

Bejoy Singh Vs. Bilasroy and Co.

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Court : Kolkata

Decided On : Jan-11-1951

Reported in : AIR1951Cal529

Judge : Bachawat, J.

Acts : [Arbitration Act, 1940](#) - Sections 16 and 30; ;Jute Price (Control) Order, 1944

Appeal No. : Civil Jurisdiction Award Case No. 189 of 1950

Appellant : Bejoy Singh

Respondent : Bilasroy and Co.

Advocate for Def. : B. Das and ;H.N. Ghosh, Advs.

Advocate for Pet/Ap. : E.R. Meyer and ;A.C. Bhabra, Advs.

Disposition : Application dismissed

Judgement :

ORDER

Bachawat, J.

1. This is an appln. for setting aside an award of the Bengal Chamber of Commerce.

2. By a contract dated 10-5-1946, the petnr. Bejoy Singh Karnwat agreed to sell to the resp. Bilasroy & Co., 45,000 bags B Twills delivery July to September 1946 at Rs. 66-12-0 per 100 bags. The contract is on the standard Indian Jute Mills Asscon. contract form which contains the following arbitration clause :

'All matters, questions, disputes, differences &/or claims arising out of &/or concerning &/or in connection with &/or in consequence of or relating to this contract whether or not the obligation of either or both parties under this contract be subsisting at the time of such dispute & whether or not this contract has been terminated or purported to be terminated or completed shall be refd. to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force & according to such rules the arbitration shall be conducted.'

3. The petnr. did not give delivery of these goods to the resp. firm. The resp. had sold these goods to one Sohonlal Karnwat at the same rate & the resp. in its turn also failed to give delivery to its buyers.

4. On 1-10-1946, the resps', buyers sent a letter to the resps, intimating that on that day the goods had been bought in the open market at Rs. 78-4-0 per 100 bags. On 7-10-1946 the resp. communicated the substance of this letter to the petnr. On 7-10-1946 the resp's. buyer sent to the resp. a bill for Rs. 5,175 on the basis of the difference between the contract price & the price of repurchase on 1-10-1946 & asked for payment of that bill. The resps. in their turn on 18-10-1946 sent to the petnr a bill for the identical sum on the same basis & requested the petnr. to pay the bill. No reply was sent by the petnr. to any of these letters, nor was any payment made of the difference bill.

5. On 7-7-1949 the resps. refd. the dispute to the arbitration of the Bengal Chamber of Commerce. In the letter of reference the resp. refd. to the contract between the parties as also to the contract between the resp. & Sohonlal Karnwat & to the correspondence passed between the parties & asked for an award of Rs. 5,175. The petnr. filed his statement on 13-1-1950 stating that his seller had failed to deliver the goods, that the resp. never issued any shipping instructions that the time for delivery was never extended & in any event damages in excess of the

maximum controlled rate could not be claimed & that the petnr. had no concern with the resps'. buyers. On 20-1-1950 the resps. filed their second statement stating that upon demands for delivery being made the petnr. had been assuring that the goods had not been received from his sellers & that he will deliver the goods on receipt & that in view of such assurance the contract continued to exist & was extended till such time when goods could be available in the free market or it was possible to assess the damages & that it was the option of the resps, not to send the shipping instructions & that if damages could not be given on the basis of repurchase, damages should be awarded on the basis of the market price on 1-10-1946. The petnr. later on filed a second statement reiterating his previous stand.

6. On 20-3-1950, the Bengal Chamber of Commerce made an award which is as follows: (1) That there was no free market available for these goods on the contract due dates of July/ August/September 1946 & the first free market available thereafter was on 1-10-1946. (2) That M/s. Bejoy Singh Karnwat shall pay to M/s. Bilasroy & Co. Ltd., in full settlement of their claim herein the sum of Rs. 5,175, together with interest thereon at the rate of 4 per cent. per annum for six months only. (3) That M/s. Bejoy Singh Karnwat shall pay to M/s. Bilasroy & Co. Ltd., the cost of this arbitration which we fix at Rs. 343 8-0 & which are to be recovered by the Tribunal from the sum of Rs. 400 deposited by M/s. Bilasroy & Co. Ltd.

7. On 22-4-1950 the Registrar of the Bengal Chamber of Commerce informed the parties that there was a clerical error in the award & that the name of the buyers was M/s. Bilasroy & Co., & not Bilasroy & Co. Ltd.

8. The notice of the filing of the award was served upon the parties & the present appln. was made on 24 8-1950.

9. Mr. Meyer appearing on behalf of the petnr. contended that the award ought to be set aside on the following grounds: (1) That the award was in contravention of the Jute Price Control Order & was illegal & against public policy. (2) That the arbitrators could not decide the dispute as to extension without taking evidence & they were guilty of misconduct in not calling for evidence & deciding the matter

without taking evidence. (3) That there is an error of law on the face of the award.

