

In Re: Ss. Maritime

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Court : Mumbai

Decided On : May-19-1922

Reported in : 75Ind.Cas.221

Judge : Marten, J.

Appellant : In Re: Ss. Maritime;james Mackintosh and Company

Respondent : ;The ScIndia Steam Navigation Co. Ltd.

Judgement :

Marten, J.

1. I have to thank Mr. Little, the Solicitor for the applicants, for his interesting and valuable argument in Chambers on a point which is both novel, and important. The application is for the issue of a Commission to Calcutta for the examination of witnesses in a private arbitration, and the point is, whether this Court has any jurisdiction to make the order.

2. Now, in India parties who wish to resort to arbitration have two alternatives. They can either get the direct assistance of the Court from the outset, or they can arbitrate without the intervention of the Court, In the former case, they can proceed under the Second, Schedule, to the Civil Procedure Code. In that event the present difficulty would not arise, for, under Section 7 of that Schedule, the Court would have power to issue the same processes to the parties and witnesses

whom the arbitrators desire to examine, as the Court might issue in suits tried before it. Accordingly, in *Rabiabai v. Rahimahai* 7 Bom. L.R. 560. Mr. Justice Tyabji decided that in such an arbitration case it was competent to the Court to issue; a Commission for the examination of witnesses.

3. But the present case is not one of that description. It is an arbitration without the intervention of the Court and it comes under the Indian Arbitration Act, 1899 the preamble of which runs: 'Whereas it is expedient to amend the law relating to arbitration by agreement without the intervention of a Court of Justice.' That Act, however, does enable the parties to get the assistance of the court in certain limited particulars, for instance under Section 10 the arbitrators have power to administer oaths to witnesses and to state a case for the opinion of the Court. Under Section 12 the Court has power to enlarge the time for making an award, under Section 13, to remit the award for re-consideration, under Section 14, to set aside the award for misconduct, etc, and under Section 16, to remove arbitrators for misconduct. Then, under Section 15, when an award has been filed in Court, it is enforceable as if it were a decree of the Court. Section 20 provides for rules to be made by the Court,

4. Then the first Schedule to the Act provides for certain matters to be implied in submissions to arbitration, unless otherwise negatived.

5. Clause 6 provides that the parties to the reference and all persons claiming through them shall 'submit to be examined' by the arbitrators on oath, and to produce documents. Clause 7 runs: "The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath.'

6. It will be noted, therefore, that there is not a word about the compulsory summoning of witnesses; nor a word about Commissions, and that this is in direct contrast with Section 7 of the Second Schedule to the Civil Procedure Code which I have already mentioned. Further, we know that the Indian Arbitration Act is largely a copy of the English Arbitration Act, Section 8 of which provides that, 'Any party to a submission may sue out a writ of subpoena ad testificandum, or a writ of subpoena duces tecum.' No such provision for the issue of subpoena as by this Court in a private arbitration is provided in the Indian Act.

7. Next, I turn to our own rules of this High Court. They are rules 351 to 360 under the Indian Arbitration Act. There is nothing there about summoning witnesses in this way nor about a Commission. The only rule I need notice is rule 352 which provides for, all applications being 'made by petition except as hereinafter otherwise provided.' Therefore; it would seem, from a technical point of view, that this particular application should have been made by petition and not on a mere request contained in an affidavit. However, that is merely a technical point and could easily be put right by the presentation of a petition.

8. Then, if we turn to rules 340 to 345 they provide for the examination of witnesses de bene esse and for a Commission under Order XVIII, Rule 16, and Order XXVI, Rule 1, of the Civil, Procedure Code. There is. nothing else to which my attention has been drawn in our rules, which are material to be mentioned on this point. Then, if I, return to the Civil Procedure Code, I, find it is perfectly clear that these examinations de bene esse under Order XVIII, Rule 16, and also, any Commissions under Order XXVI, Rules 1 and 4 are only to be granted in 'suits.' I may refer to the note which I think is correct in Mr. Mulla's Code (7th Edition) at page 697 where he says: 'A Commission can only be issued in the cases specified in this rule and rules 4 and 5 below, and in no other case. 'Similarly, when one' considers the question of summoning witnesses one finds that under Order XVI, Rule 1, there is power to summon witnesses after 'the suit is instituted.' The present application is clearly not in a suit.

