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appellants would not have been bound, had the agreement of October 11 been performed, to sell or deliver to the ice factory the coals which should be delivered to the appellants out of the respondents' stock. They do not think that the ice factory was the appellants' only customer. Their view is that, had the coals purchased been delivered to the appellants in pursuance of their contract, the latter would have been entitled to sell them in the open market at the market price, and, that being so, the damages were rightly assessed at the difference between the contract price and that market price.

Their Lordships are, therefore, of opinion that the judgment appealed from was wrong and should be reversed and the judgment and decree of Kajiji J. be restored, and they will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellants here and in the Courts below.

Solicitors for appellants: Messrs. *Hallowes & Carter.*

Solicitors for respondents: Messrs. *T. L. Wilson & Co.*

Decree set aside.

A. M. T.

PRIVY COUNCIL.

CHAMPSEY BHARA & Co. (APPELLANTS) *v.* JIVRAJ BALLOO SPINNING AND WEAVING Co., LTD. (RESPONDENTS).

J. C.* 1923.

March 6.

[On Appeal from the High Court at Bombay]

and connected appeal.

Arbitration—Finality of award—Error of law on face of award—Jurisdiction of arbitrator.

An award of arbitration can be set aside on the ground of error of law on the face of the award only when in the award, or in a document actually incorporated with it, as for instance, a note appended by the arbitrator stating the reasons for his decision, there is found some legal proposition which is the basis of the award and which is erroneous.

* *Present*: Lord Dunedin, Lord Wrenbury, and Lord Atkinson.

The appellants sold cotton to the respondents by a contract which contained a submission of disputes as to quality to arbitration, and a further clause submitting to arbitration all other disputes arising out of the contract. An award was made as to the inferiority of cotton delivered under the contract, and the respondents thereupon rejected it. The appellants claimed damages for the rejection; upon that dispute being referred under the further arbitration clause, damages were awarded to them. The award recited that the contract was subject to the rules of the Bombay Cotton Trade Association, but without stating what those rules were, and that the respondents had rejected on the grounds contained in a letter of a certain date. That letter stated merely that the cotton was rejected having regard to the amount awarded for inferiority. The High Court set aside the award on the ground that under the rules of the Association the respondents were entitled to reject the cotton without liability, and that the award was bad on its face.

Held that the award could not be set aside; the rules of the Association were not so incorporated with the award as to entitle the Court to refer to them either to show that the award was wrong in law, or to show that the contract was at an end and the jurisdiction of the arbitrators consequently terminated.

Hodgkinson v. *Fernie*[1], approved, and *Sanderson* v. *Armour*[2], followed.

Landauer v. *Asser*[3], distinguished.

Judgment of the High Court, I. L. R. 44 Bom. 780, reversed.

CONSOLIDATED appeals (No. 73 of 1921, and No. 16 of 1922) from decrees of the High Court in its appellate jurisdiction (July 29, 1919 and November 20, 1919) each reversing an order of the Court in its original civil jurisdiction.

The consolidated appeals arose out of petitions in the High Court to set aside two awards of arbitrators, dated respectively September 23, 1918, and March 10, 1919.

The awards were made upon claims by the appellants, Champsey Bhara & Co., to damages for the rejection by the respondents of cotton delivered under contracts expressed to be subject to the rules and regulations of the Bombay Cotton Trade Association. The facts sufficiently appear from the judgment of the Judicial Committee.

(1) (1857) 3 C. B. (N. S.) 189. (2) [1922] S. C. (H. L.) 117.

(3) [1905] 2. K. B. 184.

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A petition to set aside the first award was rejected by Pratt J., but upon appeal the award was set aside. The appeal is reported at I. L. R. 44 Bom. 780. Shortly stated, the learned judges (Macleod C. J. and Heaton J.) held that the contracts in question were sufficiently referred to in the award to entitle the Court to consider their effect, that upon the true construction of rule 52 of the Association the respondents had the option to reject the cotton without liability to damages; and that consequently there was an error on the face of the award.

A petition to set aside the second award was allowed by Kajiji J., who considered himself bound by the above decision of the appellate Court. Upon appeal his decision was reversed; Macleod C. J. and Heaton J. were of opinion that the recitals in the award did not, as in the other award, so incorporate the terms of the contract as to entitle the Court to refer to them.

In the first case the sellers, and in the second the buyers appealed; the appeals were consolidated.