10. During recent times numerous applns have been made to this Ct. for setting aside the award of the Bengal Chamber of Commerce made with regard to contracts for the sale of jute & manufactured goods under which deliveries were stipulated to be given on dates which fell within the currency of the Jute Price Control Order. The Jute Price Control Order, 1944, fixed the maximum price in excess of which it was illegal either to buy or to sell jute or jute-manufactured goods. This Control Order expired on 30-9-1946. All those contracts were on the standard Indian Jute Mills Asscon. Contract Form & all of them contained the usual arbitration clause providing for reference to the Bengal Chamber of Commerce. The buyers claimed from the sellers damages for non-delivery of the goods & refd. the dispute to the arbitration of the Bengal Chamber. As a rule the buyers claimed much more than the difference between the contract price & the maximum controlled price. In some cases damages were claimed for breach of contract on the due dates without any allegation of extension of the due dates & the damages claimed were quite clearly illegal & in flagrant contravention of the Jute Price Control Order. In other cases the buyers alleged extension of the due date either by agreement or by some usage prevailing in the market & claimed the difference between the contract price & the market price on a date subsequent to 30-9-1946. As a rule awards were made in favour of the buyers allowing their claims. The recent course of decisions in this Ct. establishes that the arbitrators are guilty of misconduct if they award on the footing that the goods could be bought & sold at prices in excess of the maximum controlled price during the currency of the Jute Price Control Order or if in a proper case they decide on the question of extension without taking evidence it being their duty to take evidence inspite of Rules 15 & 16 of the Arbitration Rules of the Bengal Chamber of Commerce which are as follows:

XV. The dispute will normally be decided by the Ct. on the written statements of the parties & oral evidence will not be taken nor will the parties be entitled to appear, or any formal hearing be held. The Ct. shall have power, however, if it thinks fit to appoint a time & place for the hearing of the reference & to hear oral evidence.

XVI. In any case of a formal hearing no party shall, without the permission of the Ct. be entitled to appear by Counsel, attorney or other advocate or adviser, but the Ct. is its discretion may require the parties with or without witness to attend before it or before any Committee or Sub-Committee of the Chamber to be examined.

11. Until recently & even as late as April 1948 the approach of this Ct. to such awards was some-what different & reference may be made to the judgment of Das J., delivered on 15-4-1948 in Award Case No. 39 of 1948, In re Arbitration Sree Kissen Beriwalla Ltd. In that case the contract was for July to September 1946 delivery. In August & September 1946 the buyers wrote to the sellers agreeing to extend the time for delivery but the sellers in their turn promptly replied refusing to agree to such extension & requesting the buyers to send the difference bill on the basis of the maximum controlled price. In the statement filed before the Arbitrator the buyer alleged that there were oral extensions of time upto 30-9-1946 which were confirmed by the above correspondence & claimed damages on the basis of a purchase on 1-10-1946. The sellers denied the extension & stated that they had offered to pay & were ready & willing to pay the difference on the basis of the maximum controlled price. The Bengal Chamber of Commerce made an award for the amount claimed by the buyers. Das J. observed as follows:

'It is stated that the petnr. having intimated to the resp. its inability to deliver goods & having admitted its liability for non-delivery & having sent to the resp. its cheque for Rs. 112-8. representing the difference between the contract rate and the market rate prevailing on the due date when the Jute Price (Control) Order was in force, there was no dispute between the parties, I do not think there is any substance in this contention.....

The next ground urged is that the arbitrators failed to appreciate the facts & the correct legal position. Reference is made to the correspondence which I have summarised above & it is pointed out that in those letters no case whatever was made as to any oral appln. for delivery on the part of the resp. or any oral arrangement for extension of the due date. These are questions of fact which had to be decided by the Arbitrators as the tribunal chosen by the parties. In spite of the comments made before me the arbitrators evidently accepted the case of

extension. This Ct. cannot sit as a Ct. of Appeal over the decision of the domestic tribunal. In my opinion, there is no force in this objection.

The last objection urged is that the arbitrators did not give any opportunity to the petnr. to adduce evidence as to the quantum of damages & that they failed to assess damages according to law. The reference to arbitration was subject to the rules of the Tribunal of Arbitration. Under those rules the arbitrators proceed on the respective statement of the parties as evidence before them & the parties are not entitled as of the right to adduce any oral evidence although the arbitrators may, if they think fit, call for & hear oral evidence. The arbitrators evidently were satisfied with the evidence disclosed before them in the respective statements as to the alleged calculation of damages. The further answer is that it does not appear on the face of the award as to the date on the basis of which the arbitrators had assessed the damages. Farther if the arbitrators accepted the story of 'extension of the due date upto 80-9-1946, it was for the arbitrators to consider whether the damages should be calculated on the basis of the rate prevailing on the next day.'

