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practically all his difficulties would have disappeared, as it would, in our opinion, in the circumstances have been proper to conclude that he was in fact the child and that Rao Balwant Singh was the father. Section 112 could only have been relied upon by him after proof of the giving of birth to a child by Musammat Dunaju.

The weight of evidence was against the alleged childbearing by Musammat Dunaju, and being of opinion that section 112 has no application, we are compelled to decide that the applicant has failed to show that there is any substantial question of law in the proposed appeal and, therefore, reject the application as not fulfilling the requirements of section 110 of the Code of Civil Procedure.

Application rejected.

ORIGINAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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March, 9.

SUSHIL CHANDRA DAS AND COMPANY (APPLICANT) *v.* SUKHAMAL, BANSIDHAR (OBJECTORS).*

Arbitration—Construction of document—Contract—Acceptance subject to condition subsequent—Form of indent used by members of the Delhi Piece Goods Association.

Held on a construction of a clause contained in a letter of acceptance, to the effect that the "acceptance is subject to revision and *confirmation* by mail if required", in connection with a form of indent for goods to be imported from England, devised by the Delhi Piece Goods Association and in common use in Northern India—which contained the stipulation, "It is distinctly understood between the sellers and the buyers in India that offers, if accepted by telegram, are subject to revision and confirmation by mail only if any mistake has been made in the telegram"—that the clause did not stand in the way of there being a complete and binding contract between the buyer and the seller, but merely meant that the contract was subject to the possible discovery that an event had occurred which was not within the control of either party, namely, an error on the part of the telegraph department.

Held also that another clause of the same indent form to the effect that *in the event of the purchaser failing* to take up the seller's invoice as a draft to be accepted on presentation and paid at maturity, the importers are authorized to sell the goods by public auction after due notice and to claim for the difference between the selling price and the contract price, did not

* Original Suits Nos. 1 and 2 of 1921.

amount to a condition precedent and bar the seller of his right to claim a reference to arbitration as provided by a different clause unless and until the goods had been sold by public auction.

THE facts of this case are fully stated in the judgment of PIGGOTT, J.

Babu *Lalit Mohan Banerji* and Babu *Indu Bhushan Banerji*, for the applicant.

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.—These are connected applications to file two awards, purporting to be made on the 12th of November, 1920, at the close of proceedings taken under the Indian Arbitration Act in connection with a trade dispute between two firms. It is one of a number of connected applications which would, in the ordinary course of things, have been filed in the court of the District Judge of Cawnpore, but were transferred to this Court with the consent of the parties, to be disposed of in the exercise of its original jurisdiction, because of the importance to the commercial community of some of the questions involved.

The firm in whose favour the awards have been made, that of Sushil Chandra Das & Co., which may conveniently be spoken of as the plaintiff firm, are importers of piece-goods from Manchester. The defendant firm, that of Sukhamal, Bansidhar, deals in the said goods, but does not import on its own account. On the 24th of August, 1918, the defendant firm placed in the hands of the plaintiff firm two indents drawn up on a form published by the Delhi Piece Goods Association; one indent was for one hundred bales of red shirting, the other for twenty-five bales of white lawns. On the 2nd of September, 1918, the plaintiff firm wrote intimating their acceptance of the former order, and on the 4th of September, 1918, they similarly accepted the latter. It is admitted that the conclusion of the Armistice on the 11th of November, 1918, was followed by a heavy fall in the price of piece-goods in the Indian market. On the 24th of November, 1918, the defendant firm wrote to the plaintiff firm begging the latter to arrange with their "suppliers at home to expunge these orders from their books", and offering to pay "nominal damages" in return for this favour. Further correspondence

