LETTERS PATENT APPEAL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Blagden.

1940
May 23

CO-OPERATIVE TOWN BANK OF HENZADA AND ANOTHER
v.
U KYAW THA.*

Co-operative society—Claim against member—Reference to arbitrator—Plea of limitation by member—Arbitrator ignoring the plea of limitation—Error of law apparent on face of record—Suit to set aside award—Civil Court's jurisdiction.

Where an award has been made by an arbitrator appointed by the Registrar of Co-operative Societies touching a dispute between a member and the co-operative society to which he belongs and the member files a suit to set aside the award on the ground that the arbitrator has ignored the law of limitation and that such error of law was manifest on the face of the record, the civil Court has jurisdiction to entertain the suit.

Board of Trade v. *Cayzer, Irvine & Co., Ltd.*, (1927) A.C. 610; *British Westinghouse Electric Co., Ltd.* v. *Underground Electric Railways Co., Ltd.* (1912) A.C. 673, referred to.

Dey v. *Bengal Young Men's Co-operative Credit Society*, [1939] Ran. 50, explained.

Tun Aung for the appellant.

Clark for the respondent.

Civil Second Appeals Nos. 145 and 146 of 1939 from the judgment of the District Court of Henzada in Civil Appeals Nos. 9 and 10 of 1939 were heard and decided by—

MACKNEY, J.—The same question arises for decision in these two appeals and it will therefore be convenient to deal with the two appeals together.

The facts have been set out in the judgments of the Lower Courts and need not be repeated here.

The proceedings from which these appeals have been laid are suits in which the prayer is that a certain award may be set aside and adjudged invalid and void. In each case the award was

* Letters Patent Appeals Nos. 1 and 2 of 1940 from the judgment of this Court in Civil Second Appeals Nos. 145 and 146 of 1939.

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made by an arbitrator appointed by the Registrar of Co-operative Societies under Rule 15 of the Burma Co-operative Societies Rules 1931 which have been made by the Local Government in virtue of powers conferred by Section 50 of the Co-operative Societies Act of 1927.

Section 50 sub-clause 2 (*l*) gives power to make rules providing that any dispute touching the business of a co-operative society between members or past members of the society or persons claiming through a member or past member or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision or, if he so directs, to arbitration, and prescribing the mode of appointing an arbitrator or arbitrators and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and of the enforcement of the decisions of the Registrar or the awards of arbitrators.

Rule 15 reads as follows :

" (1) Every dispute touching the business of a co-operative Society—

(*a*) between members or past members of the society or persons claiming through a member or past member, or

(*b*) between a member or past member or persons so claiming and the committee or any officer of the society

shall be referred to the Registrar. Reference may be made by the committee, or by the society by resolution in general meeting, or by any party to the dispute, or, if the dispute concerns a sum due from a member of the committee to the society, by any member of the society.

(2) On receipt of such reference the Registrar shall either decide the dispute himself or refer it for decision to an arbitrator appointed by him or three arbitrators, one of whom may be appointed by him and one by each of the parties to the dispute.

(3) The Registrar, arbitrator or arbitrators shall enquire into the dispute, and on completion of the enquiry shall record a decision or award in writing.

(4) Such decision or award shall on application to the civil Court having local jurisdiction be enforceable as a decree of such Court.

(5) In proceedings before the Registrar or an arbitrator or arbitrators, no party shall be represented by a legal practitioner."

Disputes having arisen between the appellant, a past member of the society known as the Co-operative Town Bank of Henzada, in the one case with the committee of the society and in the other case both with the committee of the Society and a member thereof, the disputes were referred to the Registrar. The Registrar appointed an arbitrator to decide the disputes. The arbitrator having made an enquiry gave his decision, at the same time giving his reasons therefor. These awards under the Rule are enforceable as a decree of a Civil Court having jurisdiction, and in fact I understand they are being or have been duly enforced.

The appellant now seeks to have these awards declared void on various grounds, the most important of which is the ground that the claims preferred against the appellant were at the time of the references to the arbitrator barred by the law of limitation, and the awards set out the facts of the dispute in such a manner as to make it clear that if the law of limitation applies there are errors on the face of the awards, in-as-much as that law has been disregarded by the arbitrator.

The original Court has decided that it has no jurisdiction to declare the awards void. The learned Judge relies on a decision of this Court, *H. C. Dey* v. *Bengal Young Men's Co-operative Credit Society* (1) which he interprets as a definite decision to the effect that in matters of the kind such as is now before me, the arbitrator's decision is unassailable.

The learned Judge, however, has overlooked the fact that what was decided was that the jurisdiction of the Courts is by necessary implication barred in the matter of disputes touching the business of a co-operative Society between members or past members of the society or persons claiming to be members or past members, and so forth, which under the rules and the Act must be referred to the Registrar for decision or, as he directs, to arbitration. What the appellant is asking the Court to do is not to pass judgment in the matter of the dispute between him and his opponents but in the matter of the awards which have been made and which he avers are not valid. These are entirely different matters. It seems unreasonable to hold that where, as

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in the present case, there is nothing in the statute regulating the reference to arbitration to indicate that the arbitrator is free to act in defiance of the laws of the land, even if he give a decision indicating signs of mental aberration on his part, nevertheless an award remains unassailable and must be enforced.

