like particularly to refer to *T. W. Thomas & Co., Limited* v. *Portsea Steamship Company, Limited* (4) for the observations of Lord Loreburn L. C. at page 6 and of Lord Gorell at pages 8 and 9 of the report. I may also refer to the judgment of Vaughan Williams L. J. in *The Portsmouth* (5). In my view, in this case, the clause respecting arbitration which is to be found in the plaintiff firm's contract with Pannalal Sagoremull was not and could not have been

(1) (1930) 34 C. W. N. 447.
(2) (1920) I. L. R. 47 Calc. 799.
(3) (1898) 3 Com. Cas. 263.
(4) [1912] A. C. 1.
(5) [1911] P. 54, 63.

incorporated in the *sowdâ* in suit. The words of the *sowdâ* are, in my view, ambiguous, and it is certainly open to question whether the words were intended to refer to the arbitration clause at all. I think the arbitration clause constituted a collateral bargain between the plaintiff firm and Pannalal Sagoremull, and it cannot be said that an arbitration clause is an ordinary incident of a contract for the sale or purchase of goods.

In this connection, I should like to quote a passage from the judgment of Lord Loreburn L. C. in *T. W. Thomas & Co., Limited* v. *Portsea Steam Company, Limited* (1). The Lord Chancellor observes :

> The arbitration clause is not one that governs shipment or carriage or delivery or the terms upon which delivery is to be made or taken.

It should be borne in mind that in that case the learned Judges were considering the question as to how far an arbitration clause in a charter-party was incorporated in the bill of lading. I think it is difficult to say, on the language of the *sowdâ*, that the parties in this case were intending to bind themselves by a clause respecting arbitration by the Bengal Chamber of Commerce or that they were intending to make the arbitration clause a term or condition of the bargain between themselves. It is common knowledge that goods bought from an importing firm by a particular dealer are often sold in the market to various successive dealers, and the ultimate buyer takes delivery from the importer. The *sowdâs* between successive dealers are more or less always in the same form, and in the absence of unambiguous indication in the *sowdâs* it is hardly reasonable to suppose that the ultimate purchaser was entering into a bargain with the last seller, that any disputes between them should be referred to arbitration under the rules of the Bengal Chamber of Commerce, a body of whom perhaps the last purchaser had never known or thought of.

(1) [1912] A. C. 1, 6, 9.

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To my mind, using the language of Lord Gorell in the case of *T. W. Thomas & Co., Limited* v. *Portsea Steamship Company, Limited* (1) at page 9 of the report :

> There is a wide consideration which I think it is important to bear in mind in dealing with this class of case. The effect of deciding to stay this action would be ..... that either party is ousted from the jurisdiction of the courts and compelled to decide all questions by means of arbitration. Now I think, broadly speaking, that very clear language should be introduced into any contract which is to have that effect, and I am by no means prepared to say that this contract, when studied with care was ever intended to exclude, or does carry out any intention of excluding, the jurisdiction of the courts.

I am not prepared to say that the language of this *sowdâ* is such as to make it clear that the parties ever intended to exclude or that the language ever had the effect of carrying out any intention of excluding the jurisdiction of the ordinary court of law.

I have been referred by counsel for the plaintiff firm to the case of *Kedarnath Babulal* v. *Sumpatram Doogur* (2), and my attention has been drawn to a passage in the judgment of Mookerjee J. at page 1025. The learned judge there says :—

> It is plain that before the jurisdiction of the court to make an order for stay under section 19 can be invoked, it must be established beyond doubt that there is a valid submission. This is by no means clear in the case before us, for, it is at least doubtful whether the arbitration clause in the Japanese contract form was or was not incorporated, by reference, as a condition in the contract between the parties.

That case also related to a *sowdâ* more or less in the same terms as the *sowdâ* in the suit and the Japan Cotton Trading Co., Ld., were the importing firm concerned in that case.

In my view, unless I am satisfied that the words of this particular *sowdâ* clearly established the incorporation of the arbitration clause in the contract of Pannalal Sagoremull into the *sowdâ*, I ought not to make any order for stay of the suit under section 19. That being my view, I think I ought to refuse this present application.

Certain other objections were advanced by counsel for the plaintiff firm to my making any order in

(1) [1912] A. C. 1, 6, 9. (2) (1920) I. L. R. 47 Calc. 1020.

favour of the applicants in this case. It was submitted that the defendant firm had taken a step in the proceedings by reason of the application made for adjournment of the summons taken out by the plaintiff firm to compel the defendant firm to file their written statement. I am not prepared to accept that submission as correct.

It was further contended that the applicant firm were not, when the suit was commenced, or at any other time, ready or willing to do all things necessary to the proper conduct of the arbitration. It seems to me that it is difficult to say on the affidavit before me, that the applicants were, at any time, ready or willing to go to arbitration. The goods, the price of which forms the subject matter of the suit, were, as I have already said, delivered on the 11th of January, 1933. No payment was made by the defendant firm, and when a demand was made by the plaintiff firm's solicitors on the 5th of December, 1933, there was no offer to go to arbitration or any indication at all by the defendant firm that they should like to have their disputes settled by arbitration, though it seems that the plaintiff firm's solicitors were threatening to take proceedings in court. It is true that in their letter of the 5th of December, 1933, the plaintiff firm's solicitors had not distinctly stated that they would take proceedings in court, but the reply of the 11th of December, 1933, of the defendant firm's solicitors, to my mind, fairly clearly indicates that the defendant firm's solicitors realised that the plaintiff firm's solicitors had been threatening proceedings in court. It was, at no time before the institution of the suit, suggested by the defendant firm, the applicant in the present motion, that the disputes between the parties should be settled by arbitration. Even after the suit had been filed on the 9th of January, 1934, the defendant firm did not evince any desire or intention to go to arbitration though they entered appearance so far back as the 13th of January, 1934. It has been suggested, in the affidavit in reply, that there were negotiations for settlement between the defendant

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firm and Pannalal Sagoremull, and that the defendant firm had only applied for stay of the suit as the negotiations had fallen through. It is not suggested that the negotiations for settlement were on the lines that there should be an arbitration between the plaintiff firm and the defendant firm, or between the plaintiff firm and defendant firm and Pannalal Sagoremull. It seems to me quite clear that, assuming the statements in the affidavits in reply to be correct, the defendant firm only realised that they might have some right to go to arbitration after they definitely ascertained that the disputes between the parties could not be settled amicably, and it was only then that they took action and brought on the present application. I am not satisfied that the defendant firm at any time at all genuinely desired to go to arbitration, and I am inclined to think that this idea of an application for stay of the suit under section 19 was conceived after the defendant firm had taken the advice of their lawyers, and that they never themselves at any time thought that they had definite rights under the *sowdâ* to go to arbitration. I do not believe they had any desire to have recourse to arbitration until it was apparent that the suit would be proceeded with in Court.

In these circumstances I am clearly of opinion that I ought not to exercise my discretion in favour of the applicant. The application will, therefore, be dismissed with costs.

*Application dismissed.*

Attorneys for applicants: *P. D. Himadsingka & Co.*

Attorneys for respondents: *K. K. Dutt & Co.*

P. K. D.