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followed; and on the 20th of January, 1919, the defendant firm wrote repudiating liability on the ground that there had never been any completed contract of sale between the parties. The plaintiff firm claimed to have the dispute referred to arbitration under the terms of clause 15 of the conditions endorsed on the printed form of tender which the defendant firm had used. The latter took up the position that, inasmuch as there had never been any completed contract between the parties, it necessarily followed that they were bound by no agreement to refer anything to arbitration. One attempt at obtaining a decision through a single arbitrator failed, the District Judge holding that the conditions necessary to entitle the one arbitrator nominated by the plaintiff firm to proceed to the delivery of an award had not been fulfilled: this order was upheld by this Court in a judgment dated the 9th of August, 1920. A supplementary award, which the same arbitrator had delivered while the proceedings relating to the filing of his first award were pending, was finally withdrawn by the plaintiff firm from the court of the District Judge, on the very proper view that it had become ineffective owing to the decision affirmed by this Court's order of the 9th of August, 1920. The plaintiff firm, however, has proceeded upon certain principles laid down in the order above referred to; it has assumed that the submission to arbitration is effective and subsisting, and has accordingly made another attempt to carry it into effect. On the 20th of August, 1920, they sent the other side notice that they desired to submit the entire dispute to arbitration and again nominated Mr. J. C. Roberts, President or Chairman of the Committee of the Delhi Piece Goods Association, as their arbitrator. The defendant firm, under protest and without prejudice to their contention that they were not bound to go to arbitration at all, nominated Mr. A. C. Khosla. The two arbitrators held a single meeting at Delhi, on the 27th of September, 1920. Mr. Khosla suggested the adjournment of the proceedings to a later date, on the strength of a telegram which he had received, to the effect that the party nominating him was not ready with its evidence. Mr. Roberts took a very strong view that the defendant firm was merely trying to evade any effective arbitration, or in any case to spin out the proceedings until the expiration of a period of three months from the date of this

Court's order of the 9th of August, 1920, should enable them to withdraw a considerable sum of money which they had deposited in the District Judge's court: he definitely refused to adjourn and the arbitrators separated without having decided anything. A memorandum of their proceedings on that date was drawn up and signed by both of them. There has been a conflict of evidence between Mr. Roberts and Mr. Khosla as to whether or not they ever got so far as discussing the merits of the dispute, or the appointment of an umpire to adjudicate on the same upon their failure to agree: they certainly did differ on the question whether they should or should not proceed at once to pronounce a decision upon the materials available, and they did separate without appointing an umpire. Mr. Roberts proceeded at once to draw up a paper which has been loosely described as his "award"; it is of course a statement of his opinion on the dispute drawn up for the consideration of the umpire. On the 1st of October, 1920, Mr. Khosla similarly drew up a statement of his own. The plaintiff firm applied to the Committee of the Delhi Piece Goods Association to appoint an umpire. Notice of the application was sent to the opposite party; and, on the 30th of October, Mr. Gur Prasad Kapur wrote to them to say that he had been appointed umpire and had fixed the 12th of November, 1920, for deciding the matter. On that date he delivered the two awards sought to be filed; they adopt in its entirety the opinion formed by Mr. Roberts and award the plaintiff firm an ascertained sum by way of damages for the breach of contract of which the defendant firm is held guilty.

The objections taken to the filing of the award may now be stated and disposed of *seriatim*.

(1) It is contended that there was never any completed contract between the parties, and consequently no binding agreement to submit disputes arising out of the contract to arbitration. This argument is based upon the wording of two letters of the 2nd of September, and 4th of September, 1918, by which the plaintiff firm intimated their acceptance of the two indents received from the defendant firm. In each case the letter begins with the words:—"We have the pleasure to accept your indent"; then follow particulars which are a mere repetition of the conditions specified in the indent under reply, and finally comes the

