APPELLATE CIVIL.

1939

Nov. 27;
Dec. 8.

Before Mitter and Lodge JJ.

JHIRIGHAT NATIVE TEA CO., LTD.

v.

BIPUL CHANDRA GUPTA.*

Company—*Arbitration—Want of jurisdiction and non-maintainability of case—Court's duty—Indian Companies Act (VII of 1913), s. 152, sub-ss* (1), (3); *s. 208C—Indian Arbitration Act (IX of 1899), ss. 2 to 22—Code of Civil Procedure (Act V of 1908), s. 89; Sch. II.*

By virtue of the provisions of s. 152, sub-ss. (*1*) and (*3*) of the Indian Companies Act, 1911, all arbitrations between companies and persons shall be effected in accordance with the provisions of ss. 3 to 22 of the Indian Arbitration Act, 1899, and, for this purpose, s. 2 of the Indian Arbitration Act restricting its local application shall be treated as non-existent.

Sub-section (*6*) of s. 208C of the Companies Act similarly makes the Indian Arbitration Act, 1899, except s. 2 thereof, applicable to arbitrations in pursuance of s. 208C of the Companies Act.

Sita Ram-Balmukand v. *Panjab National Bank, Ltd.* (1) not followed.

Peoples Bank of Northern India Ltd. v *Padam Lal Wasu Ram* (2) referred to.

Under s. 11, sub-s. (*2*) of the Indian Arbitration Act, an award shall be filed either before the High Court or before the Court of the District Judge as the case may be.

In view of s. 89 of the Code of Civil Procedure, 1908, Second Schedule to the Code has no application to arbitrations between companies and persons or to arbitrations under s. 208C of the Companies Act.

If a Court holds that it has no jurisdiction to entertain a case or that the case is not maintainable, then it is not open to that Court to decide any other issue in the case. In such a case the pleading on which the case was started should be returned to the party who filed the same leaving it open to the proper Court to decide the other issues in the case.

APPEAL FROM ORIGINAL ORDER by the applicant who filed an award.

*Appeal from Original Order, No. 39 of 1939, against the order of N. L. Hindley, District Judge of Kachar, dated Sep. 27, 1938.

(1) (1936) I. L. R. 17 Lah. 722. (2) [1938] A. I. R. (Pesh.) 54.

The material facts of the case appear from the judgment. The issues framed in the case, out of which this appeal arises, were as follows :—

(1) Is the petition for filing the award maintainable?

(2) Has this Court jurisdiction to hear the petition filed by the plaintiff or to pass judgment thereon?

(3) Is the "*achalnâmâ*" inoperative and void in law?

(4) Was the arbitrator legally appointed? And is the plaintiff company or its Board of Directors competent to refer the disputes to arbitration?

(5) Is the award illegal, *ultra vires* and void *ab initio*?

(6) Is the petition barred by limitation?

(7) Is the petition barred by estoppel, waiver and acquiescence?

(8) Is the award vitiated by corruption and misconduct on the part of the arbitrator ?

(9) Is the first party guilty of fraudulent concealment of material facts?

(10) Is the award liable to be remitted for reconsideration ?

(11) Is the award properly stamped ?

(12) Is the award liable to be set aside?

(13) Is the plaintiff entitled to get an order from the Court for filling the award ?

(14) To what relief, if any, is the plaintiff entitled?

Atul Chandra Gupta, with him *Dhirendra Krishna Ray* and *Ajit Kumar Dutt* for the appellant. In a case in which one or both of the parties are companies, reference to arbitration is possible under paras. 17 or 20 of the Second Schedule to the Code of Civil Procedure. Section 152 of the Indian Companies Act does not exclude the operation of the Civil Procedure Code. The section is an enabling provision and does not in any way restrict the powers of the company to enter into arbitration according to the provisions of the Indian Arbitration Act. In spite of s. 152 of the Act a company can make a reference to arbitration under the Code of Civil Procedure. Section 214, sub-s. (*2*) of the old Companies Act, corresponding to s. 208C, sub-s. (*6*), shows that, where the legislature intended that the application of the Indian Arbitration Act should be made compulsory, the legislature used very clear language. I rely on *Sita Ram-Balmukand* v. *Punjab National Bank, Ltd.* (1).

