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SUSHIL CHANDRA DAS AND COMPANY v. SUKHAMAL, BANSIDHAR.

There seems to me to have been jurisdiction to appoint the umpire in this case, though I strongly disapprove of the conduct of Mr. Roberts, who, as an arbitrator and a partisan, who had formed a strong view, should not have consented to preside over the meeting which appointed the umpire. His position as President of the Delhi Piece Goods Association makes it undesirable that he should act as arbitrator at all in disputes where he may be called upon to intervene also in a *quasi*-judicial capacity as the presiding official of the association which appoints the umpire. If I were convinced that the umpire had allowed himself to be influenced in arriving at his decision by anything done by Mr. Roberts other than what may legitimately be done by an arbitrator in laying his view of the controversy before an umpire, I should hold that there had been misconduct; but I recognize that the position was rendered a difficult one by the conduct of the respondents themselves and of their arbitrator. They are clearly bound by the arbitration clause, and they did their best to wreck the proceedings.

Applications allowed.

ORIGINAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

KEDARNATH, MOTILAL (APPLICANT) *v.* SUKHAMAL, BANSIDHAR (OBJECTOR).*

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March, 9.

Arbitration—Contract making it obligatory on parties to prefer claims within stated time—Claim not made within time—Award made in despite of condition not upheld.

The terms of a contract of sale provided that disputes between the parties should be settled by arbitration. But they also provided that "no claim or dispute of any sort whatever can be recognized if not made in writing within 60 days from due date of payment." The buyers refused to take delivery; and the sellers claimed damages, but did not put in their claim in writing within 60 days. The matter went to arbitration and the umpire, notwithstanding the clause cited above, decided that the claim was not barred, and made an award in favour of the sellers.

Held, on an application to file the award, that the award of the umpire was not the decision of a tribunal to which the buyers' firm was bound, under the terms of their contract, to submit.

THE facts of this case sufficiently appear from the judgment of PIGGOTT, J.

* Original Suit No. 3 of 1921.

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KEDARNATH, MOTILAL v. SUKHAMAL, BANSIDHAR.

Babu *Piari Lal Banerji* and Pandit *Uma Shankar Bajpai*, for the applicants.

Mr. *B. E. O'Conor*, Mr. *G. W. Dillon*, Dr. *Surendra Nath Sen*, Dr. *Kailas Nath Katju* and Munshi *Durga Prasad*, for the opposite party.

PIGGOTT, J. :—This is an application to file an award, dated the 22nd of November, 1920, made in connection with a trade dispute between two firms upon a private submission and an arbitration conducted without the intervention of the Court. The defendant firm is the same as in cases Nos 1 and 2 decided by us today, and the facts of the dispute are broadly similar. Here also the award is that of an umpire appointed by the Committee of the Delhi Piece Goods Association after the arbitrators chosen by the parties had failed to agree. There are two points upon which the present case is distinguishable from those above referred to.

(1) The order placed by the defendant firm with the plaintiff firm was embodied in seven indents ; the letters of acceptance in respect of two of these are not forthcoming, but in each of the remaining five letters the form of words employed is as follows :—"We have to intimate that your indents have been accepted by wire and the same are subject to revision and confirmation by mail." The qualifying expression, "if required", to which I attached considerable weight in deciding the connected cases, is not to be found here ; though we do not know for certain that it did not appear in the letter of acceptance which was undoubtedly written and delivered in respect of the first two indents. Mr. Tota Ram, Manager of the plaintiff firm, has made a very clear and (as I think) straightforward statement regarding the course of business between the parties and the reasons why he did not think it necessary to make any further communication to the defendant firm when the arrival of the mail from England showed that there had been no error of transmission in the cables which had passed between his firm and their Manchester correspondents. If this were the only point in the case I should be prepared to hold, though not without some hesitation, that the meaning of the reservation with which the plaintiff firm's acceptance was qualified was perfectly understood by both parties, that it had reference only to a contingency which never in fact arose and that there was a completed contract between the parties.

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(2) There is, however, another difficulty in the way of the plaintiff firm. According to clause (14) of the printed form of indent which is the basis of the contract between the parties, "No claim or dispute of any sort whatever can be recognized if not made in writing within sixty days from due date of payment." The first letter written by the plaintiff firm, after the defendant firm had refused delivery and repudiated the contract, in which the former prefer any claim for damages is one dated the 13th of April, 1920, considerably more than sixty days after due date of payment in respect of the very latest of the indents concerned. The umpire has considered this point: he says, in effect, that the clause above quoted refers to claims put forward or disputes raised by the buyers and has nothing to do with any claim by the sellers for damages for breach of contract. It must be remembered that clause (3) of the indent form provides the sellers with a prompt and effective remedy against failure on the part of the buyers to accept delivery: if the plaintiff firm had chosen to avail themselves of this remedy we should have had a "claim" on their part well within the prescribed period of limitation. They chose not to avail themselves of this remedy and to fall back on their rights under the ordinary law as the vendors under a contract of sale which the vendees had repudiated and refused to perform. The question is, whether the plaintiff firm, having done this, can claim the benefit of the arbitration clause, which is No. 15 in the indent form, without first fulfilling the obligation imposed upon them by clause 14, that is to say, without preferring a claim in writing within the prescribed period of sixty days. On the contract as it stands, nothing could well be plainer than the expression "No claim or dispute of any sort whatever" used in clause 14. We were asked to consider the terms of the contract as a whole; and on doing this it seems to me impossible to avoid the inference that the condition laid down in this clause was intended as a condition precedent to the operation of clause 15. It was urged that the arbitrator was in a better position than this Court can be to understand the ordinary course of business in this matter and the intention of the parties when entering into this contract. If this point is seriously pressed, it seems to me that we cannot altogether shut our eyes to the fact that the umpire represents the

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views of the Delhi Piece Goods Association, that is to say, of the importing firms, who are vitally interested in throwing the burden of the loss consequent on the slump in the Indian market after the 11th of November, 1918, as far as possible, on the "buyers in India", rather than on the importers. In any case the duty is cast upon this Court of interpreting the terms of the contract, and I do not see how we can agree to twist the plain language of clause 14 into something wholly different. Finally it was contended that the point was one for the decision of the arbitration tribunal and that we are not sitting as a court of appeal from the arbitrators or umpire. This last proposition is correct, and I have endeavoured studiously to bear it in mind throughout; but when the Court is asked to file an award it must determine whether the document propounded as such is the production of an arbitration tribunal duly constituted under the terms of a contract or agreement binding upon both parties. In my opinion the plaintiff firm was not entitled to claim the benefit of the arbitration clause (No. 15 of the contract) unless and until the provisions of the previous clause had been complied with. If this view is correct, it follows that the award of the umpire is not the decision of a tribunal to which the defendant firm was bound, under the terms of their contract, to submit.

I would therefore dismiss this application with costs.

WALSH, J.:—I agree that the applicants in this case are not entitled to an order filing the award. In my judgment the arbitrator and umpire had no jurisdiction, on the ground of the failure by the sellers to comply with clause 14 of the contract. The interpretation generally of clauses is for the arbitrators. But there is no question of interpretation in this case. To hold that a plain and unambiguous clause applies against one party to the contract and not against the other is misconduct. In this case it is clear that it was so held in the interests of a class to which the arbitrator himself belonged An arbitrator cannot give himself jurisdiction by arriving at a conclusion which there is no evidence to support, and on the evidence it was plain that no claim in writing was made within the sixty days, nor was there any evidence that this stipulation had been waived.

Application dismissed.