

# ALLAHABAD HIGH COURT

Dhiraj Lal-Ram Prasad

Vs

Sir Jacob Behrens

(Niamatullah, J.)

26.07.1932

## JUDGMENT

### **Niamatullah, J.**

1. This is an appeal from an order of the First Additional Subordinate Judge of Cawnpore on an application by the defendants-appellants under Section 19, Arbitration Act, for stay of a suit brought against the appellants-defendants by the plaintiffs. The plaintiffs are Sir Jacob Behrens and Sons of Manchester, England, and the defendants Dhiraj Lal Ram Prasad, cloth dealers in Cawnpore. These parties have entered into BEHRENS & SONS (Niamatullah, J.) 1933an agreement known as a C. I. F. contract, in the terms of which the defendants purchased cloth from the plaintiffs. Under this contract transactions are carried out in the following manner: The purchaser orders certain goods. The seller after accepting the order despatches the goods, at the same time drawing bills of exchange directing the seller to pay the Chartered Bank of Cawnpore a sum representing the cost of goods, freight and insurance, up to the arrival of the goods in India. The Bank tenders to the purchaser the bills of exchange, invoices, bills of lading and other documents. The purchaser accepts the bills of exchange and gives the necessary instructions for the clearance of the goods. The bills of exchange are then presented on maturity to the purchaser who makes the payment and receives delivery of the goods.

2. In the present case several orders for dhotis were, placed with the plaintiff firm by the defendants, and the procedure outlined above was adopted until the time came for the defendants to honour their acceptances of the bills of exchange and take delivery of the goods. In each case the defendants refused to do so. At first they asked for an extension of time, and subsequently asked that the matter might be referred to arbitration in accordance with the terms of the agreement. Ultimately a suit was instituted for recovery of a sum of upwards of one lac of repees due on the bills of exchange accepted by the defendants. The defendants thereupon made an application under Section 19, Arbitration Act, for stay of the suit. The Subordinate Judge dismissed this application on the following grounds: First, he held that this is a suit based on accepted bills of exchange, and is not a suit for goods delivered. Secondly, he held that in a C.I.F.

contract no question of arbitration can arise as in such contracts it is the duty of the buyer to pay the drafts drawn against shipment, and the only defence which he can take is that documents tendered were not proper documents. In other words no defence can be entertained without previous payment. Thirdly, he held that no dispute had actually arisen which could be referred to arbitration; and fourthly, he held that in any case if such a dispute could be said to have arisen, it had not been made within 30 days of the date of the acceptance of the bills of exchange, and therefore under the terms of the agreement could not be referred to arbitration.

3. Undoubtedly the learned Subordinate Judge was asked to give a decision on all these points, and arguments have been addressed to us also on all the matters dealt with in the judgment, but in our opinion the Court should have confined itself strictly to a decision as to whether there was or was not an adequate reason for not allowing this application in the terms of Section 19, Arbitration Act. If the decision of the Subordinate Judge on the first point, to which we have referred above, is correct, it is not, in our opinion, necessary at this stage to give a decision on the other questions dealt with by him. The agreement between the parties was *inter alia*:

(a) If such firm offers are accepted by the sellers they shall, after the despatch from Manchester of the goods, draw upon the buyers or the buyers indentors at 60 days' sight for the price so stated in such firm offer with documents attached through the National Bank of India Ltd. or such other bank as the sellers hereafter select or agree to; (b) should the sellers, at the request of the buyers, draw any drafts on the buyers indentors the buyers shall be and remain liable as guarantors or sureties for the acceptance and payment of such drafts and the sellers shall hold and continue to hold the buyers and the buyers indentors equally liable; (c) the sellers shall also be entitled and remain entitled to recover the invoice value of the goods from the buyers whether or no the property in the goods has passed to the buyers and whether or no the drafts have been accepted; (d) disputes of whatever nature arising out of any contract entered into in connexion with this agreement including the question of the construction of such contract or of any trade usage governing the goods covered by such contract unless an amicable settlement can be arrived at must be referred to arbitration under the rules of the Delhi Piece goods Association.

4. In the present case the bills of exchange directed the defendants to pay the invoice value to the Chartered Bank (which the plaintiffs selected as they could under the agreement). The defendants accepted the bills before maturity. The effect of such a transaction ordinarily is that the defendants' liability to the plaintiffs for the invoice value of the goods is discharged, and a liability to the bank under the bills is substituted therefor. The defendants could not be liable to both, that is to the plaintiffs for the price of goods and to the bank for acceptance of the bills under Section 32, Negotiable Instruments Act, which clearly provides that the acceptor before maturity of a bill of exchange is bound to pay the amount thereof at maturity according to the apparent tenor of acceptance. Clause (c) however quoted above, (the numbering is our own, adopted for the sake of Convenience), empowers the sellers to claim the invoice value in spite of the acceptance of the bill. It is, of course, implied that if the sellers elect to sue for the invoice value on the basis of the original contract they would secure for the buyers immunity against any

claim on the basis of the bill and, conversely, if the buyers' acceptance of the bill is enforced, they are absolved of their liability under the original contract. But for Clause (c) the legal position would have been only this: after acceptance followed by maturity of the bill the buyers would have been liable only to the bank which alone would be liable to the sellers according to the terms of the agreement between them, under which the sellers drew the bill of exchange in favour of the bank. The sellers have however reserved to themselves an alternative remedy of falling back on the original consideration. It is only if they avail themselves of this remedy and their claim is contested that a dispute will arise "out of a contract entered into in connexion with this agreement" within the meaning of the arbitration clause quoted! above marked (d). If, on the other hand, the suit is based on the bill and a dispute arises in such suit, it cannot be said to arise out of any contract between the parties "in connexion with the agreement" but it arises between one of the parties to it and a third person in connexion with the acceptance of the bill, a transaction collateral to but not arising out of the agreement.

