CALCUTTA HIGH COURT

Baranagore Jute Factory Co. Ltd

Vs.

Hulaschand Rupchand

A.F.O.O. No. 170 of 1955

(P. Chakravartti, C.J. and S.C. Lahiri, J.)

10.03.1958

JUDGMENT

P. CHAKRAVARTTI, C.J.

1. This is an appeal from ajudgment and order, dated 7th March, 1955, of Bachawat, J., who has rightly observed that the case involves certain important questions of arbitration law. Those questions, some of which concern particularly arbitrations by the Bengal Chamber of Commerce and Industry, have arisen in the following way.

2. By a contract entered into on 9th February, 1953, the appellant, The Baranagore Jute Factory Co. Ltd., agreed to buy and the respondent, Messrs. Hulaschand Rupchand, agreed to sell a certain quantity of jute of certain specifications. The contract contained an arbitration clause in the standard form prescribed by the Indian Jute Mills Association and provided inter alia that all disputes and claims

> "shall be referred to the arbitration of the Bengal Chamber of Commerce and Industry under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted". In addition to that general provision, the contract also contained certain special provisions regarding arbitration on claims relating to the quality or the condition of the goods. Clause 10 (2) of the contract emphasized further the obligation of the parties to have such claims decided by the arbitration of the Chamber and at the same time prescribed a period within which a reference to arbitration was to be made. It said :
> "All claims in relation to quality and/or condition shall be settled in no other way than by a reference to arbitration, as is in the contract provided for : but none shall be entertained unless submitted by the buyers to arbitration within two months of the date of delivery of the jute at the buyers' mill."

3. Clause 10 (3) of the contract provided what the form and contents of an award in favor of the

buyers would be, if they succeeded on a claim in respect of the quality of the goods and/or excessive moisture in them. It said that if the award provided for an allowance of a certain percentage of the market difference between the grades of the goods contracted for and the next lower grade and/or found a moisture content in the goods supplied in excess of a certain percentage and stipulated an allowance therefore, the buyers would accept the goods with the allowance awarded and the sellers would be liable to pay to the buyers, in addition to the allowance, a penalty or penalties computed in a certain manner.

4. In pursuance of the contract, the respondent delivered a portion of the jute contracted for, but the appellant, while accepting the goods, raised a question as to their quality and also alleged that they contained excessive moisture. The respondent was not prepared to admit those allegations and a dispute having thus arisen between the parties, it was referred by the appellant on 16th March, 1953, to the arbitration of the Bengal Chamber of Commerce and Industry. Thereupon, the Registrar of the Chamber numbered the reference as Case No. 233 of 1953 and constituted for its consideration a Court, consisting of one Mr. Carstairs and one Mr. McCraw. The arbitrators made their award on 2nd April, 1953 after they had inspected the goods and by it directed that the appellant would retain the jute and the respondent would pay it certain allowances and penalties. The respondent did not accept the award and after sundry correspondence between the parties and certain further proceedings before the arbitrators to which it is not necessary to refer,. the award was filed in Court. Thereupon the respondent made an application for setting aside the award and by an order, dated 28th August, 1953, S. R. Das Gupta, J. set it aside. The learned Judge held that the award had been made without jurisdiction but what he found was not that the arbitral Court had been illegally constituted, nor that the Court was rot competent to entertain the reference but only, as he made it clear in his judgment, that by reason of the provisions of Clause 10 (3) of the contract, the arbitrators could not award allowances and penalties unless they made provision in the award itself for an allowance of a market difference of a certain percentage and a similar allowance for moisture, which they had not done. The learned Judge, however, did not supersede the reference. "I am not superseding the reference, he said expressly in his judgment and the reservation was incorporated in his order, as drawn up, by the words "without supersession of the Arbitration proceedings herein and of the reference thereof."

5. After the award had thus been set aside, the appellant addressed a letter to the Registrar of the Chamber on 30th November, 1953 and asked him "to appoint a Board of Arbitrators to adjudicate upon" the dispute. The letter referred to the previous proceedings and the award made therein, pointed out that the award had been set aside by this Court, but the reference had not been superseded and then made the following request:

> "Accordingly, we would request you to refer the matter once again to the arbitrators for considering the original Award No. 381 of 1953, dated 2-4-53 and to pass a correct Award in our favor."

6. It was added that since the jute had in the meantime been consumed, the appellant thought that it would be necessary to refer thematter to the same arbitrators who had made the previous award "in the light of their inspection of the goods."

