1925.

RACHAPPA CHANBAS-APPA v. NINGAPPA.

must be weighed in each case on the merits. In the present case the only other circumstance in favour of the appellant is the long possession. That is largely nullified by the death of the original mortgagor in 1877 within four years of the second mortgage. In the absence of evidence as to age or knowledge of the possession in the plaintiff's son by the mortgagor, that circumstance coupled with the Rajinama and Kabulayat is not enough to show that the parties intended to convert a mortgage into a sale. I agree, therefore, that the appeal fails and must be dismissed with costs.

Decree confirmed.

J. G. R.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

1925.

June 10.

BURJOR F. R. JOSHI *v.* ELLERMAN CITY LINES, LIMITED *.

Indian Arbitration Act (IX of 1899), section 4—Submission to arbitration—Clause in bill of lading giving option to one of the parties to have disputes settled by Courts in United Kingdom—Application for stay of suit in Bombay.

A submission to arbitration according to section 4 of the Indian Arbitration Act is a submission which provides that either party in case of a dispute arising on the contract is at liberty to take the necessary steps to get the dispute decided by arbitration.

Held, therefore, that a clause in a bill of lading which provided "that all claims arising under the said bill of lading shall be determined at the port of destination of the goods according to British law, or at the shipowner's option determined in the United Kingdom and to the exclusion of the jurisdiction of any other country" was not a submission to arbitration within the meaning of section 4 of the Indian Arbitration Act, and that the definition of "submission" cannot be extended so as to include an agreement of the kind mentioned in the said clause.

* O. C. J. Appeal No. 30 of 1925 : Suit No. 3550 of 1923.

Per MACLEOD, C. J.:—"Leaving aside the particular nature of this agreement, if there had been an *ordinary agreement* to refer any disputes that might arise to the arbitration of named arbitrators at the option of *one* of the parties, then I should certainly hesitate before holding that was a submission within the proper meaning of that term."

CHAMBER summons.

Appeal from the order of Taraporewala J. granting a stay of proceedings, under section 19 of the Indian Arbitration Act.

The facts are set out in the judgment.

Sir Chimanlal Setalvad, for the appellant.

Coltman, for the respondents.

MACLEOD, C. J.:—The plaintiff filed this suit on August 20, 1923, claiming as an endorsee of a bill of lading for 280 tons of potatoes shipped on board the defendants' ship, *The City of Calcutta*, at Naples. It was alleged that when the goods arrived in Bombay on or about August 28, 1922, a great portion of them were found to be damaged and totally unfit for any use. Notice of the damage was given to the defendants' agents in Bombay, and it was claimed that the damage was due to the fact that the ship was not fit to carry such cargo, and that the defendants failed to take proper and reasonable care of the said goods. The delay in filing the suit originally appears to have been due to the fact that the parties were endeavouring to settle their differences, without having recourse to a Court of law.

On October 3, 1923, the defendants entered an appearance in the following form, which was directed to the Prothonotary:—

"Please enter an appearance which is made under protest on behalf of the defendants in the above suit, who intend to defend it upon *inter alia* the ground of no jurisdiction."

Thereafter there was a further attempt to settle the dispute.

1925.

BURJOR v. ELLERMAN CITY LINES, LIMITED.

On December 6, 1924, the defendants' solicitors wrote to the plaintiff's solicitors :—

"The above suit appears on the prospective board. Pursuant to your instructions in your letter No. 30543, dated December 15, 1923, we have done nothing in the matter. Is the suit now to be dismissed? Please let us hear from you."

On January 6, 1925, the plaintiff's solicitors replied :—

"We have seen our client and are instructed to state that our client will proceed with the suit as your client has refused arbitration. If, as you say, you have done nothing in the matter so far, our client is willing to consent to the suit being postponed for some months."

On January 23, 1925, the defendants took out a summons asking for an order that the suit and all proceedings thereunder be stayed.

An affidavit was filed in support of the summons, clause 4 of which is as follows :—

"By clause 20 of the said bill of lading it is provided that all claims arising under the said bill of lading shall be determined at the port of destination of the goods according to British law, or, at the shipowners' option, shall be determined in the United Kingdom and to the exclusion of the jurisdiction of any other country."

Exhibit A to the affidavit was the bill of lading, clause 20 of which is correctly set out in para. 4 of the affidavit.

The plaintiff filed an affidavit in reply setting out the negotiations which had passed between the parties after the claim had been made. At the end of para. 3 there is the following passage :—

"I say that I had consented to further proceedings in the suit being stayed solely because negotiations for settlement were pending. From August 1923 till January 1925 the defendants never stated either through their agents or their attorneys that they wanted to have the dispute decided by a Court of justice in the United Kingdom. Under these circumstances I submit the defendants are estopped from taking advantage of clause 20 in the bill of lading at this stage of the suit and are not entitled to have the suit and the proceedings therein stayed."

That statement does not appear to have been in any way contradicted by the affidavit filed on behalf of the defendants on February 4, 1925.

We may take it then that until the affidavit was filed in support of the summons on January 22, 1925, the defendants had not attempted to exercise the option, which they asserted they had, of compelling the plaintiff to file his suit in the Courts of the United Kingdom.