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phrase upon which the dispute has hinged:—"The above-mentioned acceptance is subject to revision and confirmation by mail if required." For the plaintiff firm Mr. Sushil Chandra Das himself has gone into the witness-box and given evidence as to the ordinary course of business. He was a somewhat confused witness, and over-ready to make sweeping assertions which subsequently required qualification: but I have no doubt he was trying to speak the truth to the best of his ability. He repudiated the suggestion which his own counsel had put forward, to the effect that the indents signed by the defendant firm must be regarded as completing and recording a contract, inasmuch as they were acceptances of offers orally made on behalf of the plaintiff firm. Nevertheless I am satisfied that there had been negotiations between the parties and a provisional agreement arrived at before the signatures of the defendant firm were put to the two indents. The mere fact that the written entries on the indent forms, apart from the printed matter, are in the handwriting of the manager or agent of the importing firm is strong corroboration of the evidence of Sushil Chandra Das on the point. The indents are in effect promises by the defendant firm to take delivery of certain goods and to pay for them at certain rates, subject to certain specified conditions, and subject also to the plaintiff firm's intimating within the prescribed period (twelve days in the case of indent No. 898 and five days in the case of indent No. 899) that they had ascertained by cable from their Manchester correspondents that the latter could supply the goods to enable the plaintiff firm to perform its part of the contract according to its terms. The reply of the plaintiff firm in each case is to the effect that the necessary cable has been sent and reply received, and that the bargain is concluded, subject only to this reservation, that the terms may have to be revised or the bargain confirmed on arrival of the English mail containing the reply of the Manchester correspondents. Such "revision and confirmation" is to remain open until the arrival of the mail, "if required". In their context these words can only be understood as meaning, "if circumstances should arise making such revision or confirmation necessary." The circumstances contemplated by both parties are clearly stated in the sixteenth clause of the printed form of indent, a clause which by

virtue of the signature of the defendant firm became part of the contract between the parties. This clause stipulates that "It is distinctly understood between the sellers and the buyers in India that offers if accepted by telegram are subject to revision and confirmation by mail only if any mistake has been made in the telegram." The following statements made by Sushil Chandra Das in his deposition seem to me obviously true in fact and a correct statement of the nature of the contract entered into, as it was understood by both parties:—

"In this transaction there was no mistake in the cables to England between me and my English correspondents. When the mail is received from England and shows that there has been no mistake in the cables, there is nothing for me to confirm to the purchasing firm. The acceptance by cable binds me to everything, to all the terms stated in the indent, except in the event of a telegraphic error in transmission."

That is to say, there was a complete and binding contract between the parties, subject only to the possible discovery that an event had occurred which was not within the control of either party, an error by the telegraph department in the transmission of the cables sent by the plaintiff firm to its home correspondent or received by the former from the latter. This event did not occur and the discovery was never made.

I am not impressed with the argument that this Court has already come to a decision upon the question now in issue in another litigation, namely in F. A. 438 of 1917, decided on the 2nd of December, 1920. In that case the reservation in the letter of acceptance did not contain the qualifying words "if necessary," and the Court had not before it the evidence available to us as to the regular course of business.

In the present case I have no doubt the parties were absolutely *ad idem* when the plaintiff firm wrote and the defendant firm received the letters of the 2nd of September, and 4th of September, 1918, that there was a completed contract, and that under this contract the defendant firm is under an obligation to submit this dispute to arbitration in the manner provided by the printed conditions on the indent form.

(2) Another point taken is that the awards sought to be filed are null and void because the umpire who delivered them

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had not been properly appointed in accordance with the terms of the submission. The contention is that the Committee of the Delhi Piece Goods Association had no jurisdiction to appoint the umpire until the two arbitrators nominated by the parties had not only failed to agree as to the merits of the dispute but had also differed as to the choice of an umpire. There has been some conflict of evidence between Mr. Roberts and Mr. Khosla as to what passed between them on the 27th of September, 1920; but I am satisfied that enough had occurred to give the Committee of the Delhi Piece Goods Association, under the rules accepted by the parties, jurisdiction to appoint an umpire. The arbitrators had differed in such conclusive fashion as to put it beyond doubt that they were not going to deliver a joint award. The refusal of Mr. Roberts to adjourn the arbitration proceedings was equivalent, under the circumstances, to a refusal to meet Mr. Khosla again: and the arbitrators had separated without nominating an umpire.

(3) I find no force in the contention that there could be no arbitration upon this agreement because the submission therein contained had somehow "spent itself" in Mr. Robert's abortive award dealt with in this Court's decision of the 9th of August, 1920, or because his supplementary award was lying unadjudicated upon in the court of the District Judge when the present arbitration proceedings began. The Court pronounced a clear opinion against the former contention in its orders (there were two distinct orders) of the 9th of August, 1920; I think the orders then passed are binding on the parties; but, even if they are not, I remain of the same opinion. The parties are under a binding agreement to refer this dispute to arbitration in accordance with the terms of the agreement itself; the obligation continues until it has been carried out.

