

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

CHOONI LAL

v.

MADHORAM AND OTHERS.*

1909
December 17.

Arbitration—Bengal Chamber of Commerce, arbitration by—Rules—Umpire, appointment of—Effect of failure to appoint.

The rules relating to arbitration under the Bengal Chamber of Commerce contemplate the appointment of an Umpire before the Arbitrators enter upon the reference, and not upon a disagreement between them.

Where the terms of a reference provide for the appointment of an Umpire before the arbitrators enter upon the reference, until the Umpire is appointed, the reference cannot proceed.

Bright v. Durnell (1), *Bates v. Townley* (2) followed.

MOTION.

THIS was an application made by the petitioner Chooni Lal under section 11, sub-section (2) of the Indian Arbitration Act for an order that an award made by the Bengal Chamber of Commerce be filed and a decree made thereon. The motion came on for hearing on the 11th November 1908, and the respondent in opposing the application relied on the case of *Hurdwary Mull v. Ahmed Musaji Selaji* (3), and judgment was reserved.

Thereafter, on the 25th November, under the direction of the Court the matter was further argued upon the question of the appointment of an Umpire.

Mr. C. C. Ghose for the applicant Chooni Lal. The rules of the Bengal Chamber of Commerce contemplate the appointment of an Umpire only when the Arbitrators disagree. This is clearly shown by reference to Rule VI. In this case, however, the Arbitrators have not disagreed at all and therefore the question of appointing an Umpire does not arise.

* Original Civil Suit No. 668 of 1908.

(1) (1836) 4 Dow. 756.

(2) (1847) 1 Ex. 572.

(3) (1903) 13 C. W. N., 63.

Mr. P. L. Buckland for the respondent. The appointment of an Umpire by the Registrar is a condition precedent to the Arbitrators entering on a reference, and until such appointment is made the tribunal to be constituted under the Rules of the Chamber for determining the dispute cannot be properly constituted.

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The words in Rule VI show that not only must the Arbitrators and Umpire be appointed on receipt of an application, but their consent must be obtained before the arbitration is conducted. The proceedings in this case have all along been irregular and the contention raised by the other side is fully met by the following English cases. *Bright v. Durnell* (1) and *Bates v. Townley* (2).

Cur. adv. vult.

FLETCHER J. This is an application by the petitioner for an order that an award made by the Bengal Chamber of Commerce may be filed in Court and that a decree be passed thereon for judgment in accordance with the terms of the award. Upon the matter first coming on before me the application was opposed by the respondents on the same grounds as those raised in *Hardwary's case* (3) with this important exception that it was not suggested in this case that the Arbitrators had allowed the time for making the award to expire before making their award.

In these circumstances I had to consider whether I ought not to remit this case to the Arbitrators.

On a more careful study of the Arbitration Rules of the Chamber of Commerce, however, it occurred to me that it was open to doubt whether the arbitral tribunal contemplated by the Rules of the Chamber of Commerce had ever been duly constituted on the ground that the Registrar had failed to appoint an Umpire. Accordingly, I set this matter down to be re-argued.

(1) (1836) 4 Dow. 756.

(2) (1847) 1 Ex. 572.

(3) (1908) 13 C. W. N. 63.

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Upon the matter coming on before me for re-hearing, it was argued by the learned Counsel on behalf of the applicant that the rules only contemplated the appointment of an Umpire by the Registrar, if and when the Arbitrators disagreed. The learned Counsel for the respondents, on the other hand, argued that the appointment of an Umpire by the Registrar was a condition precedent to the Arbitrators entering on the reference and that, unless an Umpire was appointed by the Registrar, the arbitral tribunal to be constituted under the Rules of the Chamber for determining the dispute could not be properly constituted. It is common ground that no Umpire was in fact appointed. Now Rule VI of the Arbitration Rules is the rule that governs the appointment of Arbitrators and Umpires. Such rule is in the following terms :—

“That in every case where a dispute has arisen in relation to a contract, which provides for a decision thereof by the Tribunal, an application shall be addressed by either party to the Registrar, who *on receipt of such application* shall constitute a Court by nominating in writing two or more Arbitrators and also in case of need an Umpire or if both parties in and by such application so desire a single Arbitrator to adjudicate on the dispute. The consent of the Arbitrators to act shall be obtained by the Registrar and the arbitration shall then be conducted in accordance with the following rules.”