9. Next, if one turns to Order XXVI, Rules 16 and 17, dealing with Commissions, one finds that any Commissioner who is appointed has express power to examine witnesses and 'any other person whom the Commissioner thinks proper to call upon to give evidence.' Under rule 17 the provisions of this Code relating to the summoning, attendance and examination of witnesses shall apply to persons required to give evidence under this order, and that 'for the purposes of this rule the Commissioner shall be deemed to be a Civil Court. Then Sub-rule (2) provides for certain powers to the Commissioner to apply to Local Courts other than the High Court for issuing processes against a particular witness where necessary. Once more, then, one finds these powers expressly given, and not depending on any implication or alleged inherent powers.

10. Now, there is a section in the Civil Procedure Code, Section 75, which is in rather wider terms. Section 75 provides that, "Subject to such conditions and limitations as may be prescribed, the Court may issue a Commission (a) to examine any person; (b) to make a local investigation; (c) to examine or adjust accounts; or (d) to make a partition.' Section 76 gives power to issue a Commission to another Court not being a High Court. Section 77 deals with Letters, of request in lieu of Commissions for the examination of witnesses at any place not within. British India. Section 78 provides for commissions issued, by Foreign Courts. But it must be remembered that under Section 121 the rules in the First Schedule are enacted as part of the Act, and Section 75, in my opinion, cannot be read as giving this Court power to issue a Commission to examine anybody anywhere and before any private person whether or not any suit has been instituted. For instance, I do not think, this section would give the Court power where there was no pending suit to direct a private citizen to appear before say Panchayet of some particular caste to give evidence on some caste dispute. Nor, I think, could the Court require a private citizen in a similar case to appear before a Club Committee or any other private domestic tribunal. Nor, for the matter of that, before, say, a Government Departmental Commission. I think then that this section must be qualified by the rules in the First Schedule which I have referred to, subject of course to such further rules as may be found' in our own High Court Rules. Therefore, as far as the rules and the express powers of this Court are concerned, I find nothing express which would enable me to grant this present application.

11. An appeal is next made to the inherent jurisdiction of the Court under Section 151 of the Civil Procedure Code. When such an appeal is made, I think, the Court must be particularly careful to consider the principles involved and what the application really means. I have, in my mind, a judgment given sometime ago by Mr. Justice Chitty in a case under, the Settled Land Acts, where, after an application 'under the ordinary provisions, of the Settled' Land Acts for leave to do something in relation to the settled property had failed, Counsel Mr. Upjohn next applied to the Court to sanction, the proposal under the inherent jurisdiction of the Court, Mr. Justice Chitty then gave a forcible and' salutary warning against too great a readiness to, accept such an argument, however specious.

12. In the present case, I think, the Court has to be particularly careful in making the order, because there is no opposition from any of the parties to this arbitration, and if it was a case under the Second Schedule to the Civil Procedure Code, the facts would undoubtedly justify the Commission being granted. On the merits, and irrespective of jurisdiction, I am quite satisfied that it is a proper case for the assistance of the Court. I may say at once that if I felt myself able to grant this assistance, I would undoubtedly give it, to these, business men.

13. Now, going back to principles, when a party appeals to the alleged inherent jurisdiction of the Court to grant a Commission in a private litigation, what do our Courts exist for? Our Law Courts exist for deciding the litigation of the country. For that purpose it is reasonable and necessary that the Court should have power to summon witnesses before it and to examine them. But summoning a private citizen to give evidence before another private citizen seems to me to be quite another matter. I do not see where the inherent jurisdiction comes in there at all. No doubt, in course of time this difficulty was felt in arbitrations, and that is why there has been legislation both in England and in India to assist in some respects parties resorting to a private arbitration. It is perfectly clear that in some cases that may be a convenient and speedy way of settling disputes, for instance, in disputes as to whether goods are up to sample. But the Legislature in granting this assistance in private disputes has been extremely careful to limit the Court's powers. I will not repeat it again but I have already contrasted Section 7 of the Second Schedule of the Civil Procedure Code with the very limited powers given in the Indian Arbitration Act about witnesses.

