PRIVY COUNCIL.

LOUIS DREYFUS AND COMPANY, APPELLANTS,

v.

ARUNACHALA AYYA, RESPONDENT.

J.C.* 1931, July 23.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Arbitration—Award—Misconduct—Taking legal advice—Privy Council practice — Costs — Unexplained delay — Indian Arbitration Act (IX of 1899), sec. 14.

An arbitration took place under a submission in a contract of April 25, 1918, upon a claim for damages by the buyers of goods against the seller. The arbitrators having disagreed, the matter was referred to an umpire under the arbitration clause. The seller contended, *inter alia*, that the contract of April 25, 1918, had been superseded by one of November 3, 1918, which contained no arbitration clause. The umpire awarded the buyers damages. He prefaced his award with the words: "After taking independent legal opinion, having decided that the alleged agreement, dated November 3, 1918, at no time constituted a concluded contract and did not therefore override the agreement of April 25, 1918." The seller moved to set aside the award on the grounds that the umpire had refused to state a special case, and had taken legal advice without notice to the seller. Upon the latter point the award itself was the only evidence.

Held, that the award was valid, as its language indicated merely that the umpire took advice upon the general rules of law bearing upon the case, and did not mean that he had left to an outsider the burden of deciding any issue instead of exercising his own judgment thereon; the fact that the umpire, in the exercise of his discretion, had refused to state a case did not strengthen the contention that there had been misconduct.

Where there has been unexplained delay in proceedings, a successful appellant to the Privy Council may be refused costs.

APPEAL (No. 65 of 1930) from a decree of the High Court in its appellate jurisdiction (September 12, 1927)

* PRESENT:—Lord TOMLIN, Lord RUSSELL of Killowen, and Sir GEORGE LOWNDES.

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reversing a decree of the Court in its original jurisdiction (May 6, 1926) and setting aside the award of an umpire, dated February 19, 1923, in an arbitration between the parties.

The facts giving rise to the appeal appear from the judgment of the Judicial Committee.

The High Court (RAMESAM and CORNISH JJ.), reversing the decision of WALLER J., had set aside the award in question upon the grounds (1) that there was not a valid agreement between the parties to submit the disputes between them to arbitration, (2) that the umpire had misconducted himself, within the meaning of the Indian Arbitration Act, 1899, section 14, in that before making his award he had taken legal advice without the consent or knowledge of the parties.

Sir Thomas Inskip K.C. and *Van den Berg* for appellants.—The fact that the umpire took legal advice as to the principles of law applicable was not in itself misconduct. It does not appear that he subordinated his mind to the advice received, so as to delegate the duty of deciding between the parties; that being so, there was no misconduct justifying setting aside the award: *Rolland* v. *Cassidy*(1), *Eads* v. *Williams*(2), *Emery* v. *Wase*(3), *Anderson* v. *Wallace*(4), *Ellison* v. *Bray*(5). The case first mentioned was followed by the Board in *Buta* v. *Lahore Municipal Committee*(6). The appellate Court relied upon *Dobson* v. *Groves*(7), but in the light of the above cases the language there used must be read in reference to the facts of the case, not in its widest sense. Even where there has been technical misconduct an award in a commercial arbitration should not be set aside unless it appears that injustice has been done; that is not here the case: *Olympia Oil & Cake Co., In re*(8). Having regard to the previous decision of the High Court, and its affirmance by the Privy Council, that there was a valid submission to arbitration was

(1) (1888) 13 App. Cas. 770, 776.
(2) (1854) 4 De. G.M. & G. 674.
(3) (1801) 5 Ves. 846.
(4) (1835) 3 C. & F. 26, 41, 43 (H.L.).
(5) (1864) 9 L.T. 730.
(6) (1902) I.L.R. 29 Calc. 854; L.R. 29 I.A. 168.
(7) (1844) 6 Q.B. 637, 647.
(8) [1918] 2 K.B. 771, 778.

res judicata. The award now in question was to the same effect as that which was so affirmed. Further, the contracts themselves embodied the arbitration clause by reference.

