

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and  
Mr. Justice Woodroffe.*

BALJNATH

v.

AHMED MUSAJI SALEJI.\*

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Aug. 7.

*Arbitration—Bengal Chamber of Commerce, arbitration by—Award, filing of—Indian Arbitration Act (IX of 1899), ss. 11, 13, 14 and 15—Rules under the Indian Arbitration Act, 1899—Submission—Bought and sold notes—Stamp-duty—Form of Order—Costs.*

Where bought and sold notes relating to a contract for the sale of goods, contained an arbitration clause, and were stamped with one anna stamps :

*Held*, that, on the materials before the Court, the practice of stamping such documents with one anna stamps was not invalid, and the proceedings in arbitration were effectual.

Under the provisions of the Indian Arbitration Act, an award is to be filed not on the application of the parties, but at the instance of the arbitrator; and when the award has been filed, the result is not that there is a suit in which a decree has been passed, but that there is an award which is enforceable as a decree.

*Tribhuvandas Kallindas Gajjar v. Jivachand* (1) and *In re a Bankruptcy Notice* (2) referred to.

Such of the rules of Court framed under the Indian Arbitration Act as are not in accordance with the Act are inoperative, and no effect can be given to them.

APPEAL by Baijnath, the legal representative of the petitioner, from the judgment of Fletcher J.

This appeal arose out of an application for an order that certain awards be filed in Court under the provisions of the Indian Arbitration Act of 1899. The material facts are set out in the following extract from

\* Appeal from Original Civil, No. 9 of 1912.

(1) (1910) I. L. R. 35 Bom. 196.

(2) [1907] I. K. B. 478.

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the judgment of Fletcher J. who heard the application in the first instance :—

“The submission or rather the two submissions to arbitration are contained in two contract notes, both dated the 23rd December 1904, relating to the sale of certain B. Twill bags sold on account of Messrs. Hurdwary & Co. to Messrs. Ebrahim Soleman & Co. The submission which is in identical terms in both notes is in the following terms :—

“Any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Bengal Chamber of Commerce applicable for the time being for decision and such decision shall be accepted as final and binding on the both parties to this contract. The award may at the instance of either party and without any notice to the other of them be made a rule of the High Court of Judicature at Fort William.”

The Rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce (so far as material to be here stated) are as follows :—

V. The Secretary or officiating Secretary for the time being of the Chamber shall and he is hereby appointed to be and act as the Registrar of the Tribunal and his duties as such shall ordinarily consist of or include the following :—

He shall by himself or his subordinates receive submissions, references or applications to the Tribunal, and payment of fees and costs, notify the arbitrators, give notice of hearing and other notices to parties, keep a register of submissions references and applications to the Tribunal and a register of awards and keep such other books and memoranda and make such returns as the Chamber shall from time to time require, and shall render such assistance to the arbitrators in arbitrations as they may require and generally shall carry out the directions of the Chamber with regard to the conduct of arbitrations.

VI. 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 with which are incorporated where not expressly or impliedly provided to the contrary the provisions of the Indian Arbitration Act :—

(b) If any arbitrator or umpire decline or fail to act or if he die or become incapable of acting the Registrar may appoint a new arbitrator or umpire in his stead in like manner.

- (e) The parties to the reference and all persons claiming through them respectively shall subject to the provisions of any law for the time being in force submit to be examined by the arbitrators on oath or affirmation in relation to the matters in dispute and shall subject as aforesaid produce before the arbitrators all books deeds papers accounts writing and documents within their possession or power respectively which may be required or called for and do all other things which during the proceedings on the reference the arbitrators may require and particularly in the case of references relating to piece-goods or jute shall comply with the arbitrator's requirements as to production and selection of samples and otherwise.
- (f) The arbitrators shall have power to appoint a time and place for the hearing of references and within 7 days of notice on that behalf the parties shall prepare and submit to the Registrar a written statement with regard to the matter in dispute or difference.
- (g) No party to a reference shall without express permission of the arbitrators be entitled to appear in person or by counsel attorney or other advocate or advisor or before the arbitrators or insist on or require the arbitrators to hear or examine witnesses or receive oral or documentary evidence but the arbitrators at discretion may through the Registrar require the parties with or without witnesses to attend before them or before any Committee or Sub-Committee of the Chamber to be examined on or without oath or solemn affirmation.
- (j) The arbitrators may at their own instance at any time or times before making a final award consult refer to and act on and adopt the advice recommendations or suggestion of any Committee or sub-Committee of the Chamber having or exercising special jurisdiction or powers relating to the particular industry commodity produce or branch of trade concerned in the reference or of any experts whether members or not and may also at the expense of the parties consult and adopt the advice of solicitors or counsel upon any question of law evidence practice or procedure arising in the course of reference.
- (l) The arbitrators shall make their award in writing within 14 days after entering on the reference or on or before any later day to which the arbitrator by any writing signed by them may from time to time enlarge the time for making the award.
- (o) No award shall be set aside or varied or attempted to be set aside or varied by reason or on account of any informality

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omission or delay or error of the proceedings in or about the same or in relation thereto or on any other ground or for any misconduct short of collusion or fraud on the part of the arbitrator.