There is no authority for such a monstrous proposition.

The Arbitration Act, 1899 (although, of course not applicable in the present cases) allows the Court to set aside an award where an arbitrator or umpire has mis-conducted himself or an arbitration or award has been improperly prepared (Section 14) ; and it has usually been held that the Court can so set aside an award where the decision made disregards the legal rights of the parties.

A statutory arbitration is not unlike a reference by consent out of Court. In Halsbury's Laws of England Volume I under "Arbitration", paragraph 1132, it is observed that one of the grounds on which an award may be set aside is that the arbitrator or umpire has misconducted himself. In paragraph 1133 we find that misconduct occurs if the award is on its face erroneous in a matter of law.

In *Ramdutt Ramkissendass* v. *E. D. Sassoon & Co.* (1) their Lordships of the Privy Council were dealing with the case of a mercantile reference to arbitration. They observed :

> "Although the Limitation Act does not in terms apply to arbitrations, they think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a Court of law can be equally propounded for the arbitrator's decision unless the parties have agreed (which is not suggested here) to exclude that defence. Were it otherwise, a claim for breach of a contract containing a reference clause could be brought at any time, it might be 20 or 30 years after the cause of action had arisen, although the legislature has prescribed a limit of three years for the enforcement of such a claim in any application that might be made to the law Courts."

(1) (1929) I.L.R. 56 Cal. 1048, 1056 (P.C.).

Their Lordships approved of the submission of the law to be found in *Re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (1). In that case Mr. Justice Bruce observed :

> "The next point is that, under the terms of the submission, the Tyldesley Co., who committed the damage, could not raise the statute as a defence. To this I do not agree. There is nothing in the submission to take away the right of the Tyldesley Co. to raise any defence in relation to their liability to damages. It seems to me unreasonable that parties to a submission should be precluded from raising the defence of the Statute of Limitation, unless a provision to that effect be drawn up and embodied in the submission."

I can see no reason why these observations should not apply with equal force in the case of arbitrators appointed by statutory rule. It cannot have been intended that in such cases the arbitrator should be permitted to ignore the operation of the laws applicable in matters which come before him, and should be permitted to give his decision according to his mere caprice.

After all if under the Law of Limitation no suit could with success be brought against the appellant in respect of the matters which the opposite party desires to submit to arbitration it might justly be held that in fact as the claim was not enforceable, there could be no dispute at all between the parties.

The learned Judge of the Lower Appellate Court has committed himself to the observation that :

> "As it is nowhere laid down in the Burma Co-operative Societies Act, 1927 or the rules framed thereunder that the Registrar or arbitrator in dealing with disputes contemplated under rule 15 should pay strict regard to law of limitation, contract, evidence and procedure and principles of *res judicata*, the Registrar and arbitrator therefore have a greater latitude than the civil courts in order to do complete justice between the parties and they may also take a moral aspect of a question into consideration in forming their judgment and decide according to justice, equity and good conscience."

Surely, an arbitrator cannot be held to have decided according to justice, equity and good conscience if he has allowed

(1) (1899) 68 L.J.Q.B. 252, 255.

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himself to ignore the laws of the land applicable to the matters before him.

In *Attorney-General for Manitoba* and *Kelly and others* (1) their Lordships of the Privy Council remarked :

> "Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award."

Again in *Champsey Bhara and Company* and *Jivraj Balloo Spinning and Weaving Company, Limited* (2) their Lordships explained that :

> "An error in law on the face of the award means that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

The learned counsel for the respondents referred to an observation by Mr. Justice Chari in *Maung Ba Lat* v. *The Liquidator, Kemmendine Thathanahita Co-operative Society* (3) to the effect that Section 3 of the Limitation Act does not apply to a claim by a liquidator appointed under the Co-operative Societies Act. No doubt this is so, but we are here not dealing with the question of a liquidator but of an arbitrator. There is nothing affecting arbitrators in the Co-operative Societies Act corresponding to Section 49 thereof which concerns matters pertaining to the dissolution or winding up of co-operative societies under the Act, and bars the jurisdiction of the civil Courts in respect of those matters.

What the lower Courts have decided is that they have no jurisdiction even to consider whether the awards bear errors in law on the face of them. In this decision I consider they have erred.

It may be that when they come to look into the matter they will find that there are no such errors on the face of the awards as would render the awards invalid and void : but they most certainly have the power to consider such matters.

(1) (1922) 1 A.C. 268, 283. (2) (1923) A.C. 480, 487.
(3) (1929) I.L.R. 8 Ran. 581.

These appeals are therefore allowed with costs. The decrees of the lower Courts are set aside and the original Court will now proceed to dispose of the suits in accordance with law.

The respondents obtained leave for further appeal.