(4) Another point taken has been pressed upon us from two different points of view. In the printed form of indent upon which the defendant firm endorsed their order there is a special clause (No. 3) dealing with the rights of the importing firm in the event of the purchasers (the firm signing the indent) failing to take up the seller's invoice as a draft to be accepted on presentation and paid at maturity. The importers are authorized to sell the goods by public auction, after due notice,

and to claim for the difference between the selling price and the contract price. It was put to us that this clause contains the stipulated penalty under the contract for any failure on the part of the buyers in India to accept delivery, and that it operates as a condition precedent to the arbitration clause (No. 15), so that no reference to arbitration could take place until the plaintiff firm had given due notice and had actually sold the goods by public auction. From another point of view we were asked to hold that it amounted to "misconduct" on the part of the umpire to assess the damages payable by the defendant firm upon a different basis and without compelling the importers to prove at least an actual re-sale of the goods whether by public auction or otherwise. I am quite satisfied that the provisions of clause (3) of the indent form are not a condition precedent to the operation of clause (15). The latter opens with the words:—"Any claim or dispute arising in connection with this contract, including claims or disputes in connection with non-delivery," and these words are in my opinion decisive. It also seems to me that the provisions of clause (3) do no more than authorize the importers to take certain action in a certain event, without thereby shutting them out from any other remedy lawfully open to them. Finally, I regard the question as one for the determination of the arbitrators (or umpire), whose decision is "final and binding on both parties": the umpire was within his jurisdiction in interpreting the terms of the contract, and in deciding that the plaintiff firm could support a claim for damages apart from the special provisions of clause (3).

(5) There was some further argument addressed to us against the proceedings of Mr. Roberts and of the umpire with a view to founding a charge of "misconduct" against the latter. I think it unnecessary to say more than that nothing approaching a case of "misconduct" was in my opinion made out.

For these reasons I would overrule all the objections of the defendant firm and order the two awards in question to be filed so that they may become operative as decrees of court, the said defendant firm to pay all costs.

WALSH, J.:—I agree in holding that the respondents, Sukhamal, Bansidhar, submitted in writing to arbitration, and that no case is made out for refusing to file the award.

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Walsh, J.

The main question turns upon the interpretation of the two alleged letters of acceptance written by Sushil Chandra Das, dated the 2nd and 4th of September, respectively. In terms these acceptances are conditional. But the condition contains a latent ambiguity in the words "if required." Required by whom, or what? The parol evidence as to the previous course of business satisfies me that the words meant, and were understood and intended by both parties to mean, 'if required by some telegraphic mistake between England and India for which neither of the contracting parties was responsible.' The elliptical form of words adopted had frequently been used and acted upon in previous contracts between the same parties. In other words it meant 'subject to the operation of clause 16 of the terms of your offer.' It is a dangerous mode of acceptance. It is in fact tautologous. The operation of clause 16 could not be excluded if an absolute acceptance had been given, unless its exclusion had been expressly stipulated for. The condition is therefore what is generally known as a condition subsequent. The case seems to me to be covered by section 33 of the Indian Contract Act. The "uncertain future event" was the discovery of some telegraphic error. The happening of that event became impossible when the mail confirmed the original terms as communicated by telegram, and the contract thereupon became enforceable. This case is clearly distinguishable upon the facts from the case, First Appeal No. 438 of 1917, decided by a Bench of this Court, where the words "if required" did not occur, so that the condition was in general terms, and a question in fact arose as to a change of colour in the goods to be supplied under the indent.

I do not agree with the contention urged before us by the applicants that the decision of the question whether there has been a completed contract so as to bind the parties to submission in writing rests with the arbitrators. Questions of fact and law upon which the jurisdiction of the arbitrators depends are for the courts. If *Alibhoy Mahomed* v. *Baijnath Kaloorram* (1) decided otherwise, I disagree with the decision.

On the other hand, I think that, once the contract is proved, the interpretation of its terms, such as clause 3 of this contract, is a question for the arbitrators alone.

(1) (1919) 24 C. W. N., 567.

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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.