1923, February 5, 6. *Upjohn K. C.* and *Wallach*, for the appellants (sellers). The awards could be set aside only for error apparent on the face of the respective awards or upon a document forming part of the award. A reference to a document by the arbitrators in stating the facts does not entitle the Court to look at it unless it is made part of the decision. The rules of the Association therefore could not be referred to. Reference was made to *Hodgkinson* v. *Fernie*[1], *British Westinghouse Electric and Manufacturing Company, Limited* v. *Underground Electric Railways Company of London, Limited*[2], *Attorney-General for Manitoba* v. *Kelly*[3]. *Landauer* v. *Asser*[4] is distinguishable. In

(1) (1857) 3 C. B. (N. S.) 189 at p. 202.
(2) [1912] A. C. 673.
(3) [1922] 1 A. C. 268 at p. 281.
(4) [1905] 2 K. B. 184.

that case the arbitrator stated what was the relevant term of the contract and the construction which he gave to it; if the decision has a wider application it was wrongly decided.

[LORD DUNEDIN referred to *Holmes Oil Co.* v. *Pumpherston Oil Co.*[1]]

Sir George Lowndes K. C., *E. B. Raikes*, and *Claughton Scott*, for the respondents (buyers). The awards were made without jurisdiction. Upon the buyers' rejection of the cotton and repudiation, the contract came to an end and with it the jurisdiction under the submission which was part of the contract. It is for the Court to enquire whether there was a repudiation and termination of the contract; if there was the arbitration clause does not apply; *Municipal Council of Johannesburg* v. *W. Stewart and Co.*[2], *Piercy* v. *Young*[3], *Kennedy* v. *Barrow-in-Furness Corporation*[4]. Jurisdiction could not be obtained by an erroneous finding on the part of the arbitrators: *May* v. *Mills*[5]. The question has to be tried as though the buyers had sued for an injunction to restrain the arbitrators: *E. D. Sassoon & Co.* v. *Ramdutt Ramkissen Das*[6].

[LORD DUNEDIN referred to *Sanderson* v. *Armour*[7].]

The present case is distinguishable, because in the documents there was at least a *prima facie* case of repudiation. Further, in Scotland a submission acts as a complete ouster of the jurisdiction of the Court whereas in India, as in England, it does not.

(1) (1891) 18 R. (H. L.) 52.

(2) [1909] S. C. (H. L.) 53.

(3) (1879) 14 Ch. D. 200 at pp. 207, 208.

(4) (1909) C. A., Hudson's Building Contracts, 4th Ed., Vol. II, 411, 415.

(5) (1914) 30 Times L. R. 287.

(6) (1922) L. R. 49 I. A. 366 at p. 373.

(7) [1922], S. C. (H. L.) 117.

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March 6. The judgment of their Lordships was delivered by

Lord Dunedin :—In these consolidated appeals it will be convenient to consider the first case by itself. The appellants as sellers entered into two contracts with the respondents as buyers of certain bales of cotton. The contracts were made subject to the rules and regulations of the Bombay Cotton Trade Association, Limited. Rule 12 of the said Association provides :—

"All questions or disputes as to quality between buyer and seller shall be referred to the arbitration of two disinterested persons, one to be chosen by each disputant, such arbitrators having the power to call in a third arbitrator. The award made by such arbitrators or any two of them shall be final and binding subject only to the right of appeal to the Appeal Committee. All arbitrations held under this Rule must be held in accordance with Rule 5, and only shareholders and/or Directors shall be eligible to act on arbitrations held in the rooms of the Association. Associate members, however, shall be eligible to act as arbitrators when the arbitration is held in the seller's jetha and/or godown as provided under Rule 5."

Rule 13 provides :—

"All questions in dispute (other than that of quality) arising out of, or in relation to, contracts made subject to the Rules and Regulations of the Bombay Cotton Trade Association, Limited, provided one of the parties to the contract is a member or associate member of the Association, shall be referred to the arbitration of two disinterested persons being shareholders or directors of the Association, one to be chosen by each disputant; such arbitrators having the power to call in a third arbitrator who must also be a shareholder or director of the Association.

"The award made by such arbitrators or any two of them shall be final and binding on both parties, subject only to the right of appeal to the Board within 15 days of the date of the arbitrators' award on payment of Rs. 100."

The cotton was delivered but objected to by the respondents as being not up to contract. Upon this an arbitration was entered into between the parties, and the arbitrators under Rule 12 made an award as to quality. Thereupon, the respondents rejected the cotton. The appellants retorted by claiming damages.

