

## APPEAL FROM ORIGINAL CIVIL.

*Before Costello and Lord-Williams JJ.*

GOPI NATH

v.

SALIL KUMAR MITRA.\*

1938

Mar. 1.

*Arbitration—Submission of question of law—Setting aside an award—Error of law apparent on the face of award.*

The Court may set aside an award for an error of law apparent on the face of it, if the question of law involved is not one which was specifically referred to the arbitrator.

The submission of a specific question of law must be such that it can be fairly construed to show that the parties intended to give up their rights finally to resort to the King's Courts, and in lieu thereof to submit that question to the final decision of a tribunal of their own.

*Kelantan Government v. Duff Development Co. (1) explained.*

APPEAL from a judgment of Panckridge J.

The material facts of the case and the arguments in the appeal appear from the judgment.

*S. M. Bose*, Standing Counsel, and *S. B. Sinha* for the appellant.

*S. C. Bose* and *Sudhish Roy* for the respondent.

LORT-WILLIAMS J. This is an appeal against a decision of Panckridge J. One Lala Gopi Nath demised certain premises known as the Minerva Theatre to one Salil Kumar Mitra. The lease was effected by a registered document and is dated December 2, 1933. It was for a period of two years from December 1, 1933.

Clause 2, sub-cl. (20) of the lease provided that—

Upon the expiry of the term hereby created or other sooner determination and after possession of the same is obtained by the lessee, the lessor will have the demised premises and the furniture,

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fixtures and machineries and things, scenery, dresses, stage fittings, etc., examined by a surveyor or other person competent to examine the same and any defect that may be found therein shall be made good by the lessee.....

*Lori-Williams J.*

Clause 5 provided that dispute touching the construction, meaning or effect of the lease or any clause or thing therein contained or the respective rights or liabilities of the parties under the lease or otherwise in relation to the premises should be referred to the sole arbitration of Lala Ganga Sahay of No. 53, Upper Chitpore Road in Calcutta whose decision should be final. It was further provided that the lease should be deemed to be a submission to arbitration within the meaning of the Indian Arbitration Act.

On the same date, an agreement in writing was made between the parties which was not registered. This provided for the realisation of box-office receipts and for meeting the expenses of the theatrical business. It referred in terms to the lease. In cl. 8 it was provided that an account should be taken on the 5th day of every succeeding month and the amount of profit found to have accrued during the previous month after meeting all expenses including the rent reserved by the lease was to be divided equally and one-half thereof was to be appropriated towards the liquidation of an amount due to the lessor under a previous decree and the other half was to be received by the lessee "until such time as the whole balance now due under the said decree dated the twenty second day of March, 1933, be fully paid with interest and costs".

Under the terms of the lease, in the ordinary course of events, the tenancy would have expired on November 30, 1935. On the 17th October, the lessor inserted an advertisement in the "Statesman", drawing attention to the approaching expiration of the lease and seeking for another lessee. This advertisement came to the notice of the lessee, who objected to it, and put announcements in other newspapers to

the effect that the lease would not expire on the 30th November, and that the lessor had no right to grant a new lease as from 1st December.

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On October 23, 1935, the lessee wrote a letter to Lala Ganga Sahay complaining that, in spite of demands, the lessor had failed to comply with various requirements of the lessee. The first and second paragraphs referred to payments which, the lessee alleged, were due to him from the lessor: the fourth and fifth referred to payment of certain costs and to the necessity of giving proper receipts for monies paid in part satisfaction of the decree to which I have referred. The third referred to the notice published in the newspaper by the lessor about the expiration of the lease, which, the lessee alleged, had caused injury to his prestige, credit and business. His requirement was that such notices should be stopped, because they were contrary to the terms of the agreement made between the lessor and the lessee, under which, as the lessee alleged, the existing lease could not expire on the 30th November next, as falsely stated in the advertisement. The lessee concluded by saying "I would ask you to arbitrate the above matters "as early as possible and to give an award with costs "and damages".