(g) The Indian Arbitration Act 1899 so far as the provisions thereof are not inconsistent with these rules shall apply to all references to the Tribunal.

The facts relating to the reference appears to be as follows :—

On the 30th March 1908 Messrs. Hurdwary & Co. forwarded to the Registrar of the Chamber of Commerce the two contract notes which contain the submissions to arbitration and informed him of the dispute that had arisen between the parties. On the same day the Registrar wrote to Messrs. Ebrahim Soleman & Co. and informed them of this fact. This letter also contained the following statement:—‘I shall be glad to receive your statement of the case at your early convenience but not later than week from date.’

Not receiving any answer to this letter the Registrar again wrote to Messrs. Ebrahim Soleman & Co. asking their immediate attention to their former letter and ending as follows :—‘I am constituting a Court to adjudicate upon this dispute.’

The Attorneys for Messrs. Ebrahim Soleman & Co. wrote to the Registrar on the 14th April stating certain grounds of objection which may shortly be stated as follows :—

(i) That the contracts were void having been entered into through a conspiracy between Hurdwary & Co. and one E. J. Timol who was formerly in the employ of Ebrahim Soleman & Co.; (ii) that the contracts were not for the *bonâ fide* sale of goods but were mere gambling transactions; (iii) that the persons constituting the firm of Ebrahim Soleman & Co. are owing to the death of parties and other circumstances different to those constituting the firm in 1904.”

On the 21st of April the Registrar appointed the two arbitrators who both accepted the office on the same day. No notification of the appointment of or acceptance of office by the arbitrators was given to either of the parties. It was admitted before me that neither of the parties knew the names of the arbitrators until this matter came on in Court. It appears that it is the practice of the Chamber to withhold notice of the appointment and names of the arbitrators from the parties to the reference.

On the 22nd April the Registrar sent the papers which he had in his possession to the arbitrators and on the same day the arbitrators directed the Registrar to send the papers that had been lodged by each party to the other side and giving time up to the 30th April for remarks to be sent in and the papers returned accordingly. On the 25th April the Registrar

wrote to both of the parties similar letters directing them to send in their answers by the 30th April but prohibiting them from raising any new matter. On the 27th April Messrs. Hurdwary & Co. sent in their answer and on the same date the attorneys for Messrs. Ebrahim Soleman & Co. wrote to the Registrar reiterating the objections they had raised in their former letter.

It appears that on the 29th April Messrs. Orr Dignam & Co. solicitors to the Chamber were consulted by the arbitrators as to the objections that had been raised by the attorneys of Ebrahim Soleman & Co.

On the 2nd of May the Registrar wrote to the attorney of Ebrahim Soleman & Co. stating that the arbitration must proceed and disagreeing with their objections. This letter as appears by the record was drafted by Messrs. Orr Dignam & Co. and one of the statements in this letter is of importance *viz* : The arbitrators have as empowered by the rule that govern the reference obtained legal advice on the law points raised in your letter. No notice however was taken of this letter from the Registrar.

On the 18th May the arbitrators by writing under their hands purported to extend the time for making the award till the 15th June.

On the 9th of June the Registrar sent copies of the award to each of the parties but omitting from the copy the names of arbitrators. The awards both bear date 4th of June and simply award a sum of money to be paid by Messrs. Ebrahim Soleman & Co. to Messrs. Hurdwary & Co."

On the 11th July 1908 Messrs. Hurdwary & Co. presented a petition for leave to file the awards in Court. The order was sought as against Ahmed Musaji Saleji, Mamooji, Moosaji and Ismail Ahmed Mahammadi, described as the surviving members of the firm of Ebrahim Soleman & Co., and now carrying on the winding up of the said firm. The application was opposed by Ebrahim Soleman & Co.