Dunne K.C. and *Horace Douglas* for respondent.—The question whether the submission to arbitration applied to the dispute was a vital one. The umpire was asked to refer that question of law to the Court and had power to do so under section 10 of the Act. It was misconduct to refuse to do so and then take legal advice upon the question. The High Court rightly applied the judgment of Lord DENMAN in *Dobson* v. *Groves*(1), and set aside the award. In the circumstances of the case there was no *res judicata* affecting the respondent.

Sir Thomas Inskip K.C. replied.

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The JUDGMENT of their Lordships was delivered by Lord TOMLIN.—The question in dispute in this appeal is whether the award of an umpire, dated February 19, 1923, should be set aside or not.

WALLER J. sitting on the Original Side of the High Court of Judicature at Madras on May 6, 1926, dismissed an application of the present respondent to set it aside. By a decree, dated September 12, 1927, of the High Court (Appellate Jurisdiction) the decision of WALLER J. was reversed and the award was set aside. The appellants thereupon appealed to His Majesty in Council to have the judgment of WALLER J. restored.

The appellants are seed and grain merchants carrying on business in Karachi.

On April 25, 1918, an agreement in writing was entered into between the appellants of the first part and R. K. Rajagopala Ayyar (since deceased) and the respondent of the second part. At that time Rajagopala and the respondent were carrying on business together in partnership as Messrs. R. K. Rajagopala Ayyar and Brother, and Rajagopala was managing the affairs of the firm.

(1) (1844) 6 Q.B. 637.

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The agreement provided for the parties of the second part acting as *dubashes* to the appellants. It contained, *inter alia*, the following clauses:—

1. The merchants shall be at liberty to make offers for the purchase from the *dubashes* of groundnuts, caster-seed and any other article required by them for export from Madras, Pondicherry, Cuddalore and Negapatam (hereinafter referred to as "the said merchandise"), and the *dubashes* shall be at liberty to accept such offers, provided that at the time of any such acceptance the quantity of the said merchandise required by the merchants shall be under offer to the *dubashes*, as to which the *dubashes* shall furnish, if required, evidence satisfactory to the merchants. Failure to furnish such evidence on demand shall entitle the merchants to cancel the contract with the *dubashes* for the purchase of the said merchandise.

2. Every contract resulting from an acceptance by the *dubashes* of an offer made by the merchants under clause 1 hereof shall be a contract for the delivery by the *dubashes* of the said merchandise free on board at Madras or Pondicherry or Cuddalore or Negapatam, as specified at the time by the merchants, and shall be reduced into writing, and signed by the *dubashes*, and shall provide that the analysis and quality of the said merchandise, the subject of the said contract, shall correspond to the analysis and quality required and stipulated by the merchants. Failure by the *dubashes* to sign on demand such written contract as aforesaid shall entitle the merchants to cancel the contract.

Clause 12 of the agreement provided for a deposit of Rs. 20,000 being made by the *dubashes* with the appellants, and under clause 14 the agreement was to remain in force for one year from April 25, 1918, unless previously determined under a power thereby conferred on the appellants.

The agreement also contained an arbitration clause in the following terms:—

15. If any question or difference shall arise between the parties hereto touching these presents or the constructions thereof or the rights, duties or obligations of any person hereunder, or as to any other matter in anywise arising out of or connected

with the subject-matter of these presents, the same shall be referred to two arbitrators, being European merchants, and members of the Madras Chamber of Commerce, one to be nominated by each party to the reference. If either party shall refuse or neglect to appoint an arbitrator within seven days after the one party shall have appointed an arbitrator and served a written notice upon the other party requiring him to appoint an arbitrator, then upon such failure the party making the request and having himself appointed an arbitrator, may appoint another arbitrator to act on behalf of the party so failing to appoint, and the arbitrator so appointed may proceed and act in all respects as if he had been appointed by the person failing to make such appointment. The arbitrators shall, within three days after their appointment and before entering upon the business of the said reference, appoint an umpire, in writing, to whom the matters in dispute shall be referred if the arbitrators disagree, and if they fail to appoint an umpire within the said period, then the Chairman or the Acting Chairman for the time being of the Madras Chamber of Commerce shall appoint the said umpire. The arbitrators and umpire acting under these presents shall have all the powers conferred by the Indian Arbitration Act, 1899, or any statutory modification thereof for the time being in force, and these presents shall be deemed to be a submission to arbitration within the provisions of the said Act.