7. On receipt of the appellant's letter, the Registrar of the Chamber addressed a letter to the respondent which it received on 5th February, 1954. By that letter the respondent was informed that the appellant had again referred the dispute to the arbitration of the Chamber and the reference had been marked as Case No. 63 of 1954 and that the respondent was to file its statement in reply. The respondent filed its statement on 15th February, 1954, after it had obtained an extension of time and by it took the plea that under the rules of the Chamber's Tribunal of Arbitration, the original arbitrators could not be appointed to hear the fresh reference, as prayed for by the appellant and that, further, those arbitrators having already made up their minds, could not be proper persons to be reappointed arbitrators in the same dispute. Previously, by letters dated 13th February, 1954, the Registrar of the Chamber had informed the parties that the arbitration would be held on 24th February, 1954 and asked them to attend on that date with their evidence. The forwarding letter by which the respondent sent its statement in reply referred to the Registrar's notice and expressed surprise that a Court should already have been constituted, as indicated by the notice and asked that the appellant might be informed if its presumption that the same persons had been re-appointed arbitrators was correct. Whether any reply to that letter was received does not appear. On being supplied with a copy of the respondent's statement in reply, the appellant filed a further statement on 20th February, 1954 wherein it answered the respondent's contentions by saying that the reference, then before the Chamber, was not a continuation of the old reference, but a fresh reference to which a fresh number had been assigned and that there was nothing in the rules of the Tribunal of Arbitration to prevent the Chamber from appointing the same arbitrators to arbitrate on the fresh reference. A copy of the appellant's further statement was sent to the respondent by the Registrar on 22nd February, 1954 with a direction that comments thereon, if any, must be submitted by 3rd of March but, on the same day, the Registrar also informed the parties that the arbitration had been postponed until further notice. The respondent did file a rejoinder to the appellant's further statement and contended thereby that the Chamber would be guilty of misconduct if it appointed the same two arbitrators, particularly if it did so at the request of one of the parties against the wishes of the other. When this rejoinder was filed does not directly appear, but it would seem from a letter of the Registrar, dated 5th March, 1954, that it was filed on 26th of February, 1954 and the letter, forwarding it, asked under what rule the arbitrators had been appointed. On 2nd March, 1954, the Registrar notified the parties that he had re-constituted the Court under Rule 10 of the Rules of the Tribunal of Arbitration. On 5th March following, he wrote to the respondent in reply to a letter of 26th February and informed it that the arbitrators had been appointed under the provisions of Rules 6 and 10. On the next day, he gave notice to the parties that the arbitration would be held on 10th March, 1954 and asked them to be present with their evidence, particularly evidence of the market difference on the date of the original award. On receipt of that notice, the respondent sent in an objection to the effect inter alia, that oral evidence of the quality of the goods could not be given and it also informed the Registrar that as no valid arbitration was possible and no fair decision could be arrived at "on the line of proceedings adopted by the Court in question", it would not participate in the arbitration. It appears that the arbitration was postponed from time to time and the respondent informed the Registrar a second time that it would not participate in the proceedings. Ultimately, on 28th April, 1954, the arbitration was held and an award was made to the same effect as the original award, the omission which had vitiated its predecessor being now supplied.

8. There is no direct evidence on record of the composition of the second arbitral Court. But it appears from the affidavits and it was not disputed before the learned trial Judge that the Court

first constituted on receipt of the appellant's letter of 30th November, 1953, consisted of Mr. D. A. Carstairs and Mr,. D. H. McCraw, the same two persons who had made the original award; that Mr. Carstairs left for England in the early part of March, 1954 and thereupon one Mr. H. A. Luke was appointed in his place under Rule 10; and that the second award was made by a Court constituted of Mr. McCraw and Mr. Luke.

9. The award was filed in Court on 24th June, 1954. On 26th August next, the respondent made an application for setting it aside and it was set aside by Bachawat, J. by an order made on 7th March, 1955. It is against that order that the present appeal is directed.

10. It will be convenient to state first at one place the several findings of Bachawat, J., each one of which raises an important question of arbitration law and all but one of which were challenged before us. They may be summarized as follows :

1. In the case of an arbitration without intervention of the Court, after an award has been set aside, there cannot be asecond reference of the same dispute under the same agreement to the same or another arbitrator, except when the agreement itself provides for such a reference or when the first reference was invalid, so that in reality there had been no reference at all.
2. When an award isset aside, but the reference is not superseded, a purported second reference to the same arbitrator may sometimes, but not always, be treated as a revival and continuation of the first reference.
3. One such case where a second reference may be so treated is where the whole of a part of the proceedings on the first reference was void, e.g. when the arbitral Court was illegally constituted or where the arbitrator conducted himself in such a manner that the proceedings held by him were a nullity, wholly or in part. In such a case, after the award is declared to be null and void or is set aside, without supersession of the reference, the parties are relegated to the position in which they were before the abortive proceedings began.
4. But where there was no invalidity either in the reference or in the proceedings and the award is set aside on some ground other than its nullity, without supersession of the reference, the arbitration agreement may survive, as it does, but the original reference can be revived or continued and a fresh award obtained in it only if there is sufficient machinery for further arbitration in that reference, e.g., where the agreement provides for the appointment of a new arbitrator in the place of the original arbitrator in the event of the award made by the latter being set aside or where it gives further authority to the original arbitrator to make another and a new award.
5. The rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce and Industry do not provide for the constitution of a new arbitral Court in a case where the award made by the Court, first constituted, is not void but only illegal and is set aside on the latter ground. Neither R. 7, nor Rule 10 applies to such acase.
6. In any event, no appointment under either of those rules had been made in the present case.

7. Accordingly, the proceedings had in the present case after 30th November, 1953, treated as proceedings on a second reference, were invalid. Neither could they be treated asproceedings in continuation of the original reference.

8. Accordingly, further, the appointment of Mr. Carstairs and Mr. McCraw after receipt of the Appellant's letter of 30th November, 1953, treated as a fresh appointment to a new arbitral Court, was invalid; and even if they could be treated as acting under the original appointment, their authority to make an award had long expired by efflux of time.

9. Even the subsequent appointment of Mr. Luke in the place of Mr. Carstairs was not justified under Rule 10 and did not make a good arbitral Court, because assuming Rule 10 applied, both Mr. Carstairs and Mr. McCraw required to be replaced.