On the 27th August 1908, Fletcher J. refused the application, observing as follows :—

[After setting out the facts above cited, his Lordship continued :—]

"The first objection that appears to me from the record to have any substance in it is that the submissions to arbitration bear one anna stamps only being stamped under Article 43 of Schedule I to the Indian Stamp Act 1899.

It will be noticed that Article 4 refers only to a note or memorandum by a broker or agent to his principal intimating the purchase or sale on account of such principal of any goods exceeding in value Rupees 20.

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Section 5 of the Indian Stamp Act 1899 enacts as follows :—

Any instrument relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments each comprising or relating to one of such matters would be chargeable under this Act.

Section 6 of the same Act enacts :

“ Subject to the provisions of the last preceding section an instrument so framed as to come within two or more of descriptions in Schedule I shall where the duties chargeable thereunder are different be only chargeable with the highest of such duties.”

Do then the contract notes comprise or relate to several distinct matters or are they so framed as to come within two or more of the descriptions in Schedule I to the Indian Stamp Act ?

The contract notes in addition to the intimation by the broker of the purchase or sale of the goods contain a submission in writing by the buyer and seller to refer disputes to arbitration signed by the broker as the authorised agent of the parties. To hold otherwise would mean that in this case there is no submission in writing signed by either of the parties in which case the award could not in any event be filed in Court as not being within the provisions of the Indian Arbitration Act.

If then the contract notes contain a submission to arbitration they fall within the provisions of Section 6 of the Indian Stamp Act. A submission to arbitration is chargeable with an eight anna stamp under Schedule I Article 5 of the Indian Stamp Act as an agreement not otherwise provided for (*Srm Bugabai v. Shio Ram*, Bombay Printed Judgment 1883, page 151 referred to in K Seshadri Hiyangar's Stamp Law in British India Part I Schedule I page 46). I may also refer to Russell on Arbitration 9th edition page 56 where the learned author states that a submission to arbitration requires an agreement stamp under the provisions of the English Stamp Act 1891. There is no distinction on this point between the English and the Indian Stamp Act.

I am of opinion therefore that each of the contract notes should have borne a stamp of 8 annas. This being so it becomes material to consider Section 35 of the Indian Stamp Act 1899 which is in the following terms:—

“ No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon registered or authenticated by any such person or by any public officer unless such instrument is duly stamped.

The arbitrators even though the parties do not take the objection are bound by the Indian Stamp Act to take notice of any omission or insufficiency in the stamping of any document produced before them. They are

also to require under proviso (a) to Section 35 of the Indian Stamp Act before they receive in evidence or act under the submission the payment of the necessary duties and penalties (see Russell on Arbitration 9th edition page 157) In the present case the arbitrators being persons having authority by the consent of the parties to receive evidence acted upon the two submissions to arbitration without the same being duly stamped contrary to the provisions of Section 35 of the Indian Stamp Act.

Under the old practice an award had to be enforced in a suit and in such a suit the plaintiff had to prove the submission under which the arbitrators acted [*Ferrer v. Owen* (1)] and though under the provisions of the Indian Act an award may be enforced in the same manner as a decree yet it is still necessary to prove that the arbitrators acted under a valid submission.

The Arbitration Act has only in this respect made the procedure for enforcing an award simpler than that under the former practice.

Section 35 of the Indian Stamp Act is however clear in its provisions and forbids any person having by law or consent of the parties authority to receive evidence (as the arbitrators had in the present case) from acting upon it until it is duly stamped. How then can I say on the evidence before me that they acted on a valid submission when the statute expressing says that they shall not act upon it until sufficiently stamped. I must confess that I have been unable to see any way out of this difficulty. It may however be that if this were the only objection the court could remit the matter to the arbitrators.

The next objection is that the award was made out of time.

Rule VI(j) authorises the arbitrators to consult and adopt the advice of solicitors upon any question of law arising in the course of the reference that is after the arbitrators have entered upon the reference. Now it appears from the record that Messrs. Orr Dignam & Co. were consulted on the 29th April and they gave their advice on the 1st of May. That advice was given to the arbitrators in the course of the reference appears from the letter of the Registrar to the attorneys of one of the parties dated the 2nd May in which it is stated that the arbitrators have as empowered by the rules which govern the reference obtained legal advice on the law points raised. Therefore on the 29th April the arbitrators had entered on the reference.

Rule VI (l) provides that the arbitrators shall make their award in writing within 14 days after entering on the reference or on or before any later day to which the arbitrators by any writing signed by them may from time to time enlarge the time for making the award. The arbitrators purported to enlarge the time for making the award on the 18th of May.

(1) (1827) 7 B. & C. 427.