12. The approach of this Ct. to such awards is somewhat different since 30-4-1948. I will first deal with the group of cases in which there was no allegation by the buyer that there was any extension of the due date either by agreement or by custom. In these cases the buyers claimed damages for non-delivery on the due date of the contracts which fell within the currency of the Jute Price (Control) Order, on the basis of the difference between the contract price & the price which was recommended & fixed by an Asscon. known as the Calcutta Gunny Traders Asscon. for the settlement of such contracts & the Arbitrators had allowed the claims of the buyers. This Ct. was then called upon to decide the applns. made by the sellers for setting aside the awards. On 30-4-1948 one of such cases being Award Case No. 241 of 1947, Raghunath & Son v. Mohammed Umer & Co, came before Sinha J. The contract there was for April to June 1946 delivery. Sinha J. set aside the award on the ground that the arbitrators were guilty of misconduct. This decision was folld. by Clough J. on 3-5-1948 in Award Case no. 26 of 1948 Re. Arbitration Diharamchand Tamakuwalla v. Khusiram Benarshilal where the contract was for January to March 1946 delivery. Clough J. held that it was not a

case of mere error of law & observed as follows:

'By reason of Public Policy provision has been made prohibiting trade in this particular commodity at all material times at a rate higher than that notified. In allowing damages calculated on the basis of a higher rate the arbitrators have in effect awarded damages upon the footing that at the material time the trader could have sold his goods at a rate higher than that allowed by the control measure. I agree with the decision of Sinha J. that this amounts to misconduct.'

13. An appeal was preferred from the judgment of Clough J. & the appeal was heard by the Chief Justice & Sinha J. in Appeal from Original Order No. 80 of 1948, Khusiram Banarshilal v. Girdharilal Dharamchand. The Appeal Ct. upheld the judgment of Clough J. & observed as follows:

'It is contended on behalf of the applt. that the learned Judge's decision is wrong. It is urged that at the most the arbitrators were guilty of an error & as the error is not apparent on the face of the award, it was not open to the learned Judge to set aside the award. That may be so. It is open, however, to the Ct. to look into the papers filed before the Arbitrators & to set aside the award if the Ct. comes to the conclusion that the arbitrators were guilty of misconduct.

The word 'misconduct' includes any mishandling of the arbitration proceedings or any neglect of duties and responsibilities on the part of the arbitrators which is likely to lead to substantial miscarriage of justice.

It is clear from the materials before us that the arbitrators have been guilty of legal misconduct.

Under a contract for sale the ordinary measure of damages upon a breach is the difference between the contract price & the market price on the date of breach. It is quite clear from the bill submitted by the applt. as also from the letter of the applt. referring the disputes to the Bengal Chamber, that the applfc. was claiming damages for non-delivery on that basis. No claim was made on the basis of loss of profits and no other mode of assessment of damages was suggested at any time before or after the arbitration proceedings had started. The claim was made on the

footing that on the date of breach, the goods could not be bought in the market at the controlled rate and therefore the resp. ought to be made to pay the difference on the basis of a market rate which the Gunny Traders Asscon. had fixed in respect of transactions where sellers had committed breach by non-delivery in July, August & September 1946.

The rate fixed by the Jute Price Control Order for sale & purchase of jute up to September 1946 was Rs. 28 per 100 yards. Any sale or purchase at a higher rate was a criminal act punishable under the Defence of India Rules. The market rate could not exceed the maximum rates fixed under the said order. If there was any market where it was possible to sell & purchase Jute at rates in excess of the said maximum rates, it was a 'black' market which could not be recognised by the arbitrators. Recognition of such a market involves encouragement of something which was criminal & against public policy.

The arbitrators in awarding damages as claimed by the applt. have recognised that at the material time the applt. could buy similar goods in the market as Rs. 31/8/- & they have in effect awarded damages on that footing.

The arbitrators must be presumed to know the law & that maximum rates for sale & purchase of jute had been fixed under the said order.

The award of the arbitrators amounts to a disregard of the law. They have recognised an illegal market for sale & purchase of jute & have awarded damages on the basis of a market rate at which it was a criminal offence to sell & purchase jute. It is impossible for the Ct. to give finality to an award made on such basis.'