The summons came on for hearing before Mr. Justice Taraporewala on February 13, 1925. The learned Judge said that it was conceded that if the parties agreed to have their disputes decided by a foreign tribunal, it would amount to a submission to such foreign tribunal, and that there were decisions of this Court which were binding on him in which it had been so held. The learned Judge was probably referring to the last case on this point decided by this Court in *Haji Abdulla* v. *Stamp*[1]. In that case there was a dispute with regard to a claim on a policy of marine insurance, which provided that all disputes should be referred to England for settlement, and no legal proceedings should be taken to enforce any claim except in England, where the underwriters were alone domiciled and carried on business. It was held by this Court, following the decision in *Austrian Lloyd Steamship Company* v. *Gresham Life Assurance Society*[2], that the above clause in the policy of insurance amounted to a submission to arbitration, and an order, therefore, was made that the suit should be stayed pending the result of such arbitration. The same point arose in *Kirchner & Co.* v. *Gruban*[3] :—

"By an agreement in writing, dated June 30, 1905, the defendant, a German subject, agreed with the plaintiffs, a Leipzig firm, to act as their

[1] (1924) 26 Bom. L. R. 224. [2] [1903] 1 K. B. 249.
[3] [1909] 1 Ch. 413.

1925.

BUCJOR v. ELLERMAN CITY LINES, LIMITED.

representative in the United Kingdom; to devote all his activity and industry exclusively to the sale of their goods; not to divulge any business matters to any one: and under a money penalty to remain in his position and not to give notice before July 1, 1910, to be three months' notice if then given. The parties agreed to submit themselves in all cases of dispute to the exclusive jurisdiction of the Leipzig Courts and to the exclusive applicability of the German law...*Held*, (*1*) that *prima facie* the agreement to refer was binding upon the parties and was one upon which the Court would act unless for some good cause the matter ought to be determined otherwise than by the Leipzig Court."

We think then that if the clause in the bill of lading could be read as stating that all claims arising thereunder should be determined according to British law, or should be determined in the United Kingdom, and to the exclusion of the jurisdiction of any other country, it might have been said that there was an agreement to refer any dispute for the decision of the Courts of the United Kingdom. But that is not what the clause says. Unless the shipowners exercised their option the parties would be able to file proceedings in the Courts of the port of destination.

The real question is whether as a matter of fact this particular clause was a submission to arbitration within the meaning of the word in clause 4 of the Indian Arbitration Act. On this question the Judge said:—

"The other question for which I took time to consider was a question raised by the plaintiff that as clause 20 gives option to one party only to have the matter determined by a foreign tribunal it does not amount to a submission under the Indian Arbitration Act and that for the purpose of making it a valid agreement to submit, both the parties should be equally bound. I have not been able to find any authority on the point, but on a careful consideration of the matter, I cannot agree with the plaintiff's contention. The parties here agreed to have the matters decided by a foreign tribunal, but at the option of one of the parties. Immediately that party exercises that option, in my opinion, the parties are bound to have the matters determined by arbitration, and it is no less a submission coming within the definition in the Indian Arbitration Act because the right is to be exercised at the option of one of the parties. The other party has agreed to abide by that option so

that immediately the shipowners exercised that option, there is an agreement to refer the matters to a foreign tribunal, and ordinarily the Court would stay the proceedings and leave the parties to their remedy by arbitration."

It seems to me that a submission to arbitration, according to section 4 of the Indian Arbitration Act, is a submission which provides that either party in case of a dispute arising on the contract is at liberty to take the necessary steps to get the dispute decided by arbitration. Under this agreement the plaintiff had no option. It is true that he could file a suit in the Courts of the United Kingdom subject to any question of jurisdiction. Certainly he could file a suit in Bombay; but he could not insist, if the defendant wished to file a suit, that the suit should be decided in the Courts of the United Kingdom. Therefore at the time the suit was filed, there was no submission to arbitration existing so far as the plaintiff was concerned, of which he could take advantage, and it would only be when the defendants took the objection that they had an option to have the suit tried in the Courts of the United Kingdom, that it could be said that the jurisdiction of this Court was in any way interfered with.

I do not think, therefore, that the definition of "submission" can be extended so as to include an agreement such as the one appearing in clause 20 of the bill of lading. Leaving aside the particular nature of this agreement, if there had been an ordinary agreement to refer any disputes that might arise to the arbitration of named arbitrators at the option of one of the parties, then I should certainly hesitate before holding that was a submission within the proper meaning of that term.

But even on the merits, assuming there was a submission, so that the Court would be entitled under section 19 of the Indian Arbitration Act to stay proceedings, we do not think that this is a case in which

1925.

BURJOR v. ELLERMAN CITY LINES, LIMITED.

proceedings should be stayed. We do not think that in the circumstances of the case the plaintiff should be compelled to start proceedings afresh in order to get the dispute between him and the defendant company decided, and there is no reason whatever why this claim arising in August 1922, the subject-matter of a suit of 1923, should not be decided in these Courts as early as possible. Either party can apply under the rules to have the suit transferred to the list of commercial causes, when the hearing can be expedited. The summons will be discharged with costs in this Court and in the lower Court.

COYAJEE, J. :—I am of the same opinion.

Solicitors for appellants: Messrs. *Payne & Co.*

Solicitors for respondents: Messrs. *Crawford, Bayley & Co.*

Summons discharged.

J. S. K.

CRIMINAL REVISION.

Before Mr. Justice Fawcett and Mr. Justice Madgavkar.

1925.

July 15.

In re PATEL MULJIBHAI HIRABHAI*.

Criminal Procedure Code (Act V of 1898), section 195 (1) (c)—"Court"—Courts in British India—Courts in Native States not included.

The word "Court" in section 195 (*1*) (*c*) of the Criminal Procedure Code refers only to a Court in British India; and does not include a Court in a Native State.

Channalapa Chenbasapa v. *Abdul Vahab*[1], referred to.

THIS was an application against an order passed by E. I. Patel, Resident Magistrate, F. C., at Nadiad.

Sanction to prosecute.

* Criminal Application for Revision No. 191 of 1925.

[1] (1910) 35 Bom. 139.