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But on that date the time for making the award had expired and an enlargement by the arbitrators after their original time has expired is inoperative (see Russell on Arbitration 116).

But then it is said that Rule VI (o) provides that no award shall be set aside or varied except for collusion on the part of the arbitrators. It is sufficient for me with regard to this objection to say that the present application is not one to set aside or vary an award.

I am therefore of opinion that the award was made out of time and is inoperative.

Now the next objection is that the reference was not conducted according to the rules applicable thereto.

On this objection the first point raised is that the arbitrators improperly concealed their names and the fact of their appointment. It is common ground between the parties that the arbitrators did conceal their names and that neither of the parties knew the names of the arbitrators until this application was made to the Court.

By Rule IV one of the duties of the Registrar is to notify arbitrators and give notice of hearing. Rule VI (g) provides that certain things may only be done with the express permission of the arbitrators.

It is clear to my mind that the rules contemplate the parties being notified of the appointment of the arbitrators so that they may apply to the arbitrators for the express permission mentioned in Rule VI (g). Again if the names of the arbitrators are withheld from the parties how can they apply to set aside the proceedings for fraud or collusion on the part of the arbitrators as contemplated by Rule VI (o) ?

The next objection on the rules is that the arbitrators did not appoint a time and place for the hearing of the reference.

In my opinion they failed in their duty in not doing so. By Rule VI (f) the parties have 7 days from the notice of appointment of a time and place for the hearing of the reference to submit their written statement. This period of 7 days does not begin to run until notice of appointment of a time and place for hearing of the reference has been given to the parties. I also think that the permission mentioned in Rule VI (g) to appear before the arbitrators is a permission to appear before them at the time and place appointed for the hearing under Rule VI (f).

Next it is said by the party opposing this application that Rule VI (g) is *ultra vires*.

In my opinion it is not. I doubt very much whether this rule goes further than the general rule of Law. Whether the arbitrators should or should not hear evidence and the parties by counsel or otherwise must depend on the particular circumstances in every case. The rule vests a discretion in a person exercising judicial functions which must be exercised



in a judicial manner. Thus there are many arbitrations where the arbitrators are experts where it is not necessary for them to hear evidence or the parties as the arbitrators have themselves the expert knowledge rendering them capable of deciding the matter without hearing evidence or the parties. On the other hand the reference may be such that the arbitrators cannot decide the matter in dispute without hearing evidence and the refusal to hear evidence in such a case would amount to misconduct on the part of the arbitrators. In the present case the arbitrators were correct in declining to hear evidence on the allegation of fraud which went to the invalidity of the submission. On the other hand they acted improperly in not taking evidence to ascertain who were the parties liable on the contracts. The arbitrators have never considered this matter at all and the form of the award is made against a firm and there is nothing to shew who the members of that firm are.

The section of the Contract Act referred to by the solicitors to the arbitrators has nothing to do with it.

The present application is to file the award in Court so that it may have the effect of a decree of this Court. But this Court cannot make a decree against a firm when it is ignorant as to what persons constitute the firm. This being so I am of opinion that not only did not arbitrators act improperly in not taking evidence on this issue but also that the award is bad on the face of it. But then it is said by the applicant that whatever misconduct there may have been on the part of the arbitrators this is cured by Rule VI (o). As I have already pointed out this rule does not apply as the present application is not one to set aside or vary the award. But even if the application were one to set aside the award I am of opinion that Rule VI (o) would be no bar to the jurisdiction of the Court to do so if misconduct on the part of the arbitrators were shown or if it were shown that the awards were improperly procured.

Section 14 of the Indian Arbitration Act vests in the Court a discretion to do so in any case where the arbitration is a proceeding under that Act and it is not competent for the parties by agreement to oust this jurisdiction if they desire that the award should be enforced under the provisions of that Act. For the above reasons I am of opinion that the present application fails.

The applicant must pay the costs of this application."

The order was completed and filed on the 12th February 1912.

From this order the present appeal was preferred by Baijnath, the legal representative of Hurdwary Mull who had been carrying on business under the firm name of Hurdwary & Co.

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*Mr. Pugh (Mr. W. Gregory with him)*, for the appellant. Fletcher J. was in error in holding that the proceedings in arbitration were vitiated because the contract notes were insufficiently stamped. The want of stamp or insufficiency of stamp would not invalidate the submission. Further, it is submitted it was quite unnecessary to stamp the contract notes with eight-anna stamps on account of the arbitration clause: *The Bombay Co., Ltd., v. The National Jute Mills Co., Ltd.*(1). The practice has always been otherwise [Mr. Pugh was stopped on this point]. The other two points which the respondents urge are—(i) that the award was out of time, and (ii) that the award was made against a firm and there is nothing to shew who the members of the firm were. These points cannot be taken at this stage. Their correct course was to move the Court to set aside the award under section 14 of the Arbitration Act: *Thorburn v. Barnes*(2), *Bache v. Billingham*(3).