14. The appeal from the judgment of Sinha J. in Md. Umer's case was later on upheld on 24-3-1949 by the Ct. of Appeal consisting of the Chief Justice & Chatterjee J. in Appeal from original order No. 127 of 1948, Raghunath & Son v. A.R. Md. Umer & Co. These cases were followed in the case of Chhogmal Rawattmal, v. Sankal Chand G. Shaw, 53 C. W. N. 828 where the contract was for April to June 1946 delivery. In the latter case although there was no allegation of extension, the award was sought to be supported on the ground that the arbitrators might have proceeded on the ground of extension. Chatterji J. repelled

that contention & he held that the arbitrators Could not decide on a question of extension without any allegation as to extension & without taking any evidence in respect thereof.

15. The principle of these decisions was somewhat extended by the Appeal Ct. in Appeal from original Order No. 123 of 1948, Haji Sattar Haji Pir Mahammad v. Khusiram Banarsilal, decided by Chief Justice Harries & Das Gupta J. on 25-8-1949. In this case the contract was for July to September 1946 delivery & the buyer claimed damages on the basis of the price fixed by the Gunny Traders Asscon. without any allegation as to extension. The seller instituted a suit claiming a declaration that the rates fixed by the Asscon. was illegal for an adjudication of the rights of the parties & for an injunction restraining the Bengal Chamber of Commerce from proceeding with the arbitration. An appln. for stay of the suit by the buyer was dismissed by Chatterjee J. & his decision was upheld on the ground inter alia that the Ct. will not allow the Arbitration before the arbitrators to proceed where the buyers were making an attempt to obtain from them damages which could not be legally given & there was really no legal dispute between the parties.

16. I will next deal with the series of cases in which the buyers claimed damages not on the basis of the price fixed by the Gunney Traders Asscon. but on other grounds & questions arose as to whether the Bengal Chamber should have taken oral evidence. In khusiram Banarsilal v. Mathuradas Govardhandas, 52 C. W. N. 826, which was decided by Sinha J. on 30-4-1948, the contract was for April to June delivery. On 21-9-1946 the buyer wrote extending time upto September 30. The seller promptly repudiated the extension & asked for a difference bill on the basis of the maximum control price. On September 28, the buyer asked for immediate delivery to which the seller replied on October 1, stating that they had nothing to add. On 21-2-1947 the buyer claimed Rs. 1750 apparently on the basis of the price prevailing on 1-10-1946 but later on they claimed the sum of Rs. 14,250 on the basis of the price prevailing on 31-10-1946. In the letter of reference before the Tribunal, the buyer alleged that there was an extension upto 31-10-1946 by the letter dated 28-9-1946 & by a circular of the Gunny Traders Asscon. The document which was, however, alleged to be a circular was not a circular but a bill. The Bengal Chamber made an award for Rs. 14250. It was not established

that the Bengal Chamber had been asked to take evidence before the award had been made. Sinha J. set aside the award. He held that having regard to the nature & circumstances of this case it was impossible for the arbitrators to decide as they did if they really applied their minds to the facts of the case & it was their duty to call upon the buyer to adduce oral evidence in support of his case of extension where it was not possible to decide in favour of extension without oral evidence. It is noteworthy that in this judgment there is no reference whatever to the principle that an award in contravention of the Jute Price (Control) Order is against Public Policy although Sinha J. delivered this judgment on the same day on which he decided Mohamed Umer's case. The reason was that the damages were claimed on the basis of the price prevailing on October 31 on the ground of an alleged extension. It is also to be observed that in the case before Sinha J. the documents disclosed by the buyers themselves showed that they had no case, & it may well be said that the award was perverse. The order of Sinha J. setting aside the award was upheld on another ground in appeal in Mathuradas Gobardhandas v. Kushiram Benarsilal, 53 C. W. N. 873 decided on 23-9-1949. The Appeal Ct., however, refused to decide the point on which Sinha J. based his judgment.

17. The next case is Re Arbitration Mukhram Lachmi Narain v. Khusiram Benarsilal, Award Case No. 133 of 1948 decided by Sinha J. on 3-9-1948 where the contract was for April to June 1946 delivery. The buyer on November 5 or 15 claimed Rs. 11,500 on the basis of the price fixed by the Gunney Trades Asscon. but, later on, before the arbitrators they claimed the difference between the contract price & the market price on 28-11-1946. The buyers contended that the sellers had given an assurance of delivery on receipt of the goods from their sellers & that shipping instructions had been sent, which had been retained for over 24 hours, & that really the buyers were acting as intermediary between their buyers & sellers. The allegation as to extension was not denied by the sellers in their first statement, but was denied in their second statement. 'Sinha J refuted to set aside the award & his judgment was upheld by the Ct. of Appeal in Appeal from Original Order No. 2 of 1949, Mukhram Lachmi Narain v. khushiram Benarsilal, decided by the Chief Justice & Chatterjee J. on 29-3-1949. The Chief Justice observed as follows :

'The award is undoubtedly good on the face of it & there is nothing to show by looking at the award that it was made upon no materials at all, as suggested by Mr. Chaudhuri. His argument, however, is that looking at the materials before the arbitrators it is clear that they could not have arrived at the conclusion, which they did, without calling for & hearing evidence & as they did not call for & hear such evidence they were guilty of legal misconduct which vitiates the award.