11. The first question is whether the proceedings in which the second award was made in the present case were proceedings on a second reference and if so, whether such a reference was valid. We are not concerned here with the general question as to whether there can at all be a second reference under the same agreement. Where the words of the agreement are wide enough to cover all disputes concerning the relevant transaction or contract, there can obviously be successive references under its authority regarding different disputes and even in a case where a fresh dispute arises as to the import or effect of the award made on a reference of the original dispute, a second reference regarding that dispute can be made. The case of *Chandanmull v. Donald Campbell and Co*[1]*.,* was such a case. In the present case, however, the subject-matter of the second award is the same dispute but, in view of the terms of the order of S. R. Das Gupta, J., it appears to me that unless we feel constrained to hold that there was in fact a further reference which could only be treated as a second reference, even the narrower question whether a second reference relating to the same dispute is maintainable, does not arise here. My reasons are as follows :

12. The first award was set aside by S. R. Das Gupta, J., not on the ground that the original reference was itself invalid, nor on the ground that the proceedings on that reference or any part of them was without jurisdiction but because, in the learned Judge's view, the arbitrators could not make the award they had made without coming to and incorporating in the award itself certain findings, which they had not done. The award was thus an award with an error apparent on the face of it. The learned Judge set aside the award but, at the same time, he said expressly that he was not superseding the reference. The reference was thus left subsisting. Even if the learned Judge had not made the express reservation, the result of his setting aside the award would have been the same, if he did not also supersede the reference. It is clear from Section 19 of the Act that the setting aside of an award does not, by itself, terminate the reference, except obviously where the award is set aside on a finding that the reference itself was invalid. In other cases, after the award is set aside, the reference has to be superseded by a further order, if it is desired to terminate it. It is true that if the Court supersedes the reference, the section requires it also to order that the arbitration agreement shall cease to have effect, but if it does not make an order of supersession, the reference and the agreement both survive. Where in a proceeding for setting aside an award, the Court finds that the reference itself was invalid, no question of superseding the reference in addition to setting aside the award would arise, because, in law, there never was a reference at all. In such a case, after the award is set aside, only the agreement survives. But where the reference was valid and only the award was bad, the mere setting aside

of the award would not affect the reference. In such a case, the reference and the agreement stand or fall together. If the Court makes a further order superseding the reference, it must direct that the agreement as well shall cease to have effect, so that both come to an end. The combined effect of the two orders which

[1]23 Cal WN 707 (FN)

must always be jointly made is that the provision for arbitration is superseded altogether and it is because of such effect that Section 25 of the Act describes an order under Section 19 as "an order superseding the arbitration". Where, however, the Court does not supersede the reference both the reference and the agreement continue to subsist. There can be no question in such a case of either the reference coming to an end or the arbitration agreement having been exhausted by the reference, already made.

13. In the present case, after the first award had been set aside, the reference continued to subsist under the special terms of the order of S. R. Das Gupta, J. and under the provision implied in Section 19. What subsisted as the reference was not the agreement, for the section clearly contemplates that 'reference' and 'agreement' are not identical but are distinct things. It is true that 'reference' is defined in the arbitration rules of the Bengal Chamber of Commerce and Industry as "any agreement to refer a difference or dispute (present or future) to the Tribunal", but we are concerned only with the meaning of the award, as used in the Act. In the Act, 'reference' is defined in Section 2 (e) as 'a reference to arbitration', whereas 'arbitration agreement' is separately defined in Section 2 (a) as, to quote only the material part, "a written agreement to submit present or future differences to arbitration". The confusion that was sometimes created by the use of the word 'submission' under the English Act of 1889 and to a certain extent under the Indian Act of 1899 as well, in the sense of both an agreement to refer and an actual submission of a dispute has thus been avoided. 'Reference' in the present Act clearly means the actual submission of a particular dispute under the provisions of an arbitration agreement to the arbitrator contemplated thereby. What was subsisting in the present case as the reference after the first award had been set aside was thus the presentation to the Bengal Chamber of Commerce and Industry, for arbitration by it, of the dispute between the parties which had already been made. It is hardly necessary to point out that the arbitrator contemplated by the agreement was not such arbitral Court as might be constituted by the Bengal Chamber of Commerce and Industry, but the Chamber itself. After the first award had been set aside, it was before the Chamber and not before the particular arbitral Court which had dealt with it that the reference remained pending.

14. If the original reference made to the Chamber remained subsisting even after the first award had been set aside, it is plainly impossible that there could be a second reference to the Chamber of the same dispute. This would follow both from the general law and the terms of the arbitration agreement. A party to an arbitration agreement can no more run two parallel references before the same arbitrator on the same dispute than a plaintiff can run two parallel suits before the same Court on the same cause of action. Nor did the arbitration agreement provide that a party to it could make a reference on a dispute, abandon it when it was still pending and then make another. I, therefore, agree with Bachawat, J. that if the communication addressed by the appellant to the Chamber on 30th November, 1953 has to be treated as a second reference, it must be held to have been incompetent. I do not, however, take that view on the ground that the obligation to refer contained in the agreement was fully carried out when the original reference was made and that after the award made on that reference had been set aside, there was no scope for any further reference. That ground, given by the learned Judge, presupposes that the original reference had

come to an end with the first award, which I do not consider to be correct for the reasons I have already given. But I agree with the learned Judge's conclusion on the ground that on 30th November, 1953, the original reference was still subsisting and therefore no second reference on the same dispute could then be made.