(1) (1936) I. L. R. 17 Lah. 722.

1939

Jhirighat Native Tea Co., Ltd. v. *Bipul Chandra Gupta.*

The words "in pursuance of this Act" in sub-s. (3) of s. 152 of the Companies Act means "where the "company takes advantage of the option to refer "under the Indian Arbitration Act". The word "person" in General Clauses Act (X of 1897) includes a company and a company has the right of the ordinary person to refer to arbitration under the general law of the Code of Civil Procedure. Section 152 of the Indian Companies Act did not take away this right under the general law. Regarding the effect of s. 89 of the Code, the trial Judge begs the whole question. The real issue is whether s. 152 of the Companies Act excludes the operation of the Civil Procedure Code in respect of arbitration proceedings between companies and persons.

S. M. Bose and *Satyendra Kishore Ghose* for the respondent. Section 152 of the Indian Companies Act lays down the procedure to be followed when a company resorts to arbitration. A company, because it is a company, is not prevented from resorting to arbitration, but, if a company does resort to arbitration, then the procedure is controlled by the provisions of the Indian Arbitration Act, 1899. The words "other than those "restricting the application of the Act in respect "of the subject-matter of the arbitration" exclude the application of s. 2 of the Indian Arbitration Act in cases of arbitrations resorted to by a company. Therefore, the provision of s. 2 of the Indian Arbitration Act, dealing with the local application and extension of the Act, should be considered as non-existent when a company resorts to arbitration and in such arbitrations the Indian Arbitration Act by itself applies to the whole of British India by virtue of the provisions of s. 152 of the Companies Act. All the paragraphs of Second Schedule to the Code relate to reference to arbitration in general, but the Indian Arbitration Act relates only to arbitration by agreement without the intervention of a Court. Section 3 of the Indian Arbitration Act excludes the application of the

Second Schedule to the Code where the Arbitration Act is applicable. Section 152 of the Indian Companies Act if properly construed means that once there is an agreement to refer, any procedure except what is laid down in the Arbitration Act is excluded. I also contend that s. 89 of the Code of Civil Procedure also indicates that reference to arbitration made by companies attracts the procedure of the Indian Arbitration Act to the exclusion of Second Schedule to the Code. I rely on *Peoples Bank of Northern India Ltd.* v. *Padam Lal Wasu Ram* (1); *Sundar Mal Lakhu Mal* v. *Paris Business Co-Operation Ltd.* (2); *Firm Chandu Lal-Parma Nand* v. *Grahams Trading Co. (India) Ltd.* (3) and *Behari Lal-Madho Parshad* v. *Sirsa Trading Co., Limited* (4).

Gupta, in reply.

Cur. adv. vult.

MITTER J. The respondent was the selling agent of the appellant company at Calcutta. In that capacity he had from time to time received sums of money on behalf of the company. It is not necessary to recite the terms on which he obtained the agency. He was also the financier of the company and in that capacity had from time to time advanced monies to the company. Difference as to the state of accounts arose between them. By a written submission signed on September 11, 1937, by the respondent and, by and on behalf of the company, by its Secretary, Bidit Chandra Gupta, the matters in dispute were referred to the arbitration of Mr. Surendra Mohan Sen Gupta. Mr. Sen Gupta entered upon the reference and made his award on October 15, 1937. On April 19, 1938, just on the re-opening of the Court after Easter Vacation, the Company filed an application in the Court of the Subordinate Judge, Kachar, under para. 20 of the

(1) [1938] A. I. R. (Pesh.) 54.
(2) [1931] A. I. R. (Lah.) 555.
(3) [1938] A. I. R. (Lah.) 827.
(4) (1932) I. L. R. 14 Lah. 249.

1939

Jhirighat Native Tea Co., Ltd. v. *Bipul Chandra Gupta.*

Mitter J.