Thereupon Lala Ganga Sahay, on October 25, 1935, sent notices to both parties fixing October 29, 1935, for a meeting and on that date there were present—Sunder Lal, who represented the lessor, Salil Kumar Mitra and another. We have no information as to what took place at the meeting. But on the 31st October, the lessor wrote to Lala Ganga Sahay saying that he had received a copy of the lessee's letter of October 23, 1935, wherein he made certain allegations on the basis of which he invited his arbitration and contended that the existing lease could not expire on November 30, 1935. The lessor stated that the lessee was entirely wrong and that in reality there were no points for Lala Ganga Sahay's

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determination as arbitrator. After stating particulars regarding the lease, he continued as follows:—

The lease makes no reservation for the extension of the term of the lease beyond two years. The agreement to which Mr. Salil Kumar Mitra refers is subject to the terms of the lease and does not over-ride or modify the terms of the registered lease. Under s. 92 of the Evidence Act no contemporaneous agreement can be proved to add to or subtract from the terms of a deed which is registered. A registered deed can only be abrogated or varied by a registered deed and therefore the reliance placed by Salil Kumar Mitra on the agreement for his contention is quite misconceived. Therefore, there is nothing to arbitrate about the lease which is absolutely clear in its terms and as regards the agreement there is no provision made therein for referring any matter to arbitration. Therefore, the reference made by Salil Kumar Mitra is invalid.

The other points raised are mere matter of account and adjustment which have nothing to do with the terms of the lease. It is therefore requested that the matter be shelved.

This is merely an attempt on the part of Salil Kumar Mitra to retain possession of the premises beyond the terms of the lease which he is not entitled to do.

In spite of that letter, it appears that both parties appeared before Lala Ganga Sahay. There is nothing in the paper-book, beyond the letter to which I have referred and possibly a telegram of November 7, 1935, to show that the lessor appeared before Lala Ganga Sahay under protest, but it must be remembered that it is always dangerous for a party to abstain from taking part in proceedings before an arbitrator on the ground of irregularity, because the irregularity may not be sufficient to upset any award which may be made.

On January 29, 1936, Lala Ganga Sahay made an award saying that he had heard the evidence adduced on both sides and considered the arguments advanced by each. He dealt with each of the points raised by the lessee, and with regard to the third, his finding was as follows:—

I find that the lease had not expired and will not expire until the balance of the decretal amount is fully paid in view of the agreement. I do not award any damages.

Subsequently, on April 17, 1937, the lessee wrote again to Lala Ganga Sahay raising a number of other points and asking him to arbitrate upon them. The only one to which I need refer is that in which the

lessee referred to the clause of the lease which gave the lessor the right to appoint a surveyor to examine the premises and the fixtures, fittings, *etc.* The lessee contended that in view of the fact that the lessor's agent was living in the demised premises and was thoroughly conversant with their condition and that of the fixtures, fittings, *etc.*, the lessor had no right to have the premises and the fixtures, *etc.*, examined by any surveyor. Apparently notice was sent to the lessor, because on May 19, 1937, Messrs. Akhil Bose & Co. wrote on his behalf to Lala Ganga Sahay referring to a notice dated the 6th May and saying *inter alia* as follows—

We have to repeat that you have no jurisdiction to proceed with the proposed reference and our client denies your right to do so.

Further, the writer alleged that Lala Ganga Sahay was colluding with Salil Kumar Mitra and acting in his interests against the lessor and that he was inimically disposed towards the lessor and was, therefore, unfit to arbitrate in any matter in which he was concerned. Nevertheless Lala Ganga Sahay proceeded to make an award on August 9, 1937, in which, *inter alia*, he held that as "the lessor's agent is a "whole-time resident in the demised premises and is "intimately familiar with the condition of the "theatrical materials and goods and the building, ".....Sub-clause (20) of cl. 2 of the lease will not "have any application at all, that is to say, the lessor "will not have any right" under the said sub-clause to appoint a surveyor.