5. In our opinion the agreement clearly gives to the seller an option to sue for the price of goods, but this option has not been exercised, and the main argument addressed to us is that this is actually a suit for the price of goods. If it were so, no doubt in the terms of the agreement the buyer would be able to refer to arbitration any objection which he had to make as to the quality or quantity of the goods supplied, but we are not of opinion that this is in any sense a suit for the price of goods. It is in form and in substance a suit based upon the acceptance by the defendant firm of the bills of exchange. It was open to the plaintiffs to sue for the price of goods, but it was also open to them to avail themselves of their position as holders of the accepted and dishonoured drafts, and to enforce against the defendants the terms of Section 32, Negotiable Instruments Act 26 of 1881. Mr. Banerji for the defendants-appellants has argued that the decision of the Subordinate Judge is entirely based upon a judgment of the Lahore High Court in *Radha Bihari Diwan Singh v. G.B. Alexander* A.I.R. 1922 Lah 353, and he has shown that that decision, although to some extent in point, is based upon a contract containing a clause whereby the sellers bound themselves to accept the draft on presentation and pay at maturity notwithstanding any objection they might have regarding or on account of any variation in the terms of the Indent.

6. There is no such clause in the present agreement, and for that reason we preferred to leave out of account the judgment of the Lahore High Court which has been relied on by the learned Subordinate Judge. Our view in the case is as follows : The draft was drawn in favour of the Chartered Bank, and it was the Chartered Bank who had in the first instance a right to recover the sum due on the draft from the acceptor. Had the Bank sued on the acceptance, clearly the acceptors could not have pleaded that under an agreement between themselves and a third party, namely, the sellers of the goods, they had a right to refer the matter to arbitration. No question as to the nature of the goods arose between the present appellants and the Chartered Bank, and there was no agreement between them containing any clause authorising a reference to arbitration. The Chartered Bank endorsed the bills of exchange to the plaintiffs, and the plaintiffs in bringing this suit on the basis of the bills of exchange are in the position of the Chartered Bank, and therefore

entitled to frame their suit accordingly. Their position in this respect is the same as that of a total stranger to whom the Bank might endorse the bills. A suit brought by them for the price of the goods will bring into operation the arbitration clause of the agreement between themselves as sellers and the defendants as buyers. But there is no agreement and no arbitration clause which can come into force as between the plaintiffs as holders and the defendants as acceptors of the bills of exchange.

7. In our opinion on this finding alone the defendants' application to refer the dispute to arbitration under Section 19, Arbitration Act, should have been dismissed. The effect of such dismissal is that the defendants would be at liberty to defend the suit in the Court of the Subordinate Judge on such grounds as they may be entitled to take. They can there raise the plea allowed to them by Section 43, Negotiable Instruments Act, that there has been a failure of consideration. It is also open to them to institute their own suit against the plaintiffs for any compensation to which they may be entitled for the alleged breach of the agreement in that the plaintiffs are said to have sent dhonis which are not of agreed dimensions, if such a defence is not open to them in this suit, a question on which we express no opinion. Consequently we deprecate those findings of the Subordinate Judge which appear to cut off from the defendants the defence which they might raise in the trial of the suit in the Court of the Subordinate Judge or in a suit of their own. These are the third and the fourth findings to which we have referred above. On one of these findings we cannot agree with the view taken by the Judge, and we think it proper to set aside that finding. He has held that no dispute has arisen which could have been referred to arbitration had the arbitration clause of the agreement come into operation. In our opinion such a dispute has arisen. Before the filing of the suit the defendants complained that on information received from customers they had reasons to suppose that the dhonis supplied in these consignments were not in accordance with the specifications in the invoice. The Judge appears to have overlooked the fact that this is one of the matters which the defendants wished to refer to arbitration, and as they clearly put forward this claim before the suit was filed, it cannot be said that there was no dispute which has been referred to arbitration under the agreement if the arbitration clause in the agreement had come into operation.

8. The Judge has also held that the objection, if made, was beyond time, having been made more than 30 days after the acceptance. In our opinion this is a matter which should not be decided in the present proceeding. It is true that there is a decision of a Bench of this Court in the case of *Kedarnath Motilal v. Sukhamal Bansidhar* A.I.R. 1922 All 522, which seems to hold that a decision by arbitrators on an objection raised beyond a period allowed for making such objections in an agreement is void, though one of the Judges expressed the opinion that the arbitrators themselves should decide the question whether the objection was or was not made within time. We do not think it necessary in these proceedings to express any opinion on this matter. We consider that the finding of the Subordinate Judge is premature and that this matter may be reopened if parties wish to do so in the trial of the suit or in another suit. We consider that at the present stage the duty of the Subordinate Judge, and therefore our own duty, was merely to

decide whether this suit should be stayed in order that the matter may be referred to arbitration under the agreement between the parties or not. In our view no case for reference has been made out and the suit is therefore one which must be heard on its merits as a suit based on the acceptance of a bill of exchange. We do not wish to record any finding or to support any finding which might preclude the defendants from setting up any defence in the written-statement now to be filed which is open to them in a suit of this nature, and we accordingly set aside all those findings of the Subordinate Judge, other than the finding which we affirm, that no reference to arbitration can be made in the terms of tire agreement between the parties in the "present suit as framed. Subject to this observation we dismiss this appeal with costs.