14. Further, it is perfectly clear that the Arbitration Act does not apply to all cases. You have got to bring your arbitration within the four corners of the Act, and if certain events arise which are not covered by the Act, then the parties are left without any remedy, and the Court has no jurisdiction to remedy the defects under the Arbitration Act. This is exemplified by a case decided by the Court of Appeal in our Courts in *1019 Gopalji v. Morarji* 50 Ind. Cas. 411 : 21 Bom. L.R. 308 : 43 B. 809. That was a case where three arbitrators were appointed. They all after entering on the arbitration, either retired or refused to continue, and then there was an application made to the Court to appoint new arbitrators in their

place. If it was a case of doing justice or of the inherent powers of the Court, supposing the express, provision of the Act did not apply, you would have thought that was eminently a Case where the power should be exercised because otherwise the whole of the arbitration would be entirely abortive. The case came before me in the first instance, and although it was clear that one coach and four had already been driven through the Act, I thought I could see ray way, to prevent another gap, being made in the useful provisions of the Act, and that I could construe the provisions in such a way as to fill up the vacancies. However, the Court of Appeal took a different view, and held that the Act only enabled the Court to fill up vacancies in the case of a single arbitrator or two arbitrators but not in the case of three. Consequently, the arbitration proved abortive. Mr. Justice Hayward in his judgment pointed out that the Act conferred special powers on the Court, and that those powers do not exist under the inherent jurisdiction. He says at page 832 page of 43 B.--[Ed.]

The appeal involves a point of importance. The Indian Arbitration Act applies to the appointment of a single arbitrator and in certain cases to the appointment of two arbitrators. Does it apply in any case to the appointment of three arbitrators? It is important to remember in solving this point that the Act is an Act to amend, the law relating to Arbitration. It does not deal with the whole Law of Arbitration and it must be construed strictly in that it confers special powers of interference not otherwise inherent in the Court.

15. That statement of the law is, I think directly opposed to the argument which, has been addressed to me as to the inherent jurisdiction of the Court, If it is necessary for the ends of justice in the present case to grant a Commission to examine witnesses, surely it was also necessary for the ends of justice to fill up the vacancies in the arbitrators in the other case. And I may point out, as showing the niceties of the distinctions which this badly drawn Act has caused, that in *In re Babaldas Khemchand* 57 Ind. Cas. 9971 : 22 Bom. L.R. 842 : 45 B.1. Mr. Justice Pratt stayed an action where there were three arbitrators and refused to adopt the argument that the Act did not apply at all where there were three arbitrators. In other words, he held that an arbitration, where there are three arbitrators, may be a good arbitration under the Act, although in certain cases you cannot fill up.

vacancies that way occur in those arbitrators.

16. I next turn to English authorities which, I think, I may fairly do, because, as I have said, the Indian Arbitration Act, is practically taken from the English Act, and there is much in common between the two rules of procedure. There the exact point has been decided in a manner adverse to the present application. I refer to *In re Shaw Ronaldson* (1892) 1 Q.B. 91 : 61 L.J.Q.B. 141, where the head note is as follows: 'Where parties agree to refer their disputes to arbitration, no action having been brought in respect of those disputes, the Court or a Judge has no power under Order XXXVII, Rule 5, to order the issue of a Commission for the examination of witnesses in the matter, referred to arbitration, 'That was decided by Mr. Justice Mathew and Mr. Justice Collins, as they then were. As we all know, few people knew more about the Law of Arbitration and Commercial Law generally than Lord Justice Mathew. He was indeed the originator and the first Judge who sat in the modern Commercial Court in the High Court in England. Mr. Justice Collins, who was afterwards the Master of the Rolls, was also, if I may say so with all respect, a brilliant Commercial and Common Law Lawyer. When then I find these two learned Judges holding that the Court has no jurisdiction, that decision, in my opinion, is entitled to the greatest weight. In that case they decided that a private arbitration was not a 'cause' or a 'matter' under the rules or Acts there cited. The corresponding word in our Code is 'suit.' There is no 'suit' before me. It is only a private arbitration.