The application made to the learned Judge was to set aside these awards on the ground that they were vitiated by errors appearing on the face of them, namely, that it was clear in the first award that Lala Ganga Sahay had arrived at his decision about the terms as a result of taking into consideration the unregistered agreement. It was argued that, as a matter of construction, that procedure was wrong, because such an agreement could not be used to

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modify the terms of the registered lease. With regard to the second award, it was clear, in view of the terms of the document itself, that the mere fact that the lessor had an agent living on the premises could not be held to deprive him of rights which were specifically given to him under the terms of the lease.

The learned Judge found in favour of the lessor upon both these points. But it was argued that, although the Court will generally set aside an award for an error of law apparent on the face of it, an exception is made where the question of law involved has been specifically referred by the parties to the arbitrator, and the learned Judge was referred to the case of *Kelantan Government v. Duff Development Co.* (1). Upon the authority of that case, he came to the conclusion that where, as in the present case, there was an arbitration clause in general terms which included a submission to refer to arbitration questions touching the construction meaning or effect of the document itself or any clause or thing contained in it or the respective rights or liabilities of the parties under it or otherwise in relation to it, it was unnecessary that the parties should refer any specific point of construction to the arbitrator in order to bring the case within the exception to which I have referred. The learned Judge was of opinion that it was not necessary that a reference of the specific point of law should be formulated in a submission *ad hoc* executed by both parties: and he held that the submission contained in the arbitration clause in the lease was sufficient without any further act of submission on the part of either of the parties.

In my opinion, that is not the effect of the decision in that case. It is true that the Lord Chancellor, Viscount Cave, used words which, at first sight, would seem to indicate that he thought that a submission in general terms would be sufficient. But Lord Parmoor left the point undecided and Lord Trevethin

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definitely disagreed with the Lord Chancellor. Moreover, the case cannot be accepted as a binding decision in favour of such a contention, because, beyond making the submission in the arbitration clause, the parties, being unable to agree upon an arbitrator, had both asked the Government to appoint an arbitrator. And when that had been done, both parties delivered pleadings in which they submitted specific points of law for the arbitrator to decide. So that, in that case, the parties had voluntarily referred specific points of law for the consideration of the arbitrator, in addition to the submission to arbitration contained in the arbitration clause. In spite of those facts it was Lord Trevethin's opinion that there was in that case no submission of a specific point of law for the consideration of the arbitrator within the meaning of the rule.

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*Lord-Williams J.*

In the present case, the facts which are alleged to indicate submission by the parties of a specific point of law for the consideration of the arbitrator are much fewer in number and less in weight than in the case to which I have referred. Lord Trevethin stated in his judgment that where it is alleged that there was a submission of a specific question of law, it must be such that it can be fairly construed to show that the parties intended to give up their rights finally to resort to the King's Courts, and in lieu thereof to submit that question to the final decision of a tribunal of their own. In face of the facts in this case and the letters to which I have referred, it cannot possibly be contended that the lessor agreed to refer either specific or in fact any points of law for the consideration of Lala Ganga Sahay, or that there is anything to show that he intended to give up his rights to resort finally to the King's Courts regarding such points of law as have been discussed in the present case.

The result is that, in my opinion, the present case does not come within the exception to which I

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have referred, and this Court is entitled to interfere with the decisions of the arbitrator. Further I am of opinion that the arbitrator's decision on both points was wrong and that the errors committed by him appear on the face of the awards which he made. For these reasons the appeal must be allowed with costs, to the extent that cl. 3 of the award dated January 29, 1936, and cl. 5 of the award dated July 14, 1937, are set aside.

COSTELLO J. I agree.

*Appeal allowed.*

Attorneys for appellant: *Akhil Bose & Co.*

Attorneys for respondent: *Mitter & Bural.*

A. C. S.