15. But must the letter addressed by the appellant to the Registrar of the Tribunal of Arbitration on 30-11-1953 be construed as constituting a second reference? It appears to me that if from what a party says to the Chamber after an award made in its favor has been set aside, it is reasonably clear that all that he wants is what the Chamber should, in the events that have happened, take up the dispute again and make a proper award, it ought not to be held merely because of some language he has used that he was making a fresh reference. To take literally what a lay party says to the Chamber in such asituation and hold him strictly to his words would be wholly unreasonable and unrealistic. In the present case, by the first paragraph of its letter of 30-11-1953, the appellant asked the Registrar to appoint a Board of Arbitrators to adjudicate upon a dispute which had arisen between the respondent and itself. That paragraph, taken by itself, undoubtedly reads as if the appellant was making a new reference under Rule V of the Rules, but in the subsequent paragraphs, it proceeded to give a history of the previous proceeding ending with the setting aside of the award and then stated expressly that though the award had been set aside, the reference had not been superseded. Next, it requested the Registrar, in words which I have already set out in an earlier part of this judgment, to refer the matter again to arbitrators for a consideration of the original award and the passing of a correct award and it also made a suggestion that since the goods could no longer be inspected, having been consumed in the meantime, the matter might be referred again to the original arbitrators who had inspected the goods.

16. In my opinion, the letter, taken as a whole and fairly read, can only mean that the appellant was asking the Registrar to resume the reference, already made, which had resulted in an incorrect award but which had not been superseded and to arrange for its further consideration by arbitrators. It is true that when, subsequently, the respondent objected to the proposal for the re-appointment of the same arbitrators on the ground that the Rules of the Chamber did not permit such re-appointment, the appellant insisted in its reply that it had made a fresh reference and contended that there was nothing in the Rules to bar the appointment of the same arbitrators when the old reference was not being continued but a fresh reference had been made. Unfortunate as that rejoinder was, it cannot, in my opinion, alter the nature of the communication made on 80-11-1953, The rejoinder contained no statement or representation of fact and could create no estoppel. It contained only a contention of the nature of a debating point and, at the most, it contained the appellant's opinion of the communication it had made to the Registrar. If in fact that communication was only a request for a resumption and continuance of the original reference, as, in my view, it was, subsequent statements, though of the appellant itself, could not make it a fresh reference. Nor could the assignment of a new number to the case have that effect. Even in the civil courts, a suit is often re-numbered. I am accordingly of opinion that no second reference was made in this case on 30-11-1953, but only a resumption of the original reference made on 16-3-53 was asked for and that what was done after that date was done by way of a continuation of the original reference.

17. I may pause here to examine briefly the general propositions of Bachawat, J. and certain decisions cited before us. The first proposition is that after an award has been set aside, there can be no second reference of the same dispute, except where the first reference was a nullity or

where the arbitration agreement provides for a second reference. I have already pointed out that in view of the provisions of Section 19 of the Act and the order made by S. R. Das Gupta, J., the broad question as to whether a second reference of the same dispute is at all possible in any circumstances does not arise in the present case. It is therefore not necessary to consider whether once a valid reference is made under the terms of an arbitration agreement, the agreement exhausts itself so far as that dispute is concerned, unless there is provision in the agreement itself for a second reference. Here, the original reference was subsisting and was continued and no second reference was made. I may, however, repeat what I have already said as to the first of the learned Judge's exceptions. Where the reference, first made, is an invalid reference a second reference of the same dispute would obviously lie, because in law there has been no reference at all. It follows that where an award is set aside as a nullity on the ground that the reference itself was invalid, the original reference cannot subsist under the provisions of Section 19, even if it is not expressly superseded, because there was nothing to supersede and in such a case a second reference would he. But where the award is set aside as a nullity on some other ground, e. g. that the arbitrators conducted the proceedings in such a manner as made them void, the reference will subsist, unless superseded and in such a case there cannot be another reference of the same dispute. The same will be the position when an award is set aside as merely illegal, as was the case here.

18. The decisions cited on behalf of the appellant on this question are not at all relevant and may be disposed of shortly. *Ramdutt Ramkissendass v. F. D. Sassoon and Co*[2]*.,* and *Rikhab Kumar v. Trivedi and Co*[3]*.,* were both decisions under the Arbitration Act of 1899 which contained no section corresponding to Section 19 of the present Act. In the first case, a further reference of the same dispute was held to be not a continuation of the original reference but a fresh reference and the law of limitation was applied to it on the footing that it was an independent and otherwise valid proceeding. But it would appear from the decision in *E. D. Sassoon and Co. v. Ramdutt Ramkissen Das*[4]*,* that the award made on the original reference was held to be void, because the reference to the sole arbitrator who had made it, was invalid. In the second case, a suit was stayed under Section 19 of the Act on the finding that an arbitration agreement between the parties had not exhausted itself by an abortive attempt at arbitration which had resulted in an invalid award and which had been found by the Court to have been no arbitration in law at all. Bachawat, J. has stated, apparently by inadvertence, that there was a second reference in the case on which a second award was made and the court upheld that award as valid. The real facts were as I have stated. The ground on which the award was set aside is not expressly stated in the judgment, but it would seem from the terms of the arbitration clause and the manner in which the umpire who made the award was appointed, that his appointment was invalid. That would also appear from the observations in the judgment, such as that the arbitration was "found not in law to have been an arbitration at all" and that it was "found to have been of no legal effect". Both the cases would thus come within the first exception made by Bachawat J. and they can be of no assistance to the appellant on the facts of the present case. I may point out here that although in the case of an arbitration by a body like the Bengal Chamber of Commerce and Industry, there is a distinction between the invalidity of the reference and the invalidity of the constitution of the arbitral court, there can, for practical purposes, be no such distinction when the

[2]56 Ind. App. 128 : (AIR 1929 PC 103)
[3] ILR 51 All. 874 : AIR 1929 All 455
[4]49 Ind. App 366 : (AIR 1922 PC 374)

arbitrators contemplated by the agreement are individuals, to be appointed by the parties in a

particular manner. In such a case, a reference to an illegally appointed arbitrator is an invalid reference. The two decisions discussed above were both cases of an invalid appointment of an arbitrator, involving invalidity of the reference made to him. They are of no relevancy in the present case, but in view of the provision of Section 19 of the present Act, the appellant does not require their aid.