This dispute was referred to arbitrators under Rule 13. They issued their award as follows :—

"To all to whom these presents shall come, we, Purshotamdas Thakoredas of Bombay, Hindu Inhabitant, and Vincent Alpe Grantham, also of Bombay, European Inhabitant, send greeting. Whereas by a contract, dated 17th day of August 1918, Messrs. Champsey Bhara and Company had agreed to sell to the Jivraj Balloo Spinning and Weaving Company, Limited, 100 bales of Mundra M. G. Fully Good Staple cotton on the terms and conditions mentioned in the contract. And whereas by another contract, dated 4th day of September, 1918, the said Messrs. Champsey Bhara & Company had also agreed to sell to the said Jivraj Balloo Spinning and Weaving Company, Limited, 100 bales of New M. G. Mundra Cotton Fully Good Staple on the terms and conditions therein contained. And whereas both the said contracts were made subject to the rules and regulations of the Bombay Cotton Trade Association, Limited. And whereas the goods tendered under the said contracts by the said Messrs. Champsey Bhara & Company were rejected by the Jivraj Balloo Spinning and Weaving Company, Limited, on the grounds contained in their letters, dated 25th November 1918, and 11th November, 1918, respectively. And whereas the said Messrs. Champsey Bhara & Company, claimed from the said Jivraj Balloo Spinning and Weaving Company, Limited, the sum of Rs. 25,000 (rupees twenty-five thousand) in respect of the aforesaid contracts. And whereas the said Jivraj Balloo Spinning and Weaving Company, Limited, denied liability in respect of the said sum or any part thereof. And whereas the said disputes were referred to the arbitration of us, Purshotamdas Thakoredas and Vincent Alpe Grantham, who were appointed Arbitrators by the Deputy Chairman of the Bombay Cotton Trade Association, Limited. And whereas on the 12th day of December the time for making our award was extended by the Deputy Chairman to the 27th day of December, 1918. Now know ye that we, the said Purshotamdas Thakoredas and Vincent Alpe Grantham, having taken upon ourself the burden of the said reference and having done all acts necessary to enable us to make a valid Award, hereby make our Award as follows, that is to say :— We award and direct that the said Jivraj Balloo Spinning and Weaving Company, Limited, do pay to the said Messrs. Champsey Bhara & Company the sum of Rs. 25,000 (rupees twenty-five thousand), and we do further award and direct that the said Jivraj Balloo Spinning and Weaving Company, Limited, do pay the costs of this our Award, which we assess at the sum of Rs. 55 (rupees fifty-five).

"In witness whereof we have hereunto set our respective hands this 23rd day of December, 1918.

"Signed and Published this 23rd day of December, 1918, by us, Purshotamdas Thakoredas and Vincent Alpe Grantham in the presence of

(Signed) J. A. GRANT."

(Signed)
PURSHOTAMDAS THAKOREDAS.
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An appeal was made to the Appeal Committee, who confirmed the award. The respondents then presented a petition to the Court asking that the award should be set aside. They alleged two grounds (1) that there was no question referable to the arbitrators under section 13 ; (2) that there was an error of law on the face of the award. The case depended before Pratt J., who dismissed the petition. Appeal was taken to the Appellate Division of the High Court, and they reversed the judgment holding that there was an error in law on the face of the award. The way that the learned Judges arrived at that conclusion was this : They said that the recital that the respondents had rejected the cotton on the grounds mentioned in the letters of the 11th and 25th November, 1918, respectively, allowed them to look at the letters. The letter of the 11th November is as follows :—

"To Messrs. Champsey Bhara & Company.

"Dear Sirs,

"Re: D/Order No. 27, dated 6-11-18 for
"100 bales N. M. G. Mundra.

"Please note that at the survey held this day on the above lot tendered by you against contract No. 56, dated 4-9-18, as the Arbitrators have in their award allowed Rs. 10½ off, we hereby reject the said lot and refuse to take delivery thereof.

"THE JIVRAJ BALLOO SPINNING AND WEAVING COMPANY, LTD."

The letter of the 25th November is in identical terms referring to the other contract. The learned Judges then held that if Rule 52 of the Regulations is looked at—it being the clause which deals with what is to happen when arbitrators, as to quality, make certain findings—it becomes apparent that the arbitrators here could only have arrived at their judgment if they entirely misinterpreted that rule. They based their opinion upon the case of *Landauer* v. *Asser*[1].

