

1925

JOHN ROBERT

v.  
CHARLES  
WILLIAMTaraporewala  
J.

Q. 4.—Whether the said legacy of Rs. 15,000 in favour of Mrs. Mary Josephine Ball is liable to rank *pari passu* with the said abovementioned legacies and to abate proportionately with these having regard to the estate?

A.—In the affirmative.

Costs to come out of the estate.

Solicitors for plaintiff: Messrs. *Pandia & Co.*

B. K. D.

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## ORIGINAL CIVIL.

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*Before Sir Norman Kemp, Kt., Acting Chief Justice, and Mr. Justice Murphy.*

1929  
September 10.

MARITTIMA ITALIANA STEAMSHIP COMPANY (ORIGINAL DEFENDANTS),  
APPELLANTS v. BURJOR FRAMROZE JOSHI (ORIGINAL PLAINTIFF),  
RESPONDENT.\*

*Indian Arbitration Act (IX of 1899), sections 4 and 19—Stay of suit—Discretion of Court—What constitutes a submission—Submission spelt out of bill of lading—Jurisdiction of Indian Courts—Exclusion—Void condition—Indian Contract Act (IX of 1872), section 28.*

The plaintiff's agent in Italy shipped potatoes to plaintiff in Bombay by a steamer belonging to the defendants. The bill of lading in respect of the said consignment contained the following clause (clause 27):—

“All applications for indemnity of damage, shortage, deterioration, loss of goods shipped, shall be submitted for amicable settlement to the Agency of the Company at the port of discharge. Failing such an amicable understanding, either the shipper or the consignee, desiring to proceed against the Company in Court of Law, can do so before the Judicial Authority in Genoa, Naples, Cagliari or Venice, in case of a dispute for not more than Liras 500; and only before the Judicial Authority in Genoa for sums over that amount, the shipper and the receiver or any other person interested in the cargo expressly renouncing the competence of any other judicial authority.”

The goods were damaged in transit and the plaintiff filed a suit in the Bombay High Court to recover damages from the defendants. The defendants took out a Chamber summons for a stay of the suit under section 19 of the Indian Arbitration Act, contending that the above clause in the bill of lading constituted a valid submission to arbitration under section 4 of the said Act. The trial Judge refused to grant the application. On appeal by the defendants:—

*Held*, (1) that, where a clause in an agreement contains an arbitration clause, if there is no mutuality in the reference, i.e., where both the parties are not bound to refer a dispute to a particular tribunal, such a clause does not amount to a 'submission' under the Indian Arbitration Act;

\*O. C. J. Appeal No. 11 of 1929; Suit No. 1812 of 1928.

(2) that clause 27 of the bill of lading constituted a valid submission under the Indian Arbitration Act, to the Judicial Authority in Genoa, and that the suit should be stayed pending the decision of that Court :

*Tilakram v. Kodumal*,<sup>(1)</sup> followed;

(3) that the clause, in so far as it was an attempt to oust the jurisdiction of the Courts in India, was void "to that extent" under section 28 of the Indian Contract Act, but that fact did not make the whole clause void;

(4) that where in a mercantile contract parties have deliberately entered into a contract involving an arbitration clause, the Courts should be careful of setting it aside;

(5) that the suit should be stayed, as the order of the trial Judge was not supported by the exercise of any real discretion.

#### CHAMBER SUMMONS FOR STAY OF SUIT.

One of the plaintiff's agents at Naples in Italy, on August 5, 1927, shipped for Bombay a consignment of 10,550 baskets of potatoes, by one of the defendants' steamers s.s. "Arabia", under a bill of lading. The ship arrived in Bombay on or about August 27, 1927, when delivery of 4,900 baskets only was effected as the rest were entirely rotten and were destroyed. It was alleged that out of the 4,900 baskets, of which delivery was effected, 75 per cent. of the goods therein were damaged.