Second Schedule of the Civil Procedure Code for filing the award. A copy of the award was filed with that application. The respondent, being served with notice of the said application, filed his written statement on June 20, 1938. As the contest raised important points, the learned District Judge transferred the case to his file and, by his order dated September 27, 1938, dismissed the same.

On the pleadings, fourteen issues were framed. The thirteenth and the fourteenth were general issues. The remaining twelve issues raised specific points. The learned District Judge gave his judgment on the first five issues only. He held, on issue No. 1, that the application was not maintainable, as it was made under para. 20 of the Second Schedule, and, on issue No. 2, that the application to file the award could not be made to the Subordinate Judge. The ground for his decision was that the Indian Arbitration Act (IX of 1899) was applicable to the case. He further held, on issue No. 5, that the award was illegal and void as the "formalities of the "Arbitration Act had not been observed". His last mentioned conclusion, according to him, followed as a corollary to his finding on the issue No. 2. He further held that the submission was valid, that the company and the Board of Directors were competent to refer the dispute to arbitration and that the arbitrator had been legally appointed (issues Nos. 3 and 4). We think that the learned District Judge in the view that he took on issues Nos. 1 and 2 ought not to have expressed his opinion on issues Nos. 3 to 5. He should have returned the application for being presented to the proper Court, leaving it open to the proper Court to decide these three issues as well as the other issues. As we think that the learned District Judge was right in his decision on issues Nos. 1 and 2, we set aside his decision on issues Nos. 3 to 5 and leave the subject-matter of these issues open between the parties.

Determination of the questions involved in issues Nos. 1 and 2 depend mainly upon the interpretation

of s. 152 of the Indian Companies Act. These issues as framed by the lower Court are :—

(1) Is the petition for filing the award maintainable?

(2) Has this Court jurisdiction to hear the petition filed by the plaintiff or to pass judgment thereon?

The first and the third sub-sections of s. 152 are :—

(*1*) A company may by written agreement refer to arbitration, in accordance with the Indian Arbitration Act, 1899, an existing or future difference between itself and any other company or person.

(*3*) The provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration shall apply to all arbitrations between companies and persons in pursuance of this Act.

The second sub-section is not material in the appeal.

Two views have been taken of these two sub-sections by other Courts, but there is no decision of this Court. The conflict in the Lahore High Court was settled by a Full Bench of that Court in *Sita Ram-Balmukand* v. *Punjab National Bank, Ltd.* (1). Stress was laid by Bhide J. on the word "may" in the first sub-section and on the last five words of the third sub-section, which, by the way, were misquoted. The conclusion of the Full Bench was that apart from s. 152, a company had the power to refer disputes to arbitration and that s. 152 gave a company the option to refer matters in disputes between it and another company or person in accordance with the Indian Arbitration Act, 1899, and when the said option was exercised by the company, the limiting provision contained in s. 2 of the Indian Arbitration Act would have no force. It was said that s. 214(*2*) of the Companies Act, as it stood then [s. 208C, sub-s. (*6*) of the Act now in force] lent additional support to that view. The other view is that, if a company wishes to refer disputes to arbitration, it must refer in accordance with the provisions of the Indian Arbitration Act, 1899. One of the recent decisions which has expressed this view is in *Peoples*

(1) (1936) I. L. R. 17 Lah. 722.

1939

Jhirighat Native Tea Co., Ltd. v. *Bipul Chandra Gupta.*

Mitter J.

Bank of Northern India Ltd. v. *Padam Lal Wasu Ram* (1). We do not feel inclined to the view taken by the Full Bench of the Lahore High Court.

Sub-section (*1*) of s. 152 by itself conveys the meaning that a company will have the power to refer to arbitration in accordance with the Indian Arbitration Act, 1899. It would be a redundant provision if it be not read with sub-s. (*3*). A company would have had the power, apart from sub-s. (*1*) of s. 152, to refer to arbitration in accordance with the Indian Arbitration Act, 1899, a dispute the subject-matter of which could be the subject-matter of a suit which, with or without leave, could have been instituted in a presidency town. Sub-section (*3*) of s. 152, therefore, is of prime importance, and, in our judgment, the questions involved in issues Nos. 1 and 2 will have to be answered on the interpretation to be put on that sub-section.