As I have already said the arbitrators are entitled to decide the cases refd. to the Bengal Chamber of Commerce upon the statements made to them by the parties, though they are empowered to call evidence. The statements made by the parties are, therefore, in the nature of evidence which they can rely upon, if they think proper. The statements made by the resps, clearly go to show that time for performance of the contract had been extended & the learned Judge has pointed out that there has been no categorical denial of that in the first statements of the appls. If there was material upon which the arbitrators could hold that the time for performance had been extended, then it would be for the arbitrators to find when the contract was eventually repudiated by the sellers. It was suggested by Mr. Ghaudhuri that there was no evidence at all upon which the arbitrators could hold that the contract had been extended beyond the date either November 5 or November 15, 1946, when bills for Rs. 11,500 were sent to the appls. Sending bills based upon differences in price would normally amount to an acceptance of the sellers' repudiation. But the resps. explained these bills as being an attempt to compromise the dispute. They did not claim that in sending the bills they had accepted the repudiation. In fact their conduct went to show that they had not accepted the repudiation, because they sent shipping instructions after these bills as being an attempt to compromise bills had been sent. The case for the resps. was that time was extended until the sellers received the goods from their sellers. Whether such was the case or not was pre-eminently a point for the arbitrators to decide and if they came to the conclusion that there was an extension of time, it was for them to say when the contract was eventually repudiated by the appls....

There was material before them upon which they could decide that time had been extended & that the breach occurred as alleged in the reference to the arbitration, namely, 28-11-1946. It may well be that this Ct. upon the same materials would

not have arrived at the same conclusion; but that is immaterial. Mr. Chaudhuri went as far as to argue that if we thought that the conclusion upon the materials was perverse, then we could hold that there was legal misconduct in not calling further evidence. But it appears to me that we must very carefully draw the line, because where a Ct. disagrees with a finding of fact of an arbitrator, it could, if Mr. Ghaudhuri is right, always upset such finding by holding that failing to call further evidence would amount to legal misconduct which would vitiate the award...

Further, there was another point, namely, that the resps. were merely intermediaries. The arbitrators being experts in this trade would know what would be likely to happen in a case of this kind & would be able to judge upon materials whether or not the resps. were principals or merely intermediaries. Whether they were found to be principals or intermediaries it is impossible to say. All we know is that an award was made in favour of the resps. & that award may have been based on the difference in the price between the market & the contract price at the date of the breach on November 28, or it may have been based upon damages suffered by the intermediaries, as they had been called upon by Soorajmull Nagarmull to pay a sum slightly less than the sum awarded to the resps.'

18. The next case is Arbitration Matter No. 139 of 1948, Kushiram Banarsilal v. Sagarmull Dhanraj, decided by Chatterjee J. on 21-9-1940. In this case there was an allegation of extension & the award was ex-parte as the sellers never appeared before the arbitrators. Chatterjee J. refused to set aside the award & observed as follows :

'It is impossible to hold in such a case that Arbitrators were bound to insist on oral evidence & in its absence the award is illegal. There was in fact no issue raised & in the present case the matter did not really reach the stage when any oral evidence was called for..... Counsel refd. me to another judgment delivered by Sinha J. in Raghunath & Son v. R. Mohamed Timer & Co..... In the case before Sinha J. there was no extension pleaded beyond the expiry of the Control Order. That judgment cannot be applied in this case where extension has been pleaded.'

19. The next case is Re: Arbitration Sri Kissen Beriwalla, Ltd. v. Hari Krishna Sudani, Case No. 82 of 1948, decided by Sinha J. on 24-9-1948. In this case, the

contract was delivery July to September 1946. In August & September 1946 the buyers wrote to the sellers extending the time, but the sellers promptly replied refusing the extension & asking the buyers to send bills on the basis of the maximum control price. In his statement before the Arbitrator the buyer alleged extension of the due date up to 30-9-1946 & also alleged that although the money was tendered on 30-9-1946, the seller asked him to tender money again on 1-10-1946, but in spite of such tender no delivery had been made. It was contended before Sinha J. (a) that the award was in contravention of the Jute Price Control Order & was illegal; (b) that the Arbitrator could not decide an issue of extension without taking evidence. Sinha J. refused to set aside the award & observed as follows :

'With regard to (a) if there had been no question of extension & damages had been awarded on the basis of difference between the contract rate & the market rate prevailing on the due dates fixed by the contract & if the Arbitrators had awarded damages at a rate higher than the rate fixed by the Jute Price Control Order, the award could possibly be challenged. If the Arbitrators held that the time for performance of the contract had been extended, they could give damages at a rate higher than the maximum controlled rate, if on the extended due date the Jute Price Control order was not in operation. In this case the allegation was that the due date for performance of the contract had been extended till 30-10-1946. If the arbitrators accepted the case of the resps. about extension of time they could award damages on the basis of rates prevailing on 1-10-1946, when the resps. purchased the goods in the market.