*Mr. B. C. Mitter (Mr. A. N. Chaudhuri with him)*, for the respondents. I do not press the question of the insufficiency of the stamp, as it could always be cured by a penalty. The points I press are—(i) that the award was out of time, and (ii) that the award was made against the firm, whereas the appellants claimed relief against particular individuals. Rules were framed by the High Court under section 20 of the Indian Arbitration Act. Under rules 7 to 9 this is the proper time for us to raise our objections to the award. Under the rules, once the award is filed, there is no further opportunity to set aside the award.

[JENKINS C.J. The rules appear to be in conflict with the provisions of the Act, and to that extent are inoperative.]

(1) (1912) I. L. R. 39 Calc. 669. (2) (1867) L. R. 2 C. P. 384.

(3) [1894] 1. Q. B. 107.

If the Court holds the rules are bad, and that an order should be made for filing the awards, the awards should be taken to be filed as of date, so that we may have an opportunity of raising our objections to the awards.

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JENKINS C.J. This appeal arises out of an application preferred as far back as the 11th of July 1908, whereby it was prayed that an order should be made that certain awards be filed in Court under the provisions of the Indian Arbitration Act of 1899. The respondent formulated his objections in an affidavit, but the principal ground on which the application failed before the learned Judge by whom it was heard in the first instance was that the whole proceedings in arbitration were ineffectual, because the submission was insufficiently stamped. We cannot accept that view. The parties have stamped their document in accordance with the practice which has been recognised by this Court for a long series of years, and we are not prepared to question that practice on the materials at present before us.

But, apart from that, there were certain other grounds on which the learned Judge thought there was a difficulty in the petitioner's way, and in particular he considered that the award was out of time and that there was a difficulty as to who were the members of the firm against whom the award went.

A good deal of difficulty in this case has been occasioned by the rules of Court framed under the Arbitration Act. But it appears to me that so far as they do create a difficulty, they are not in accordance with the Act. Effect, therefore, cannot be given to them. The Arbitration Act provides that the High Court may make rules consistent with the Act, and in particular as to the filing of awards and all

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proceedings consequent thereon or incidental thereto, and all proceedings in Court under the Act. Now, the Act itself provides in section 11 that "when the arbitrators or umpire have made their award, they shall sign it, and shall give notice to the parties of the making and signing thereof and of the amount of the fees and charges payable to the arbitrators or umpire in respect of the arbitration and award." The second clause of the section provides that "the arbitrators or umpire shall, at the request of any party to the submission or any person claiming under him, and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charges of filing the award, cause the award, or a signed copy of it, to be filed in the Court; and notice of the filing shall be given to the parties by the arbitrators or umpire." That clause appears to me to be clear. Then it is provided in section 13 that the Court may remit the award, and in section 14 that "where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set aside the award." Section 15 provides that an award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall, subject to certain exceptions, be enforceable as if it were a decree of the Court. The filing therefore is an act to be done, not on the application of the parties, but at the instance of the arbitrator; and when the award is filed, the result is, not that there is a *suit* in which a *decree* has been passed, but that there is an award which shall be enforceable as though it were a decree. This topic is very clearly discussed in *Tribhuwandas Kallianadas Gajjar v. Jivanchand* (1), where reference is made to *In re a Bankruptcy Notice* (2), an English

(1) (1910) I. L. R. 35 Bom. 196. (2) [1907] 1 K. B. 478.

decision on a cognate section. In the circumstances it appears to me that we must adhere to the Act; and what we must now do is to direct, as the petitioner prayed, that the award be filed. The filing must be as of the date when it should have been filed, that is the 27th of August 1908: but as this order is made only today, that fact must be borne in mind if the respondents consider that they have any objection which they can urge in accordance with the terms of the Act. We must, therefore, set aside Mr. Justice Fletcher's order, and direct the award to be filed.

Costs throughout will be added to the sum awarded, so that the enforcement of their payment will depend upon the power to enforce payment under the award.

WOODROFFE J. I agree.

*Appeal allowed.*

Attorneys for the appellant: *Leslie and Hinds.*

Attorneys for the respondents: *S. D. Dutt & Ghose.*

J.C.

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