17. Then there is another case of *In the matter of an arbitration Dreyfus and Sons and R. and W. Paul* (1893) 9 T.L.R. 358. In that case Mr Justice Collins refused in a private arbitration to grant a Commission to examine witnesses. The case went on appeal where from the interlocutory observations made by the learned Judges, it was clear they had the greatest doubt as to the jurisdiction, Eventually, the appeal was dismissed on the ground that the application on its merits showed no ground for the exercise of the Court's discretion. That case can in no wise help the present application. If anything, it is against it.

18. In England; just as in the case decided by Mr. Justice Tyabji which I have referred to, it has been held that where once there has been a suit and the suit has

been referred to a Referee for trial, then the Court has power to issue a Commission. [See *Hayward v. Mutual Reserve Association* (1891) 2 Q.B. 236 : 65 L.T. 491 : 39 W.R. 624).]

19. Then, if I turn to the recognized text books, I find in *Russell on Arbitration*, 10th Edition, at page 138, it is stated definitely that 'in the case of a reference by consent, the Court has no power to order a Commission to issue for the examination of witnesses abroad.' Similar statement appears in *Halsbury's Laws of England*, Vol. I, page, 458, note (h) and on other pages.

20. Now, against all that, the only precedent or authority for the order which I am asked to make is an order made by Mr. Justice Kanga in Chambers a short while ago when he was acting temporary Judge of this Court. I am told the learned Judge did raise the question of jurisdiction and considered the papers for some three or four days. But there is no delivered judgment, and I am not aware what were the reasons which induced the learned Judge to grant the Commission in that particular case. In any event, a decision of that sort in Chambers, where no note of the judgment has been kept and where I have no notes of the argument (if any) is not in any way a precedent binding upon me, least of all when it is a question of jurisdiction. And, with due respect to the learned Judge, I find myself unable to follow the decision.

21. One other argument urged upon me was that the consent of the parties would give the Court jurisdiction. That to my mind is an extremely dangerous argument to use. It was admitted that I could not issue this Commission, supposing here was opposition. Let me test this admission. If it is necessary for the ends of justice that, under the inherent jurisdiction of the Court, I should grant a Commission to examine witnesses in Bengal, then what possible difference can it make whether all the parties consent to it or not. If, for instance, it is essential for the plaintiff to call certain witnesses, surely it is only right that they should be called quite irrespective of whether the defendant agrees that they should be called. I cannot see what the defendant's consent has got to do with the power of the Court.

22. Many people are carried away with the erroneous idea that, because two parties agree on any particular course, that necessarily gives the Court jurisdiction

to make the order. They sometimes go so far as to suggest that the Court is bound to, make the order in such a case. Here I am asked to affect the rights of private citizens who, occupy certain important public posts, viz., certain officers of the Port of Calcutta. They are not parties to the arbitration. So it is not a question merely between the parties to a private arbitration. I am asked in effect to allow private litigants to summon these particular Port Officers before them and to oblige them to produce documents and so on. So I am affecting the rights of other citizens, and it is not merely a question, of what these particular parties want me to do.

23. After considering carefully all the arguments that have been addressed to me, I am of opinion, there is no jurisdiction in this Court to grant a Commission to examine witnesses in a private arbitration and still less so, when the Commission is to be sent to another Province.

24. I accordingly refuse the application.

25. As regards costs, costs of all parties will be costs in the arbitration.

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