With regard to (b) it is complained that the arbitrators acted wrongly in awarding damages on the basis of Rs. 83/4/0 per 100 bags as there was no evidence before the arbitrators for any extension of time for delivery of goods.

Under Rule 15 of the Rules of Arbitration of the Bengal Chamber of Commerce, the disputes between the parties were normally to be decided on the written statements of the parties. Written statements were filed by the parties. There was also the correspondence between the parties prior to the reference being made. It is true that the correspondence which started on 7-10-1946, shows that there were

allegations of extension & that denials thereof by the parties. Prior thereto there was no correspondence. The case of the resps. was that there had been an extension of due date upto September 1930. The petnr. denied this. The arbitrators accepted the case of the resps. & did not believe the case of the petnr. The arbitrators are commercial men of experience having knowledge & experience of the course of transactions in matters like this. The parties did not offer to adduce oral evidence or request the arbitrators to be allowed to call oral evidence. It is not incumbent on the arbitrators in every case where there is conflict between the parties on facts, to call for oral evidence. The arbitrators have a discretion had they have exercised it. I am not in a position to say that the exercise of discretion not to take evidence in this case amounted to misconduct.

On the materials before the arbitrators they came to a particular conclusion. I am unable to say that the conclusion which they came to was one which no reasonable man could have arrived at or that they did not appreciate or apply their minds to the points involved. The parties clearly set out the facts & their respective contentions in their written statements & they were quite content to have the decision of the arbitrators on the written statements. It is now too late for them to complain that no oral evidence was taken. There is no mistake on the face of the award. This Ct. cannot go into the facts & act as a Ct. of appeal against the award of the arbitrators. In my opinion, it has not been established that the arbitrators were guilty of any misconduct in making the award.

The appln. is dismissed with costs.'

20. The next case is Re: Arbitration Rajputana Trading Co. v. Haji Ibrahim Kasim Kochinwalla, decided by Sinha J. on 29-9-1948, & in Appeal from Original Order No. 102 of 1948 by the Chief Justice & Chatterjee J. on 28-3-1949. In this case the contract was for April to June delivery. On 20-9-1946 the seller stated that the contract stood cancelled, but in reply the buyer made demands for delivery. The buyers claimed that due date had been extended orally as also by usage of trade. The arbitrators took evidence & made an award in favour of the buyer. The Appeal Ct. refused to set aside the award.

21. It is to be noted that in none of these cases the awards have been set aside in a case where the buyers claimed the difference between the contract price & the market price prevailing on 1-10-1946, upon the allegation that the due date or the extended due date was 30-9-1946. Indeed Sinha J. in the case *Re Arbitration Srikissen Bariwalla v. Hari Krishna Sadani* and Das J. in *Re Arbitration Srikissen Bariwalla Naraindas* held that the arbitrators are not guilty of misconduct if such claim of the buyer is allowed & that the error of law if any did not appear on the face of the award. Besides it was not quite clear on the authorities whether in such a case there was in fact an error of law and whether or not the price on 1-10-1946, was the correct measure of damages. In *Jamal v. Molla Dawood Sons & Co.*, 43 I. A. 6, the Judicial Committee held that the loss to be ascertained & the measure of damages is the loss at the date of the breach. In *Hailsham, Laws of England*, vol. (10) p. 122, footnote (u) the measure of damages in such a case is said to be as follows:

'The difference is more properly that between the contract price & the market price on the day after the breach where the debt. is the whole of the day fixed for delivery on which to deliver (*Shaw v. Holland*, (1846) 15 M. & W. 136), but the express, or implied, terms of the contract must be given effect to.'

21a. In *Shaw v. Holland*, (1846) 15 M. & W. 136, damages were assessed on the date of the breach of contract but there are observations both in the judgment & in course of the argument that a reasonable time may be given for the purchase of the goods after the date of the breach.

22. In *Pannalal Sagarmull v. Mukram Radhakissen*, 39 C. L. J. 77, the Appeal Ct. observed as follows:

'As I read the learned Judge's judgment he came to the conclusion that the period during which the depts. might have delivered the May shipment extended to 31st October and when one looks at the correspondence of this period it is not difficult to see how it was that the learned Judge arrived at that conclusion. The material date, namely, that on which the depts. finally decided that they would not deliver the May shipment being 31st October, it was not unreasonable in my judgment for the learned Judge to take the market rate on 1st November.'