The deposit of rupees twenty thousand referred to in clause 12 of the agreement was duly paid, and under the terms of the agreement a number of contracts were made between the appellants and the *dubashes*, including four contracts in August, 1918, for the sale by the *dubashes* to the appellants of goods for delivery at various dates between September, 1918, and February, 1919. Each of these four contracts contained the words "Conditions as per agreement with you" (i.e., the appellants) "dated the 25th April, 1918."

In their Lordships' judgment, the combined effect of the agreement of April 25, 1918, and the four contracts was to import into each of the four contracts a provision for arbitration in the terms of clause 15 of the agreement of April 25, 1918.

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Shortly after the contracts of August had been made, differences arose between the respondent and his partner Rajagopala, and the firm found itself unable to deliver punctually the goods agreed to be sold under the several contracts entered into between the firm and the appellants.

Accordingly on September 25, 1918, the respondent wrote a letter to the appellants, suggesting modifications of the subsisting arrangements, with the result that on November 3, 1918, a document was signed by the appellants, the respondent, and certain sureties and one Sundaresa. This document was not signed by Rajagopala Ayyar, who was ill and died a day or two later.

This document was in the following terms :—

1. The difference in price due to the firm for September contracts as per their two bills to Messrs. R.K.R., Rs. 20 to be be paid in cash.

2. All contracts outstanding to be extended up to February, 1919.

3. Messrs. C. K. Narayana Ayyar & Sons and S. Kuppuswami Ayyar stand sureties for the due fulfilment of all outstanding contracts, each agreeing to deliver one-half of the above at the respective contracted rates at the aforesaid time.

4. The contract for 500 tons at Rs. 38 due October to be cancelled by the firm.

5. The *dubashy* to go in future under the name of "Arunachala Ayya Sundaresa Ayyar".

6. All sales made to the firm to be confirmed especially by Mr. Sundaresa Ayyar.

An amount of Rs. 50,000 to be deposited with the firm by the aforesaid *dubashes* as per the new agreement.

In their Lordships' opinion, the effect of this document is plain and may be stated as follows :—

Certain moneys due to the appellants under subsisting contracts were to be paid in cash. One outstanding contract, not being one of the four August contracts,

was to be cancelled. Time for delivery under all outstanding contracts, including the four August contracts, was to be extended to February 1919. Two sureties were to guarantee the performance of all outstanding contracts. Sundaresa Ayyar was to take Rajagopala's place as one of the *dubashes* in respect of future contracts, and the deposit was to be increased to Rs. 50,000. There was nothing in this agreement to free the firm of R. K. Rajagopala Ayyar and Brother or the respondent from the submissions to arbitration contained in the four August contracts. These contracts remained unaffected except that the time for delivery was extended.

The deliveries under the four August contracts were not in fact made within the extended time, and on March 8, 1919, the appellants wrote to the *dubashes* firm and to the respondent calling attention to the default, claiming damages, and asking to have the matter settled by arbitration.

The respondent in his answer on November 14, 1919, did not repudiate the August contracts or suggest that there was no submission to arbitration, but took the line that there had been no default.

Apparently the appellants did nothing further until June 14, 1920, when they again wrote to Messrs. R. K. Rajagopala Ayyar and Brother and the respondent a letter claiming Rs. 1,34,053-9-6 by way of damages in respect of the four August contracts, and stating that, failing a settlement, they should refer the matter to arbitration under clause 15 of the agreement of April 25, 1918.

On September 18, 1920, no arbitrator having been nominated on the respondent's side, the appellants appointed two arbitrators.

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On January 26, 1921, the arbitrators affected to enlarge the time for making their award until February 28, 1921.

This extension was undoubtedly made too late, as the original time for making the award had already expired.

