

Morgan Walker and Co. Vs. Khardah Co. Ltd.

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Court : Kolkata

Decided On : Mar-10-1958

Reported in : AIR1959Cal169,63CWN451

Judge : P. Chakravartti, C.J. and ;S.C. Lahiri, J.

Acts : [Arbitration Act, 1940](#) - Section 5

Appeal No. : A.F.O.O. No. 26 of 1956

Appellant : Morgan Walker and Co.

Respondent : Khardah Co. Ltd.

Advocate for Def. : K.P. Khaitan and ;B. Das, Advs.

Advocate for Pet/Ap. : M. Hazra and ;A.C. Bhabhra, Advs.

Disposition : Appeal allowed

Judgement :

P. Chakhavartti, C. J.

1. This is an appeal from an order of Bachawat, J., dated 27-6-1955, whereby the learned Judge revoked the authority of the Bengal Chamber of Commerce and Industry to arbitrate; in a dispute between the appellants and the respondents which had been referred to the Chamber at the instance of the appellants. He held

that the reference then pending before the Chamber was a second reference of the same dispute which could not legally be entertained but, since the Chamber was nevertheless entertaining it and thus acting illegally, the only proper course to take was to revoke the authority of the Chamber. For his reasons, he referred to those given in his order in the case of Hulaschand Rupchand v. Baranagore Jute Factory Co., Ltd. (96 Cal LJ 66).

2. The facts are few and simple. On 13-8-1951, the appellants entered into a contract with the respondents for sale to them of 2000 maunds of Ready jute 'packed in bales, each weighing about 3 1/2 &/or 4 maunds'. In pursuance of that contract, the appellants delivered some jute in bales of the stipulated size which the respondents duly accepted and paid for, but they delivered some more jute in bales of 5 maunds which the respondents refused to accept. The respondent's contention was that they were not bound under the contract to accept jute delivered in bales of 5 maunds, whereas the appellants' contention was that they were, inasmuch as the contract had subsequently been amended. A dispute having thus arisen between the parties, the appellants referred it to the arbitration of the Bengal Chamber of Commerce and Industry in accordance with the arbitration agreement contained in the contract and on 26-6-1952, the Chamber made an award in their favour. The respondents then made an application to this Court for setting aside the award. By an order dated 12-1-1953, S.R. Das Gupta J. set it aside and his order was affirmed on appeal on 9-6-1953. The trial Court and the appellate court both held that the arbitrators had proceeded on a patent misconception of the dispute before them and assumed that they were to decide the rights of the parties under an amended contract, whereas whether the contract had been amended or not was one of the matters they were required to decide.

3. Though the award was set aside, the reference was not superseded. On 31-7-1954, the appellants addressed a communication to the Registrar of the Chamber, whereby they asked him 'to constitute a court for adjudicating upon the disputes' between the respondents and themselves, arising out of the contract concerned. The letter which began with that request proceeded to state the whole case of the appellants and at the end of the narration, claimed an award in their favour. It then proceeded to refer to the previous award and after stating that it had been set

aside on the ground that the arbitrators had assumed that the contract had been amended without deciding that fact, as they should have done, added that this Court had held that arbitrators had jurisdiction to decide whether the contract had been amended or not. On receipt of that communication from the appellants, the Registrar of the Chamber addressed a letter to the respondents on 18-9-1954, in which he said that the appellants had applied for arbitration in their dispute with the respondents under the contract of 13-8-1951, that he had constituted a Court for the purpose and that the respondents were to file their statement on or before the 29th September next. The letter was accompanied by copies of the statement of the appellants and the papers filed by them and it showed that the Registrar had assigned a new number to the case. Thereafter, on 7-12-1954, the respondents took out a Notice of Motion for an application to be made by them on the next day and, on the same day, they obtained an interim injunction, restraining the appellants from proceeding with their case before the arbitrators. The application was made on the 8th December and by it the respondents prayed for a determination that no arbitration agreement subsisted as between the appellants and themselves, that, as the arbitrator, the Bengal Chamber of Commerce and Industry was functus officio and that the reference made to it was invalid and, alternatively, for a revocation of the authority of the arbitrator. Bachawat, J. made an order according to the alternative prayer, as already stated.

4. It may be pointed out at once that the respondents' prayer for a revocation of the authority of the Chamber was clearly misconceived and the learned Judge's order, giving effect to that prayer, was also, strictly speaking, not correct. The Arbitration Act gives no power to the Court to revoke the authority of an arbitrator, but only gives it power to give leave to a party to revoke. The other power it gives to the Court is to remove an arbitrator. Since, however, the learned Judge clearly intended that the Chamber should no longer act as an arbitrator in the dispute, we may treat his order as an order removing the arbitrator. The only question in the appeal, therefore, is whether the ground given by the learned Judge for making the order is correct.

5. In my view, the ground on which the learned Judge made the order is not sustainable. His earlier order in the case of *Hulaschand Rupchand v. The*

Baranagore Jute Factory Co.. Ltd. (96 Cal LJ 66) on which he relied, was itself brought up on appeal and we have just delivered our judgment thereon in which we have given our reasons for dissenting from him on this question. The same reasons apply here. The dispute between the parties was referred to the arbitration of the Chamber in March, 1952 and an award was made, but when that award was set aside by the Court, the reference was not superseded. The result was that the Chamber remained in seizin of the reference and the arbitration agreement continued to subsist. At that stage, the appellants who had originally made the reference addressed a further communication to the Registrar of the Chamber and asked for arbitration and an award. It is true that the communication was in the form of a statement of claim, but it referred to the previous proceedings and stated how they had ended and with it was enclosed a copy of the award that had been set aside. In my opinion, the correct view of that communication is not that a fresh reference was made by it but that, by it, the appellants asked for further arbitration on the reference which they had already made and which was still pending. Since the original reference had not been superseded, there could be no second reference of the same dispute and there was no need of any. Nor is there anything in the communication of the 31st July, 1951 which must compel one to hold that the appellants were making a second reference and not asking, in substance, for a continuance of the reference already before the Chamber. In the course of the argument we were informed that when an award made by the Chamber was set aside and the parties went back to it for further arbitration, it was always necessary to file fresh statements, because the original statements, submitted to this court along with the award, were retained here and not returned. In those circumstances, we must hold, for the reasons given by us in our judgment in Baranagore Jute Factory Co. Ltd. v. Hulaschand Rupchand Appeal No. 170 of 1955: : AIR1958 Cal490 that there is no question of a second reference in this case. What the Chamber was doing was not that it was entertaining a second reference, but that it had resumed and was continuing the reference originally made to it. In doing so, it was doing nothing illegal.

6. For the foregoing reasons, the order under appeal cannot be upheld. We must make it clear, however, that our decision is limited to the single point dealt with by the learned Judge and we are deciding nothing more than that the proceedings

before the Chamber were not bad for the reason that they were proceedings on a second reference.

7. In the result, the appeal is allowed. The order of Bachawat, J. is set aside and the respondents' application is dismissed. As the point involved in the appeal is one as to which some doubt has recently been felt, there will be no order for costs.

S.C. Lahiri, J.

8. I agree.

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