19. While on the first proposition of Bachawat, J., I may notice an argument of the appellant against it which was based on Section 37 (5) of the Act. That section provides inter alia that where the Court orders an award to be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the period prescribed by the Limitation Act "for the commencement of the proceedings (including arbitration) with respect to the difference referred". It was contended that this section showed that after an award had been set aside, a fresh arbitration proceeding could be commenced by a second reference. The section undoubtedly suggests that there can be a case where, after an award has been set aside, a second reference may validly be made, because, otherwise, there could be no point in prescribing a method for the computation of limitation for the commencement of arbitration proceedings after an award had been set aside. But it is not laid down or implied in the section that in every case where an award is set aside, there may be a second reference. The section is concerned only with limitation and it is not its function to provide whether a second reference may or may not be made. So far as it deals with cases where an award is set aside, its effect is only to provide that a particular period shall be excluded in computing the period of limitation for fresh arbitration proceedings, where such proceedings can otherwise be validly commenced. The section, therefore, does not in any way enlarge the law as to when a second reference is maintainable and provides no warrant for a contention that in every case where an award is set aside, there can be a second reference.

20. The remaining three of the general propositions of Bachawat, J., may conveniently be taken together. Like his first, the third proposition also does not call for discussion in the present case, because neither the constitution of the arbitral Court, nor any part of the proceedings on the original reference was invalid and the first award was not found to be void. But the proposition appears to me to be non-controversial. Where the whole or a part of the proceedings under a reference is void, resuiting in a void award, the parties are thrown back, on the award being set aside, to the position in which they were before the abortive proceedings began and they are entitled to have the reference resumed and continued to a valid and effective determination of their dispute. That is obviously the commonsense view and it is supported by the high authority of the decision of the Judicial Committee in *Shree Meenakshi Mills Ltd. v. Patel Bros*[5]*.,* It is also clear that the principle of that decision would apply to a case of arbitration by the Bengal Chamber of Commerce and Industry, where the arbitral court is illegally constituted, because, in such a case, the arbitrator being the Chamber and not the arbitral court, there is no invalidity in the reference itself but there is invalidity only in the subsequent proceedings. Where the reference itself is invalid, the case would come under the first proposition of the learned Judge and further proceedings after the award is set aside, if taken, would be proceedings

[5]71 Ind App 106 : (AIR 1944 PC 76)

on a fresh reference. The second proposition of the learned Judge presents no difficulty in so far as it states that when an award is set aside but the reference is not superseded, a purported second reference may sometimes be treated as in revival and continuation of the original reference, but difficulty is caused by the illustrations he gives in his fourth proposition. It may be conceded that

even where the reference is not superseded, it can be revived and a fresh award obtained only when machinery for further arbitration is available. If, for example, the arbitrator contemplated by the agreement is a Chamber of Commerce, but the rules of the Chamber contain no provision for the appointment of a fresh arbitral court, if and when the award made by the Court first constituted, is set aside, the subsistence of the reference after an award is set aside can serve no useful purpose, because the reference, though still pending, can no longer be proceeded with. But it is not clear why it should be necessary, as the learned Judge states, that the arbitration agreement should either provide for the appointment of a new arbitrator or provide for further authority of the original arbitrator to make another and a new award. A reference means the submission of a dispute to an arbitrator for arbitration by him. The submission and the arbitrator cannot be dissociated from each other. If, where the reference is not superseded under Section 19 of the Act, it subsists though the award is set aside, the submission to the arbitrator to whom the dispute has already been referred subsists and if it does, it is not clear why the arbitrator cannot make a fresh award in the absence of a provision for further authority in that regard in the arbitration agreement. That the Act requires the reference to be specifically superseded if it is intended to bring it to an end means that, in the contemplation of the Act, the arbitration may be left in the hands of the arbitrator whose award is set aside and such contemplation would be meaningless unless the Act also contemplated that the same arbitrator might proceed to make a new award. Where the arbitrator is an individual, it may in many cases be inequitable that he should again arbitrate in the same matter, but if the parties want no more arbitration, they may ask the Court to supersede the reference, which will have to be accompanied by a termination of the agreement; or, if they would prefer arbitration by another arbitrator, they may perhaps ask the Court's leave to revoke the authority of the arbitrator or ask it to remove him without ordering that the arbitration agreement shall cease to have effect.