The arbitrators disagreed and appointed Mr. Chettle to be umpire.

Mr. Chettle made his award on February 21, 1921, and awarded that the respondent and his firm should pay the appellants Rs. 1,34,053-9-6, with interest at six per cent. from February 28, 1919, and costs.

Neither the respondent nor his firm was represented in the arbitration or took any part in the proceedings.

On August 10, 1921, a motion was launched by the respondent to have the award of Mr. Chettle set aside. In his affidavit in support of the motion the respondent alleged, among other reasons for setting the award aside, that the effect of the document of November 3, 1918, which he said was a concluded agreement, was to override the agreement of April 25, 1918, and thus to eliminate the submission to arbitration contained in that document. He did not repudiate the agreement of April 25, 1918, or contend that he was not bound by the August contracts.

On September 6, 1921, PHILLIPS J. set the award aside. The learned Judge held that the award was bad because the affected extension of time for making the award was ineffectual, and because the umpire did not send the respondent any notice of his proceedings. While expressing his inclination to the view that the document of November 3, 1918, did not wholly supersede the agreement of April 25, 1918, he held that it was not necessary for him to decide this point.

The appellants appealed, and, on July 20, 1922, SCHWABE C.J. and WALLACE J. made an order setting aside the award, but remitting the matter back to the umpire.

The learned appellate Judges held that the award was bad on the grounds on which PHILLIPS J. had based himself, but they also held that the document of November 3, 1918, had not wholly superseded the agreement of April 25, 1918. It is plain that they remitted the matter upon the basis of a determination that there was in existence a submission to arbitration binding upon the respondent.

Subsequently the respondent appealed to His Majesty in Council against the order of July 20, 1922, but this appeal was on December 8, 1924, dismissed because the respondent did not appear to support it.

In the meantime the respondent, by way of counter-blast to the arbitration, launched a suit against the appellants for damages under the document of November 3, 1918, in respect of transactions subsequent to that agreement. This suit was dismissed on April 12, 1923. The trial Judge, COUTTS TROTTER J. in the course of his judgment expressed the view that the document of November 3, 1918, superseded the agreement of April 25, 1918. The respondent appealed but without success.

After the order of July 20, 1922, had been made, it was found that Mr. Chettle was no longer available to act as umpire, and ultimately by an order of the Court Mr. Rae was appointed umpire in his place.

The proceedings under the remit pursuant to the order of July 20, 1922, were therefore held before Mr. Rae and the respondent was represented thereat.

On February 19, 1923, Mr. Rae awarded that Messrs. R. K. Rajagopala Ayyar and Brother (of which

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firm the respondent was the sole surviving partner) should pay to the appellants the sum of Rs. 1,34,053-9-6, with interest thereon at six per cent. from February 28, 1919, to payment, and also certain costs.

The award was therefore identical in effect with that made by Mr. Chettle.

Mr. Rae prefaced his award by stating that it was made

> "after taking independent legal opinion having decided that the alleged agreement, dated 3rd November, 1918, at no time constituted a concluded contract and did not therefore override the agreement of the 25th April, 1918."

As will hereafter appear, this preface formed the basis for an attack subsequently made upon the validity of Mr. Rae's award.

On February 23, 1923, the respondent gave notice of motion for an order that Mr. Rae's award be declared *ultra vires*, illegal, and not binding upon him, and that the award be set aside. This is the application which has led to the present appeal before their Lordships' Board.

In his affidavit in support of his motion the respondent for the first time set up, amongst other grounds for attacking the award, that the agreement of April 25, 1918, was made by his partner without his authority and that he was not bound by it. He also contended that the award was bad because the umpire had refused to state a special case and had taken legal advice without notice to him.

On April 30, 1925, over two years later, the motion to set aside Mr. Rae's award was heard by WALLER J. who gave his final judgment on May 6, 1926.

The learned Judge dismissed the motion with costs, holding, amongst other things, that the agreement of April 25, 1918, was operative and was binding on the

respondent, that the umpire had a discretion as to stating a special case, and that he did not do wrong in taking independent legal advice.