23. In 39 C. L. J. 77, apparently there was no evidence as to the market price on October 31st, the date of the breach. In *Coorla Spinning & Weaving Mills Co. v. Vallabdas, A. I. R. (12) 1925 Bom. 547*, it appears from the report at pp. 553 & 555 that the Ct. of Appeal also held that the rate prevailing on the date following the date of the breach of the contract could be properly taken into account in assessing damages but the view of Marten J. was that it was only the loss on the date of the breach which was to be looked at & no other date should be taken into account.

24. In this state of authorities, the case of *Re Arbitration Ganesh Commercial Co. v. Bajranglal Laduram* came to be decided by Sinha J. on 20-4-1948. In this case the dispute between the parties was with regard to September 1946 delivery. The seller on 23rd September requested the buyer to send bills on the basis of the maximum price, but the buyer sent a bill claiming the difference on the basis of the difference between the contract price & market price on 1-10-1946. In the statement before the Bengal Chamber the buyer reld, upon a rule of the Gunny Trades Asscon. to the effect that the buyer could buy against the seller on the date following the above date. The seller contended that the contract was not governed by such rule. The Bengal Chamber made an award in favour of the buyer & later on an appln. to set aside the award was made. Having regard to the state of the authorities & having regard in particular to the judgment of Sinha J. in *Srikissen Beriwalla v. Hari Krishna Sadani*, as counsel for the petnr. I did not argue the question of misconduct before Sinha J., but he gave leave to the petnr. to argue the point before the Appeal Ct. Sinha J. dismissed the appln. but this order was set aside by the Appeal Ct. in Appeal from Original Order No. 73 of 1948, decided by Harries C. J. & Chatterjee J. on 4-8-1949 now reported in *Bajranglal Laduram v. Ganesh Commercial Co.*, 55. C. W. N. 147 & the award was set aside. The appeal Ct. held that the matter was concluded by the previous Appeal Ct. judgments & that the award was really on the basis of a black market rate on 30-9-1946. In the Appeal Ct. the decisions in *re Arbitration Srikissen Beriwalla v. Hari Kissen Sadani* and *In re Arbitration Srikissen Beriwalla* were not cited but it appears to me that these decisions in so far as they hold that the arbitrators could in such a case award damages on the basis of the price prevailing on 1-10-1946 have been impliedly overruled by the Appeal Court.

25. The next important case is Award Case No. 128 of 1949, Tolaram Nathmal v. Bilasrai & Co., decided by Sinha J. on 16-9-1949. In this case, the Ct. was called upon, for the first time, to deal with an award which was made in the same form in which it has been made in the present case. The contract was for July to September delivery. In August & September 1946, the buyers, as usual, wrote letters agreeing to extension & the sellers replied refusing to agree to extension. On 19-10-1946, the buyers informed the sellers that the goods had been repurchased & sent a bill of difference. In the reference before the Bengal Chamber of Commerce it was alleged that there was a custom by which the due date of delivery stood extended until after 30-9-1946 & damages were claimed on the basis of difference of price prevailing on October 1. Sinha J. refused to set aside the award & observed as follows:

'It is quite true that if the Arbitrators had calculated damages on the basis of difference between the contract rate & the market rate on a date on which the Jute Price Control Order was in operation they would be in effect recognising a black market & that would be an offence against the law of the land and they would be guilty of misconduct. In this case the Arbitrators have not available (sic) in the market during the currency of the Jute Price Control Order & the first free market came into existence on 1-10-1946. They, therefore, did not award damages on the basis of difference between the contract rate & the market rate prevailing on any date during the currency of the Jute Price Control Order. If they awarded damages on the basis of difference between the contract rate & the market rate prevailing on the 1st October no question of black marketing should arise because on the 1st October there was no controlled rate. It is true that in Bajranglal Laduram v. Ganesh Commercial Co., Ltd., damages were awarded as on the 1st October. But there was no finding by the arbitrators that there was no free market during the currency of the Jute Price Control Order & goods were not procurable in the market during that period. Therefore, the ordinary rule as to measure of damages between the contract rate & the market rate on the date of breach applied & as the market rate on the date of breach was controlled, no damages could be awarded in excess of the difference between the contract rate & the market rate on the date of breach. In this case, however, it is quite clear that the arbitrators have not awarded damages on the ordinary footing because there was no free market for

jute during the currency of the Jute Price Control Order. Further in this case a custom was pleaded & it was open to the arbitrators to come to a conclusion as to whether the custom existed. I do not think the custom was inconsistent with the terms of the contract. Numerous awards have been made on the basis of such custom & have been upheld by this Ct.'