21. On the question of continuance of arbitration after an award is set aside, the appellant cited two decisions. The first, *Jokhiram Kaya v. Ganshamdas Kedarnath*[6], was decided under the Arbitration Act of 1899 and is only an illustration of the principle that where an award is set aside on the ground that the concluding part of the proceedings was void, the proceedings antecedent thereto are not affected and that arbitration may be resumed when the bar preventing it is removed. The facts were that after arbitration proceedings had made some progress, a suit was brought and the award was made during the pendency of the suit and after the award was set aside, an application was made in the suit for its stay in view of the arbitration agreement and proceedings. A question then arose as to whether the remedy to proceed by arbitration was still available and the Court decided that it was and that the Bengal Chamber of Commerce might continue the arbitration by appointing other arbitrators under Rule 8 of its Rules, corresponding to the present Rule X. That decision has no application to the present case, but I may be permitted to observe with due respect, that the recourse to Rule 8 appears to me to be very unconvincing. The other decision cited was *Rallis India Ltd. v. B. V. Manickam Chetti and Co*[7]., a decision under

[6]25 Cal WN 62 : AIR 1921 Cal 244

[7] AIR 1956 Mad 369

the present Act. There, an award was set aside without superseding the reference and an application being thereafter made under Section 20, praying that the Court might direct the agreement to be filed and make an order of reference to the arbitrator mentioned therein, it was held that since the reference had not been superseded, the arbitration agreement was subsisting and accordingly the application lay. This decision also is of no assistance in the present case, but

I may point out. with respect that not merely the arbitration agreement but the original reference also was subsisting and if it was, the learned Judges did not explain why another reference was necessary and how one could be made.

22. I may now proceed to a consideration of the findings of the learned Judge with reference to the particular facts of the case, but before I do so, I would dispose of a short point arising out of Clause 10 (2) of the contract. It was provided by that clause that no claim in relation to quality and/or condition of the goods would be entertained unless submitted to arbitration within two months of the date of the delivery of the Jute. When the jute was delivered, does not appear from the Paper-book, but it must have been on some date between 9-2-1953, the date of the contract and the 16th March, 1953, when the original reference was made. Bachawat, J. found it unnecessary to consider if the further reference made on the 30th November, 1953 was time-barred, because, in his view, if the further reference was a second reference, it was not maintainable at all. I have found that no fresh reference was made on the 30th November, 1953 and that what the appellant did on that date was only to ask the Chamber to resume and complete the consideration of the reference already made on the 16th March, 1953. On that finding, no question of limitation under Clause 10 (2) of the contract arises.

23. The first of the particular propositions of Bachawat, J. is that the arbitration rules of the Bengal Chamber of Commerce and Industry do not provide for the constitution of a fresh arbitral court in cases where an award is set aside on a ground other than its nullity. The learned Judge has accordingly held that even assuming that the original reference was subsisting in the present case after the first award had been set aside, no authorized machinery could be provided under the rules for holding further proceedings under it and therefore it could not be validly continued. It has, however, been conceded by the learned Judge that where an award is set aside as null and void, a fresh arbitral court can be constituted under R. VII. The distinction thus made by the learned Judge does not appear to me to be correct. Rule VII requires the Registrar to constitute "another Court", if the Court, first constituted, "have allowed the time or extended time to expire without making any award and without having signified to the Registrar that they cannot agree." I am free to confess that the words "without making any award" are not very well-adapted to cases where an award was made in fact but was subsequently set aside by the Court, but if they are at all extended beyond cases where no award was factually made to cases of invalid awards, I am unable to see why they should be held to apply to one kind of invalidity but not to another. Bachawat. J. appears to think that where an award made is a nullity, it has no existence in law and therefore when an arbitral court of the Chamber makes an award which is set aside as void and the time for its making an award has already passed, it can be said to "have allowed the time or extended time to expire without making any award" within the meaning of R. VII and consequently "another court" can be constituted in such circumstances under the Rule. If this reasoning be sound, I am unable to see why it should not apply equally to a case where an award is set aside as being not void but illegal. In neither case has the arbitral court really failed to make an award and in both cases it has made an award in fact. There can be no doubt that the normal meaning of R. VII is that it contemplates a case where the arbitral court has not made any award at all and, under that meaning, any case where the court has made an award would be outside the Rule altogether, irrespective of whether the award is void or invalid. If, nevertheless, the Rule is to be applied to a case where there is an award but it is a nullity, it is only by introducing a fiction that the factual existence of the award can be ignored and it is only by extending the natural meaning of the Rule that it can be so applied. If so, I can see no reason why the factual existence

of an illegal award which has been set aside cannot be similarly ignored and why it cannot be proper to make a similar extension of Rule VII to such a case as well. So far as the arbitral court is concerned, it has made an award in both cases and since an illegal award, after it has been set aside, is as ineffective as an award which is a nullity, there is no good ground for treating such awards differently for the purposes of R. VII.

24. But the more important question is whether it is at all proper to extend R. VII to cases of invalid awards, whether void or voidable, on the basis that they too are cases of no-awards. I would answer the question in the affirmative. It is true, as I have already pointed out, that the words of the Rule are not very apposite to cases where an award has been made by the arbitral court, though it may have been found to be a bad award. But the necessity of finding a rule for cases where after an award of the Chamber has been set aside, the parties go back to the Chamber to seek further arbitration is patent and since the Rule can be applied to such cases with a slight stretching of its language, it should, in my opinion, be so applied. In actual practice, it has always been understood to apply to such cases and has been applied, till in some very recent cases its applicability began to be questioned. Unless it is applied, the Chamber cannot constitute a fresh court after an award made by it has been set aside, although the reference has not been superseded and the Court's forbearance in not superseding the reference will come to nothing. Such a situation ought not to be allowed to arise, if it can be avoided. Where the parties have agreed to submit their disputes to the arbitration of an Association, to be held according to its rules, the Court ought to lean in favor of so construing the rules as will not frustrate arbitration but will aid and advance it and enable it to take place. In my opinion, R. VII can and ought to be held to apply to cases where an award by an arbitral court of the Chamber has been set aside as invalid.