On August 27, 1928, the plaintiff filed a suit to recover Rs. 47,800 from the defendants for damages. On November 14, 1928, the defendants took out a chamber summons for a stay of the suit under section 19 of the Indian Arbitration Act on the ground that clause 27 of the bill of lading constituted a "submission" to arbitration within the meaning of that Act.

The summons was heard by Rangnekar J. His Lordship discharged the summons and refused to grant the stay.

The defendants appealed.

*O'Gorman*, for the appellants.

*Sir Jamshed Kanga*, Advocate-General, for the respondent.

<sup>(1)</sup> (1928) 90 Bom. L. R. 546.

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KEMP, AG. C. J. :—This is an appeal against the order of Mr. Justice Rangnekar refusing to stay this suit under section 19 of the Indian Arbitration Act.

Shortly put, the suit is for damages in respect of a consignment of potatoes shipped on the defendant company's s.s. " Arabia " at Naples on or about August 5, 1927. The goods arrived in Bombay on or about August 27, 1927, and a large portion of the consignment was discovered to be rotten and delivery of some 4,900 baskets only was given. Of these also seventy-five per cent. were damaged. The plaintiff claims that the damage was due to improper ventilation and lack of reasonable and proper care by the defendant steamship company of the said goods.

The defendant company took out a summons under section 19 of the Indian Arbitration Act praying for a stay of the suit by virtue of a clause in the bill of lading, which, they stated, provided for an arbitration of a dispute of this nature.

Before proceeding to consider the clause in question, I may mention that the defendants are an Italian steamship company with their head office at Genoa and having an agency in Bombay. Their ship was flying the Italian flag and the bill of lading to which we have been referred is a bill of lading in the Italian form. It may be observed in passing that the bill of lading does not commence with the words usually found in an English bill of lading, " shipped in good order and condition " but merely " shipped by Messrs. Florinda de Lucca on undermentioned conditions." There would, therefore, be sufficient reason for the shipping company to desire that the law applicable to the contract of affreightment should be the Italian law and that they should for that purpose insert the clause in the bill of lading which is the subject-matter of the stay application.

The learned Judge refused the stay and stated :—

“ Finally under the circumstances of this case I am of opinion that I should not, even if the defendants are *prima facie* entitled to a stay, grant the stay asked for. I therefore discharge the summons with costs. Counsel certified.”

We can now turn to the clause in the bill of lading and in order to extract the guiding principle from the cases which have been cited to us we may state, shortly, that they lay down that where there is no mutuality in the reference, i.e., where both the parties are not bound to refer the dispute to a particular tribunal, such a clause does not amount to a submission under section 4 of the Indian Arbitration Act.

Now, it has been held that clauses in the nature of the clause in question amount, where there is a mutuality, to a submission to arbitration. Clause 27 of the bill of lading is in these terms : [it is set out in the head-note.]

Clearly, what it provides for is that in particular disputes where the amount in dispute exceeds five hundred liras—which it does in the present case—the complaint of the shipper or the consignee against the shipping company shall be decided before the judicial authority in Genoa. But the respondents contend that this clause does not provide for mutuality and that the shipowner is not bound to file his suit—if he has one—against the consignor or consignee in Genoa. I think that there is mutuality, because with reference to certain disputes, viz., those claims by the shipper and the consignee against the company, both the shipper and consignor and the shipping company are bound by the terms of that clause to have the dispute determined by the judicial authority in Genoa. In this connection I again refer to my remarks on the reason why the shipping company stipulated for the tribunal at Genoa. Genoa, as I have said, is the head office of the company. The most recent case in our Court on the question and the effect of this

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clause is the case of *Tilakram v. Kodumal*,<sup>(1)</sup> which referred to a contract between an upcountry constituent and his commission agent and the clause there stipulated that all suits in regard to any matter arising out of the transaction should be instituted only in the High Court of Judicature at Bombay or in the Court of Small Causes at Bombay. This clause has now become by no means an uncommon one in transactions between commission agents and their constituents. In that case, the learned Judges confirmed the order of Mr. Justice Rangnekar by refusing the stay because the suit had been filed by the commission agent in Bombay in accordance with the clause in the contract. But each case must be determined on the wording of the particular clause in the contract and I quite understand that with reference to other disputes than those which consist of claims by the consignors or consignee, against the company, there is no special tribunal provided, to which those disputes may be referred.