ROBERTS, C.J.—These two connected appeals are brought by the appellants in order to prevent the respondent from filing a suit to set aside the award of an arbitrator and to claim relief under section 39 of the Specific Relief Act.

What the plaintiff has done in each of the suits is to aver in his plaint that there is an error of law manifest on the face of the record which vitiates the award; some particulars are given and it is said that, although the arbitrator was bound to comply with the law of limitation, he ignored the principles of law and allowed the claim basing his award on a manifestly erroneous legal proposition. And the question is whether this suit is maintainable.

Lord Haldane, in *British Westinghouse Electric and Manufacturing Co., Ltd.* v. *Underground Electric Railways Co. of London, Ltd.* (1) said :

"I am of opinion that the doctrine of *Hodgkinson* v. *Fernie* [3 C.B. (N.S.) 189] to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land."

There has been some confusion in connection with arbitrations which are conducted under the Co-operative Societies Act, and I much regret to learn that it has arisen owing to a misunderstanding of the scope of the decision, to which I was a party, in *H. C. Dey* v. *The Bengal Young Men's Co-operative Credit Society* (2). That was a case in which a member of a co-operative

(1) (1912) A.C. 673. (2) [1939] Ran. 50.

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society, being bound by the very terms of his membership and the statutes which deal with co-operative societies and their members to refer any dispute between him and the co-operative society which touched its business to the Registrar, was sued and it was held that a suit brought in the Courts was impliedly barred under section 9 of the Civil Procedure Code; and all that that case is authority for is the simple proposition that where a statute expressly says that persons of a certain class must go to arbitration or must refer their disputes in a particular way and not come to the Courts, they are obliged to take that step and the Courts will not, when they do not take that step, entertain an action by them.

But, although that step must be taken in the first instance, the case cited is no authority for the surprising proposition that when an award of an arbitrator has been made, or the decision of the Registrar has been arrived at, an error manifest upon the face of the award or decision leaves the party aggrieved with no remedy and ousts the jurisdiction of the Courts altogether. It has often been observed that Courts are always inclined where possible to support the validity of an award and will not lend themselves to a consideration of what a Court of law would have done, when the parties have agreed on the one hand, or when there is a statutory obligation placed upon them on the other, to refer their disputes to a tribunal which is not a Court of law. But, on the other hand, that tribunal must come to a decision which is a quasi judicial decision or must make an award which has been arrived at after proper consideration of the case. I ventured to give this morning as an illustration something which is far different from what is alleged in this case, namely, a case in which an arbitrator being lazy might declare that the issues of law and fact were so complicated that he was just as likely

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to fall into error as decide right, and thereupon might think he was justified in deciding the case upon the spin of a coin, which would be not his arbitrament but an arbitrament of chance. Other cases may be thought of in which parties may have a right to come to Court to set aside an award not so flagrant ; one such would be, in my opinion, the delegation by an arbitrator to some other person never contemplated by the parties, of the duties which lay upon the arbitrator himself.

The question whether in this particular case the arbitrator was right or wrong does not arise at all ; nor have we to decide now whether the law of limitation applied, or whether, if it did apply, the arbitrator refused entirely to consider it, or came to a wrong decision of law respecting it ; nor have we to do decide whether there was an error of law manifest on the face of the award, as the plaintiff pleads. All we have to decide is whether such a suit is maintainable ; and if the plaintiff says that there is an error of law, he is clearly entitled to go to the Courts and try to establish that proposition ; whether there was such conduct on the part of the arbitrator as would justify the Court interfering is a matter for the Court before whom the suit is tried. I agree, with respect, with the decision of my learned brother Mackney and find but little to add to it.

He has pointed out what are the limits within which the case of *H. C. Dey* v. *The Bengal Young Men's Co-operative Credit Society* (1) may be applied, and, by reference to the existing law on the subject, has shown that this is a case in which the aggrieved party is plainly entitled to challenge the award of the arbitrator.

I desire to add very little as to the vexed question of how far an arbitrator should consider the law of

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limitation : the matter is one which is largely open. This seems clear from the observations in the speech of Viscount Cave L.C. in the case of *Board of Trade* v. *Cayzer Irvine & Co., Ltd.* (1). He said :

"I am far from wishing to throw doubt upon the view which has been commonly held, and which was affirmed by the decision of a Divisional Court in the case of *In re Asley and Tyldesley Coal and Salt Co., and Tyldesley Coal Co.* [68 L.J. (Q.B.) 252] that an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, including a defence under any statute of limitation. A decision against that view might seriously prejudice the practice of referring disputes to arbitration ; and, while I am unwilling to pronounce a final opinion upon a question which does not really arise in this case, I certainly say nothing which is adverse to the view to which I have referred."

For these reasons, we think that the learned Judge's decision in Second Appeal was undoubtedly right and, accordingly, these appeals must be dismissed with costs, advocate's fee in each appeal six gold mohurs.

BLAGDEN, J.—I agree.

(1) (1927) A.C. 610.