25. I may, however, observe that it is a matter for surprise that the Chamber should not have a more clearly expressed rule, providing for the constitution of a fresh arbitral court in cases where an award made by it is set aside but the reference is not superseded and the parties want further arbitration. Such cases are of constant occurrence. Other cases not directly provided for may also be mentioned, e.g., a case where an award is set aside on the ground that the Court which made it was not legally constituted. Rule VII would not apply to such a case in terms, since there was no court at all and perhaps R. V would have to be drawn upon. It is extremely desirable that the Chamber should revise its Rules of Arbitration at an early date and make clear provision for these various contingencies.

26. Bachawat, J. has held that R. X also could not authorize the constitution of a fresh arbitral court in the present case. In that view, I agree with him. Rule X applies where "any appointed arbitrator or umpire neglects or refuses to act or dies or becomes incapable of acting." None of those events can be said to have happened here. It will be remembered that by a notice, dated 2nd March, 1954, the Registrar informed the parties that he had 'reconstituted' the Court under Rule 10 and by another letter, dated 5th March, 1954, he informed the Respondent that the arbitrators had been appointed under the provisions of Rules 6 and 10. Rule 6 only prescribes the number of arbitrators of whom the arbitral Court shall be composed and may therefore be left out of account; but if in speaking of re-constitution of the Court or appointment of arbitrators, the Registrar was referring to the re-appointment of Mr. Carstairs and Mr. McCraw to form the fresh arbitral Court, R. 10 could not clearly authorise such appointment. None of the contingencies specified in the Rule had occurred and therefore the Rule could not apply at all. But assuming that this was a case of the arbitrators having failed or neglected to act or their having become

incapable of acting and therefore the Rule would apply, even then the same arbitrators could not be re-appointed under it, because the Rule requires "new" arbitrators to be appointed and substituted and therefore both Mr. Carstairs and Mr. McCraw would have to be replaced. Bachawat, J. has pointed out this effect of applying R. 10, but he has done so by way of commenting on the subsequent appointment of Mr. Luke in the place of Mr. Carstairs, which I find it difficult to follow. Taken by itself, the appointment of Mr. Luke in the place of Mr. Carstairs after the latter had proceeded to England was a perfectly good appointment under Rule 10 and in the reason which necessitated that appointment, there was nothing which made the replacement of Mr. McCraw also necessary, if Rule 10 was to be applied. It was the earlier appointment of Mr. Carstairs. and Mr. McCraw to constitute again the arbitral Court which could not be justified under Rule 10.

27. But for the reasons I have already given, R. 7 applied to this case and a fresh arbitral Court could be validly constituted under that Rule. Bachawat, J. has observed that even assuming Rule 7 applied, no appointment had been actually made under that Rule, but I do not consider that circumstance to be fatal. If in the facts of a case a particular Rule was applicable and would warrant the appointment of arbitrators made, the mere fact that in making the appointment or informing the parties of it, the Registrar had quoted another and inappropriate rule, would not exclude the application of the proper rule or invalidate the appointment. But the really fatal objection to the appointment of Mr. Carstairs and Mr. McCraw under under Rule 7 to form the fresh arbitral Court is, which has also been pointed out by Bachawat, J., that the Rule requires "another Court" to be appointed and it is now settled law that "another Court' means a Court constituted of members other than those who constituted the original Court. It follows that although Rule 7 was applicable and a fresh Court could have been validly constituted under it if the requirements of the Rule were observed, they were not observed and the Court actually constituted was not a validly constituted Court. The original Court having been constituted of Mr. Carstairs and Mr. McCraw, the same persons could not validly be appointed under Rule 7 to form the fresh arbitral Court. The partial reconstitution of the Court which took place subsequently on the substitution of Mr. Luke for Mr. Carstairs could not make it a validly constituted Court, because no subsequent change in the composition of the Court, brought about by other reasons, could cure the initial invalidity of its constitution and also because, in any event, Mr. McCraw remained a member of the second Court up to the end. The second award made, by the second Court was thus an award made by an illegally constituted Court and therefore invalid, as Bachawat, J. has held.

28. The learned Judge has further held that even assuming that after 30th November, 1953, Mr. Carstairs and McCraw could still act under their original appointment and were in fact so acting and that the original Court was continuing to function, the second award would still be bad as an award made out of time, because the time of the original Court for making its award had never been extended. Before us, the respondent assailed the award on the ground of limitation in a different way. It was contended on its behalf that under Section 3 of the Act, read with Article 3 of Schedule I, arbitrators had to make their award "within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement" or within such extended time as the Court might allow and that since there had been no extension of time in the present case and the appellant had called upon the Chamber to act in the reference by a letter dated 30th November, 1953, the award made on 28th April, 1954 was made out of time, even if it was taken as an award made by a second Court.