(1) [1905] 2 K. B. 184.

The law on the subject has never been more clearly stated than by Williams J. in the case of *Hodgkinson* v. *Fernie*[1] : "The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact.....The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established."

This view had been adhered to in many subsequent cases, and in particular in the House of Lords in *British Westinghouse Electric and Manufacturing Company, Limited* v. *Underground Electric Railways Company of London, Limited*[2].

The question to be decided is: Does the error in law appear on the face of the award? In the *British Westinghouse case*[2] it clearly did. The arbitrator had stated a special case and got an opinion of Divisional Court; in making his award he stated that opinion and founded his award upon it. The opinion as given was held to be erroneous, and so there was an error in law on the face of the award. In *Landauer* v. *Asser*[3] the state of affairs was different. The question was as to liability and interest on a policy of insurance effected by sellers for and on account of buyers, and the arbitrator framed his award thus:— "I decide that as the parties to the contract dated

(1) (1857) 3 C. B. (N. S.) 189 at p. 202.

(2) [1912] A. C. 673.

(3) [1905] 2 K. B. 184.

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3rd November 1903, were by the terms thereof principals thereto, their interest and liability in insurance is defined to be the value of the invoice plus 5 per cent., and that the buyers are therefore entitled to and only to the said amount, the balance one way or the other being due from or to the sellers."

The Court of appeal held that this entitled them to look at the contract and to come to the conclusion that the decision was erroneous in law. The case of *Landauer* v. *Asser*[1] is not binding on their Lordships, and it was contended that it was wrongly decided, but in their Lordships' opinion it is not necessary to consider that point, for the present case differs from *Landauer's case*[1] in an essential particular. In that case the legal proposition was stated in terms on which the award proceeded. In the present case, no legal proposition at all is stated as a ground of the award. The reference to the letters is only in the narrative, and even when the letters are looked at they only contain the view of one party. To make this case equiparate with *Landauer* v. *Asser*[1] the award would have to run somewhat thus:—"In respect of the ground of rejection contained in the letters of the 11th and 25th November, and in respect of Rule 52 of the Articles, I decide that, &c."

Now the regret expressed by Williams J. in *Hodgkinson* v. *Fernie*[2] has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, 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

[1] [1905] 2 K. B. 184. [2] (1857) 3 C. B. (N. S.) 189 at p. 202

is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying: "inasmuch as the arbitrators awarded so-and-so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Rule 52." But they were entitled to give their own interpretation to Rule 52 or any other Article, and the award will stand unless, on the face of it, they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt J. was right and the conclusion of the learned Judges of the Court of Appeal erroneous.

The counsel for the respondents then argued the other point, which the learned Judges of the appellate Court found it unnecessary to decide, and which the trial Judge decided against them. He said that upon a proper construction of the contract the moment his client rejected the cotton in virtue of the decision by the arbitrators as to quality, he was entitled to do so, and the contract was repudiated or came to an end; that then the arbitration clause could no longer be appealed to, and he said that inasmuch as this was a plea to jurisdiction the Court ought to decide it.

Their Lordships think that this argument is based upon a confusion of thought. The question of whether an arbitrator acts within his jurisdiction is, of course,

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for the Court to decide, but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference. It is, therefore, for the Court to decide in this case whether the dispute which has arisen is a dispute covered by Rule 13 of the Association. It clearly is so, because it is undoubtedly a dispute arising out of, or in relation to, a contract made subject to the rules and regulations of the Cotton Trade Association. Now that clause refers to the arbitrator the whole question, whether it depends on law or on fact, with the exception only of dispute as to quality. It is, therefore, for the arbitrator and not for the Court to decide what is the effect of a rejection based on an award as to quality. In truth this point is decided in terms by the recent case of *Sanderson* v. *Armour*[1]. It was a Scotch case, but in no way depended upon any peculiarity of the law of Scotland.

The decision of the first appeal in this sense disposes of the second appeal without further argument, as it is obvious that in that case even the reference in the narrative to the grounds of defence in the letters is absent, and there is nothing but the bare statement that a certain sum was awarded. It follows that in the first appeal the appeal must be allowed and the judgment of the trial Judge restored; the appellants must have their costs here and in the Courts below. The second appeal must be dismissed and the respondents will have their costs.

Their Lordships will humbly advise his Majesty accordingly.

Solicitors for appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for respondents: Messrs. *Hughar & Sons.*

A. M. T.

[1] [1922] S. C. (H. L.) 117.