On July 19, 1926, the respondent gave notice of appeal. On September 12, 1927, the appellate side of the High Court allowed the appeal and set aside the award.

The Court held, *inter alia*, (1) that the decision of SCHWABE C.J. and WALLACE J. did not determine the question whether there was an agreement to submit to arbitration binding on the respondent; (2) that there was in fact no agreement to submit to arbitration binding on the respondent either because he was not bound by the agreement of April 25, 1918, or because, if he was so bound, such agreement was superseded by the document of November 3, 1918, which contained no arbitration clause; (3) that the umpire was not guilty of misconduct in refusing a special case; and (4) that he had been guilty of misconduct by taking independent legal advice.

The appellants now appeal to His Majesty in Council against the decision of September 12, 1927, contending, *inter alia*, that the question of the umpire's jurisdiction was *res judicata* between the parties having regard to the decision of SCHWABE C.J. and WALLACE J. of July 20, 1922, and the subsequent dismissal of the appeal from that decision to His Majesty in Council, and that the umpire was not guilty of misconduct.

The respondent on his part contends that he was not bound by the submission in the agreement of April 25, 1918, and that, if he was, that agreement was superseded by the document of November 3, 1918, that there is no *res judicata*, and that anyhow the award is bad because the umpire took independent advice after refusing to state a special case.

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It is remarkable that throughout this lengthy litigation no Court has in terms called attention to the fact that each of the four August contracts by direct reference to the agreement of April 25, 1918, embodied the arbitration clause and that the respondent never repudiated such contracts or suggested that he was not bound by them.

Their Lordships are of opinion that the respondent was in respect of each of the four August contracts bound by a submission to arbitration in the terms of clause 15 of the agreement of April 25, 1918, whether or not Rajagopala had originally authority to enter into that agreement so as to bind his partner.

In any case, their Lordships are of opinion that the question of the umpire's jurisdiction is *res judicata* between the parties. Under the order of July 20, 1922, the appeal from which to His Majesty in Council was dismissed, the matter was remitted to the umpire. This could have been done only upon the footing that the respondent was bound by a submission to arbitration. In their Lordships' judgment, the Court did in fact determine that the respondent was so bound, whatever may have been the reasons upon which that determination was based.

The award must therefore stand unless it can be shown that the umpire was guilty of misconduct.

The precise length to which an arbitrator may go in seeking outside advice upon matters of law may be difficult to prescribe in general terms. It is less difficult in a particular case to determine whether or not an arbitrator has gone further than is justifiable. Here, unless the language of the award is itself sufficient to fix the umpire with misconduct, the charge against him must fail.

In their Lordships' judgment, the language of the award does no more than indicate that the umpire took advice upon the general rules of law bearing upon the case and does not mean that he left to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon. The case against the umpire in this respect is not, in their Lordships' view, strengthened because the umpire in the exercise of his discretion refused to state a special case.

Their Lordships are therefore of opinion that the award is good and ought to stand.

Their Lordships cannot, however, part with this case without calling attention to the remarkable and unexplained delay which has occurred at various stages of its course. Lord BUCKMASTER, in delivering the judgment of their Lordships' Board in *Banga Chandra Dhur Biswas* v. *Jagat Kishore Chowdhuri*(1), indicated that in cases of unexplained delay costs might be refused.

Although in the present case their Lordships do not think fit to refuse costs to the appellants, they desire to re-affirm the views expressed by Lord BUCKMASTER in order that the penalty liable to be incurred by unexplained delay may be fully understood.

For the reasons which have been indicated their Lordships will humbly advise His Majesty that the appeal should be allowed and that the decree of the appellate side of the High Court of September 12, 1927, should be set aside and that the order of May 6, 1926, should be restored.

The appellants' costs here and on the appellate side of the High Court must be borne by the respondent.

Solicitors for appellants: *Burton, Yeates & Hart.*

Solicitor for respondent: *H. S. L. Polak.*

A.M.T.

(1) (1916) I.L.R. 44 Calc. 186, 200; L.R. 43 I.A. 249, 256.