It has been contended by Mr. C. C. Ghose that, although upon the ordinary and grammatical reading of Rule VI the words “on the receipt of such application” govern the whole of the sentence “shall constitute a Court by nominating in writing two or more Arbitrators and also in case of need an Umpire or, if both parties in and by such application so desire, a single Arbitrator to adjudicate on the dispute,” yet taking the rules as a whole the appointment of an Umpire is not contemplated, unless and until the arbitrators have failed to agree.

On the other hand, it has been argued by Mr. Buckland on behalf of the respondent that the words in Rule VI must bear their ordinary and natural meaning, and further that the words in Rule VI: “The consent of the Arbitrators to act shall

be obtained by the Registrar and the arbitration shall then be conducted in accordance with the following rules" show that not only must the Arbitrators and Umpire be appointed on receipt of the application, but the consent of both the Arbitrators and Umpire to act must be obtained before "the arbitration is conducted" for by Rule 1 (5) the expression "the Arbitrators" includes (unless clearly precluded by the context) the Umpire.

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In my opinion the argument of Mr. Buckland is well-founded. I think that the subsequent rules clearly show that the rules do not contemplate the Umpire being appointed on the disagreement of the Arbitrators, but on the other hand contemplate the Umpire being appointed before the Arbitrators enter upon the reference.

This, I think, is sufficiently shown by Rule VI (m), which is in the following terms :—"If the Arbitrators have allowed the time or extended time to expire without making any award or have signified to the Registrar or to the Umpire that they cannot agree, the Umpire may forthwith enter upon the reference."

How can the Arbitrators signify to the Umpire that they cannot agree and how can the Umpire forthwith enter upon the reference, if the Umpire is not to be appointed, until the Arbitrators disagree ?

I see therefore no reason why the words in the first part of Rule VI should not bear their ordinary meaning and I therefore hold that upon such application as is mentioned in Rule VI it is incumbent on the Registrar, when he appoints two or more Arbitrators, to appoint also "in case of need" an Umpire.

What then do the words "in case of need" mean ?

From a careful study of the Rules I think that the words "in case of need" are meant to apply to cases where the failure of the Registrar to appoint an Umpire might, if the Arbitrators disagree, render the proceedings abortive.

Rule IX provides : "In cases where a Court of the Tribunal shall consist of a plurality, the decision of the majority shall be deemed and taken as the decision of the Court.*"

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Thus in the case of the Registrar appointing three Arbitrators under Rule VI, the rules do not contemplate that being a "case of need" in which an Umpire need be appointed, because Rule IX provides that the decision of the majority shall be taken as the decision of the Court. But in cases where two Arbitrators are appointed, Rule IX cannot apply as there can be no majority and this is, I think, at any rate a "case of need" contemplated by Rule VI.

But then it has been argued on behalf of the applicant that even if the Rules (being the terms of the reference) do provide for the appointment of an Umpire on the receipt of the application for arbitration by the Registrar, yet, as the Arbitrators did not disagree, the failure by the Registrar to appoint an Umpire does not vitiate the proceedings. This point however, in my opinion, is concluded by the authority of two cases, both being the decisions of the Full Court of Exchequer, one being the case of *Bright v. Durnell* (1) and the other being the case of *Bates v. Townley* (2).

In the case of *Bright v. Durnell* (1) the terms of the reference provided that the dispute "was to be referred to the arbitration of two persons, one to be chosen by each, who were to appoint an Umpire before they commenced proceedings."

The Arbitrators not being able to agree on the appointment of an Umpire one of the parties to the reference commenced proceedings in Court against the other party. The other party obtained a rule *nisi* calling on the party, who had instituted the proceedings, to show cause why the proceedings should not be stayed as the parties had agreed to refer the dispute to arbitration. The Court discharged the rule and Parke B in giving his judgment made the following pertinent remarks:—

"If the Umpire is not appointed how can we compel the Arbitrators to appoint one? And, until he is appointed, the reference cannot go on. It appears to me to be a condition precedent that an Umpire be appointed."

It is obvious that it can make no difference whether the Umpire is to be appointed by the Arbitrators or by a third

(1) (1836) 4 Dow. 756.

(2) (1847) 1 Ex. 572.

party. If the terms of the reference provided that the Umpire is to be appointed, before the Arbitrators enter upon the reference, the reference cannot go until the Umpire is appointed.

As I have already said I hold that it is incumbent on the Registrar when he appoints two Arbitrators on the receipt of an application for arbitration under Rule VI, to appoint also an Umpire.

This application therefore fails and must be dismissed with costs.

Attorney for the applicant: *S. S. Bonnerjee.*

Attorneys for the respondent: *Leslie & Hinds.*

R. G. M.

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