I have come to the conclusion that the clause is a valid submission, under section 4 (b) of the Indian Arbitration Act, to the judicial authority in Genoa, and that the suit should, in the absence of any other circumstances, be stayed pending the decision of that Court.

Then, it is contended that under section 28 of the Indian Contract Act this clause is void because it excludes absolutely the jurisdiction of the Courts. But, turning to the clause excluding jurisdiction, the material portion of it commences with the words, "the shipper and the receiver or any other person interested in the cargo expressly renouncing the competence of any other judicial authority." Now, in so far as this is an attempt to oust the jurisdiction of the Courts here it is undoubtedly void under section 28, but section 28 does not have

<sup>(1)</sup> (1928) 30 Bom. L. R. 546.

the effect of making the whole clause void because the section says that what is to be void is only that portion which relates to the ouster of the jurisdiction. The section says in the concluding part of it that the stipulation is void "to that extent."

The only remaining contention advanced by the respondent is that on a consideration of all the facts of the case the stay should be refused. Now, under section 19 of the Indian Arbitration Act the "onus" is on the plaintiff to show cause why the suit should not be stayed and all that the learned Advocate General can point to for the exercise of his discretion by the learned Judge in the last paragraph of his judgment is the affidavit of the respondents dated November 19, 1928, in reply to the summons and the affidavit in support of it. That affidavit states in paragraph 2 that the reason why the suit should not be stayed is that "all necessary evidence for the determination of the dispute in this suit is available in Bombay." This is a general statement and on investigation it is not only incorrect but the contrary is true. The only evidence that could be adduced here is the condition of the goods on arrival, and that is the evidence of the expert who surveyed them and in all probability the steamship company would admit the fact that delivery was only given of some 4,000 baskets of damaged potatoes and the remainder of the consignment was rotten. The parties to a suit here would have to obtain a commission to Italy to determine, firstly, what was the condition of the goods when they were received and what was the method in which they were stowed in the hold and whether the stowage was improper for goods of this kind; secondly, what is the Italian law which would govern the contract in this case. On the other hand, if the suit were filed in Italy this evidence would be at hand and it is difficult to see how any evidence could be required from Bombay, when once

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the condition of the potatoes on arrival was admitted. Therefore, the learned Judge's conclusion does not seem to be supported by the exercise of any real discretion, and the question is, whether a stay should be granted or not. I am of opinion that the order in this respect should be set aside and that the suit should be stayed until further orders.

Finally, I would refer to the appeal which was made to us about the hardship to the plaintiffs that they cannot sue here. With regard to that we have seen the reasons why the shipping company inserted this clause in the bill of lading and, further, where in a mercantile contract the parties have deliberately entered into a contract involving an arbitration clause the Court should be careful of setting it aside. The plaintiff knew, or must be deemed to have known, perfectly well the terms of the contract of affreightment between him and the shipping company and he deliberately entered into it and has no claim to ask us to relieve him from the consequences of it.

The suit is stayed. The respondent to pay the costs of the summons in the lower Court and of this appeal. Suit stayed until further orders. Liberty to apply. The costs of the suit up to date to be in the discretion of the arbitrator. I adopt the last part of this order from that passed in *De La Garde v. Worsnop & Co.*<sup>(1)</sup>

MURPHY J. :—I agree.

Attorneys for appellants : Messrs. *Little & Co.*

Attorneys for respondents : Messrs. *Payne & Co.*

*Appeal allowed.*

B. K. D.