29. I do not think it necessary to consider the view expressed by Bachawat, J. on the assumption made by him, because I do not think that the assumption can properly be made. In fact, Messrs. Carstairs and McCraw did not continue to act under their original appointment after the award made by them had been set aside, but they were re-appointed. Besides, after the first arbitral Court had made its award, it clearly became functus officio, because there is no provision in the Rules for a Court to function further after it has made its award. It may be that even after the award had been set aside, the Chamber did not become functus officio, because the reference had not been superseded and therefore, as the arbitrator under the reference, it remained seized of it. But the particular arbitral Court was not the arbitrator and therefore although the reference was not superseded, the result was not that it remained pending before that particular Court; and although the Chamber could only act through an arbitral Court, it does not follow that the first Court constituted by it continued to subsist even after it had discharged its function of making an award on behalf of the Chamber. No question as to whether the second award, treated as an award made by the original Court, was made within time, therefore arises,

30. The respondent's argument before us took the award as an award made by a second Court and still condemned it as time-barred but, in my view, even that attack on the ground of limitation cannot succeed. Article 3 of Schedule I to the Act, on which the attack was based, does not apply in this case at all. The Schedule is attracted to arbitration agreements by Section 3 but that section, while it provides that "an arbitration agreement shall be deemed to include the provisions set out in the First Schedule", contains at the same time the important exception, "unless a different intention is expressed therein". The agreement in the present case provided that disputes between the parties "shall be referred to the arbitration of the Bengal Chamber of Commerce and Industry under the rules of its Tribunal of Arbitration for the time being in force" and further that "according to such rules the arbitration shall be conducted". The rules of the Chamber include a rule, prescribing the time-limit within which the arbitrators must make their award. It is R. 25, expressed as follows : The Court shall make its award in writing within four months after entering on the reference or on or before any later day to which the Court with the consent of all parties in the proceedings, by any writing signed by them, may from time to time enlarge its time therefore or any extension of time granted by the Court of Judicature at Fort William in Bengal.

31. In my view, since the agreement provided for the conduct of arbitration according to the Rules of the Chamber and those Rules contain a rule as to the time within which the award must be made, an intention was expressed that as regards the limitation for making the award, the arbitrators would be governed by the special rule which the parties were agreeing to accept and that the provision relating to the same matter, contained in Article 3 of Schedule I to the Act, would not apply. The respondent's attack on the award, based on Article 3of Schedule I, was therefore misconceived.

32. Judged by R. 25, the award made on 28th April, 1954, was clearly made within time. Unlike Article 3,the Rule prescribes a single starting point for limitation which is the date when the Court enters on the reference. The somewhat troublesome problem of construction presented by Article 3 of Schedule I as to whom the two alternatives, "after entering on the reference" and "after having been called upon to act", shall respectively apply is not thus presented by the Rule. It is also to be noticed that while Article 3 speaks of the "arbitrators" entering on the reference, R.

25 speaks of the 'Court' doing so. Apart from extensions of time, of which there was none here, what is to be seen under Rule 25 is whether the arbitral Court made the award within four months of its entering on the reference. When an arbitrator enters on a reference made to him is a question on which slightly different views have been taken and one view is that he does not do so till the parties are before him. But it appears to me that even if an arbitrator may be said to enter on the reference on an earlier date, such date, under the rules of the Bengal Chamber of Commerce and Industry, cannot be earlier than the date on which the Registrar first asks the parties to file their respective statements. Under Rule 11 of those Rules, "the parties shall within such time as may be directed by the Court, prepare and submit to the Registrar in duplicate a written statement of their respective cases". Since the direction as to the time for filing the statements is to be given by the Court, it may be said that the Court enters on the reference when it gives such direction. Assuming that is correct, the first notice in this case, calling for the submission of statements after the appellant had asked for further arbitration, was given on or about 5th February, 1954. If that notice was given under the direction of the second Court, as it must be presumed to have been, the date on which the Court entered on the reference was the date on which the direction was given and that date, in the absence of any earlier date proved by the respondent, must be taken to be the date of the notice. In no view can the date on which the second Court entered on the reference be pushed further hack. It follows that even if, for the purpose of computing limitation in the present case, the entering on the reference must be taken to be the entering by the Court constituted of Messrs. Carstairs and Mc Craw on their reappointment, the award made on 28th April, 1954, was clearly made within the period of four months prescribed by R. 25. It was more within that period if the Court to be regarded be the Court constituted of Mr. Luke and Mr. McCraw which actually made the award. The respondent's attack on the award on the ground of limitation must therefore fail. The question of limitation, however, is of no importance, since the award was made by an illegally constituted Court and was therefore invalid in law.

33. This judgment has run to a considerable length because of the large variety of matters discussed in the judgment under appeal, but, in reality the question involved in the case is a fairly simple one. When the first award was set aside, the reference was not superseded. The reference, therefore, remained subsisting before the Bengal Chamber of Commerce and Industry even after the award made by its first arbitral Court had been set aside and it was that reference which was resumed and continued on the second application made by the appellant. But in constituting a second arbitral Court for dealing with the reference, the Chamber committed a fatal error. It was entitled to proceed under Rule 7 which applied to the situation, but that Rule, instead of authorizing the re-appointment of the same arbitrators, forbids such re-appointment. The Chamber, however, re-appointed Messrs. Carstairs and McCraw, who had formed the first arbitral Court, to form the second arbitral Court as well and thus constituted a Court which, under its own rules, was illegally constituted. That Court remained an illegally constituted Court, although one member of it was subsequently replaced by a fresh member under Rule 10 and it was that Court which made the award of 28th April, 1954. The award was made within the period of limitation prescribed by R. 25, but being an award made by an illegally constituted Court, it was wholly invalid in law. Bachawat, J. 'therefore rightly declared it to be such and rightly set it aside.

34. For the reasons given above, this appeal must fail. It is accordingly dismissed, but as we are holding in favor of the appellant on many of the points, there will be no order for costs.

S.C. Lahiri, J.

35. I agree.

Appeal dismissed.