

PRIVY COUNCIL

Firm of Saleh Mahomed Umer Dossal

Vs.

Seth Nathoomal Kessamal

Privy Council Appeal No.7 of 1926

(Viscount Sumner, Lords Sinha J. Blanesburgh and Sir John Wallis JJ.)

05.05.1927

JUDGMENT

VISCOUNT SUMNER J.

1. In this case as the respondent did not appear their Lordships with the very full assistance of counsel for the appellants have examined it with, as they believe, every care to see whether there is any irregularity, or other matter than that which has been fully argued, to which their attention ought to be directed, but they are satisfied that the only question which can reasonably be raised is whether the Court of the Judicial Commissioner, from which the appeal comes, were or were not right in their decision that the award made in the arbitration between the present parties was bad on its face. Though it was no part of the proceeding now before the Board, it is the case that after the issue was decided, that is now under appeal, the present appellants applied to have it reviewed, and on that occasion one of the members of the Court, whose judgment is under appeal, said, in refusing the application:

It may be admitted for the present purpose, that our decision proceeded largely on the same grounds as those that commended themselves to the High Court of Bombay in *Jivraj Baloo Spinning and Weaving Co. Ltd. v. Champsey Bhara and Co.* Those grounds did not commend themselves to their Lordships of the Privy Council, and the judgment of the High Court of Bombay was reversed. That judgment of their Lordships of the Privy Council was delivered on the 6th March 1923, and at the time we heard the revisional application in question it had not reached India. It may be assumed for present purposes that, had that judgment been placed before us at the hearing our judgment would not have proceeded on the lines on which it did proceed.

2. It is therefore perfectly plain, that the one point which was in dispute in the Court below was, whether or not under the circumstances of the case there could be said to be an error upon the face of the award, which had been brought before them by the regular process of objection on the part of one of the parties to the award, when filed.

3. The contract is referred to in the award. It recites a contract made between the parties dated the 1st December 1919, but it does so for one purpose only, namely, to earmark the disputes, which had arisen and which, by a subsequent, written reference, had been referred first to the arbitration of two named arbitrators, and then, in the event which happened, of the umpire, who made the award when they differed. The umpire recited that both parties were present on every occasion when he sat ; that he considered all the evidence, documents and accounts before him and the arguments of the pleaders, and then made the award. Paragraph 1 of his award adjudged that one party should pay a named sum with interest at a fixed rate, and from dates which were fixed also and then with the costs of the arbitration. Para, 2 stated that on receipt of these amounts the other party should forthwith deliver certain goods, which were precisely specified, Para. 3 provided for a right to require payment of storage charges, if there was delay in taking delivery, and the amount of the arbitration costs was then specified as well. There was also a clause, which stated that in addition to these costs, all costs, if any, incurred in filing the award in Court should be paid. That clause is a severable matter and was treated by the first Judge as a mere indication of opinion for his guidance and not as part of the award, and when afterwards the award came to be questioned before the full Court, no exception was taken to his decision on this ground, which therefore stands. The exception taken to his decision simply had reference to specific objections and left the award in other respects standing. It was that the umpire had been guilty of that particular form of judicial misconduct, which consists in making a mistake in law, and letting it be visible on the face of his award. The argument was that the contract was incorporated into the award by the reference mentioned above, and that, adopting the parties' admission that the bales tendered were of substantially less weight than the bales, whose deliverable weight was specified in the contract, the award must be taken to have disclosed on its face an error in law in construing the terms of the contract, which related to the description of the goods sold and to the law applicable to the sale and delivery of goods by description. Their Lordships, independently of the case of *Jivraj Balloo Spinning and Weaving Co. Ltd. v. Champsey Bhara and Co.* could not have entertained that view, because it appears to them quite plain that this award, the terms of which are very precisely stated, makes its allusion to the contract very guardedly and for the purpose only of

earmarking the origin of the dispute in question. It is perfectly consistent with the umpire's having come to conclusions of law or of fact of his own, by which the parties who submitted their disputes to him would be bound. On looking at the previous decision of the Board, however, it may be observed that was a stronger case than the present one, because in that case there had been a rejection of the goods altogether, a fact which was referred to in the award. By this and other exceptional references to the contracts, the award incorporated their written terms, and the rules and regulations, subject to which they were made; and the letters between the parties, stating the grounds on which the goods were rejected, were also mentioned and included. It then proceeded to state how the arbitrators got at their conclusion. On these facts the decision of the Board was that there was nothing that could be called error upon the face of the award, and therefore, the appeal succeeded. A fortiori this appeal must succeed also.

4. Their Lordships think it unnecessary to canvass the case any further. They will humbly advise His Majesty that the appeal be allowed with costs, and the decision of the first Judge be restored.

Appeal allowed.

Cases Referred.

[1919] 44 Bom, 780 : 53 I. C. 799 : 21 Bom. L.R. 1037.

AIR 1923 PC 66 : 47 Bom. 578 : 50 I. A. 324 : (1923) A. C. 480 (P.C.)