By its own force, the Indian Arbitration Act, 1899, governs a narrow field. It operates where the subject-matter of the submission falls either wholly or partly within the *locus* of a presidency town or of the city of Rangoon. The Act itself lays down the procedure for its extension to other local areas. The procedure is that a notification by the local Government defining the extended local area must be issued. A repeal of s. 2 of the Act would bring into operation the other sections of the Act, namely, ss. 3 to 22 throughout the whole of British India by the force of s. 1, sub-s. (*2*). These two facts are fundamental and, in our judgment, must be kept in view and, if these are kept in view, the meaning of sub-s. (*3*) of s. 152 of the Indian Companies Act would become clear. The concluding words of that sub-section "in pursuance of *this* Act",—words which had troubled the minds of the Judges constituting the Full Bench of the Lahore High Court,—mean that ss. 3 to 22 of the Indian Arbitration Act, 1899,

(1) [1938] A. I. R. (Pesh.) 54.

would apply to all arbitrations in which one or both the parties are companies irrespective of the *locus* of the subject-matter *by the force and effect of the Indian Companies Act*, and the procedure provided for in the Indian Arbitration Act for extending its field of operation would not have to be followed in such cases. This is, in our judgment, the effect of sub-s. (*3*) of s. 152. The words "in pursuance of "*this* Act" (*i.e.*, Companies Act) clearly qualify the phrase "shall apply". The meaning is that the provisions of the Indian Arbitration Act, 1899, except s. 2 thereof (which is to be treated as non-existent) shall apply to all arbitrations between companies and persons by the force and effect of the Companies Act itself. The decision of the Full Bench of the Lahore High Court has the effect of substituting for the words "in pursuance of *this* Act" used by the legislature the words "in pursuance of sub-s. (*1*)" or the words "in pursuance of this section." On the interpretation we have put upon sub-s. (*3*) of s. 152, s. 4(*a*) of the Indian Arbitration Act, 1899, would apply to all arbitration in which a company is a party. Paragraphs 20 and 21 of the Second Schedule of the Civil Procedure Code is accordingly excluded and the Court to which the award will have to be filed under s. 11(*2*) of the Indian Arbitration Act of 1899 must be either the High Court or the Court of the District Judge, as the case may be. The material paragraphs of the Second Schedule of the Civil Procedure is excluded by the *direct* force of the Indian Companies Act, by reason of that Act incorporating ss. 3 to 22 of the Indian Arbitration Act. The Second Schedule is accordingly excluded by virtue of the provisions of s. 89 of the Code of Civil Procedure.

We do not think that s. 208C, sub-s. (*6*) of the Companies Act helps the contention of the appellant, which was on the same lines as were adopted by the Full Bench of the Lahore Court. That sub-section made the provisions of the Indian Arbitration Act, 1899, except s. 2 thereof, applicable to arbitrations

1939

Jhirighat Native Tea Co., Ltd. v. *Bipul Chandra Gupta.*

Mitter J.

in pursuance of that section, namely, 208C. The arbitration contemplated in that section is one between the company in liquidation and one or more of its members, an arbitration to settle an internal dispute or difference. Section 152 (*3*) would not have covered such a case as the arbitration contemplated there is one between a company and either another company or an individual a third party, *i.e.*, an arbitration to settle not an internal but an external dispute or difference. We, accordingly, uphold the decision of the learned District Judge on issues Nos. 1 and 2 only. As the Court, in which the application to file the award was made, had no jurisdiction to entertain it, not being the Court of the District Judge, the proper order would not be an order of dismissal, but an order for return of the application for presentation to the proper Court in accordance with the provisions of the Indian Arbitration Act, 1899. We accordingly direct the application to be returned. Subject to this modification and the reservation made with regard to issues Nos. 3 to 5, the appeal is dismissed.

As the respondent has succeeded substantially he must have the costs of this Court from the appellant company.

Hearing fee 3 gold mohurs.

LODGE J. I agree.

Appeal dismissed; order modified.

N. C. C.