This judgment was upheld by the Appeal Ct. in Appeal from original Order & Decree Nos. 180 & 181 of 1949 by the Chief Justice & Banerjee J. on 21-11-1950. Following a previous decision of the Appeal Ct. in Tolaram Nathmal v. Ganesh Commercial Co., Ltd., the Appeal Ct. held that as there was an allegation of extension by custom, the award could not be said to be illegal. The Appeal Ct., however, held that if there was no such allegation the award would have been bad & would have been set aside. The Chief Justice observed as follows:

'However I find myself unable to agree with Sinha J. that the award would have to be regarded as valid even if custom or usage had not been raised.

Sinha J. appears to have thought that apart from custom as there was a finding that there was no market for these goods on the due dates, the arbitrators would be entitled to take into account the market rate on the first day on which there was a free market.

Normally in the case of failure to deliver goods the damages are calculated as the difference between the market price of the goods prevailing on the date of breach & the contract price. If there be no market price then the Ct. must ascertain as best it can the value of the goods on the date of the breach. The purpose of awarding damages is to place the pltf. as far as the Ct. can, in the position he would have been if the contract had been performed. If there was no market price on July 31st August 31, & September 30 then the Ct. or the arbitrators would have to ascertain as best they could what damage the buyers had suffered & damages would have to be awarded to compensate the buyers for such damage.

What damage did the buyer suffer on July 31, August 31, & September 30 by reason of the failure of the applt. to deliver? The buyers suffered damage in that they failed to obtain the goods which they had contracted to buy & the quantum of

the damage would be the Value of those goods. What was the value of those goods on July 31, August 31 & September 30? The price was fixed by law & any sale or purchase at a price greater than the maximum price fixed by law was illegal & a breach of the law rendering the parties liable to prosecution. It seems to me that the value of the goods on due dates would be the value as determined by the controlled rates. However the value on 1-10-1946 was far in excess of the controlled rates & the prices on October 1 would undoubtedly have been black market prices during the period of the control. Assuming that there was no extension of the due dates, fixing the damages by reference to a market price other than the controlled price would be expressly condoning illegality which I think would amount to misconduct.

To the honest trader his loss on due dates during the control would be the difference between the controlled rate & the contract rate, because the honest trader could not possibly allege that the goods were worth more to him than the controlled rate, because he could have sold them in the black market. The dishonest trader could make such a suggestion, but surely the quantum of damages cannot depend upon whether the buyer happens to be an honest or a dishonest trader. It seems to me that Sinha J. was wrong in the view he took that this award could not be challenged even if no question of extension of the due dates of delivery could be raised.'

26. In Award case 92, of 1947, Tolaram Nathmal v. Ganesh Commercial Co., Ltd., the dispute was with regard to September 1946 delivery. The buyers claimed damages on the basis of the price on 1-10-1946. They justified their claim on the basis of the general law as also on the basis of the rule of the Gunney Traders Asscon. The sellers in their last statement contended that the buyer would not claim on the basis of the price on a day beyond the date of the breach & that was the law of the country & also the practice & usage of trade. Das J. held that all the statements must be read together & so read the issue of trade usage was plainly raised & the arbitrator was competent to decide this issue and refused to set aside the award. The judgment of Das J. was affirmed in appeal from Original Order No. 6 of 1948, Tolaram Nathmal v. Ganesh Commercial Co.

27. It is desirable that I should also briefly review the earlier decisions of this Ct. dealing with the question whether the Bengal Chamber is entitled to decide disputes without taking evidence having regard to its arbitration Rules. The present set of rules was adopted in 1941 but the Bengal Chamber had substantially similar rules before that date. In *Hurdwarymul v. Ahmed Musaji Salehji*, 13 C. W. N. 63, the firm against which the claim was made contended that it was differently constituted from the firm which had entered into the contract. The Bengal Chamber took legal advice & refused to entertain this objection. Fletcher J. held that the Bengal Chamber in spite of such rules could not decide this objection without taking evidence & that the award was bad on the face of it because it was made against a firm & there was nothing to show who the members of the firm were. It seems that the Bengal Chamber refused to adjudicate upon an issue which Fletcher J., consid. to be material & in that sense they may be said to be guilty of misconduct. It is not quite clear whether a request had been made to the Bengal Chamber to take oral evidence. It is also to be borne in mind that the decision was dissented from in *Louis Dryfus & Co. v. Purusottamdas Naraindas*, 47 Cal. 29, where Rankin J. held that an award could be made against a firm & was not bad on the face of it because it was so made & was also dissented from on another point in *Bombay Co. Ltd. v. National Jute Mill Co. Ltd.*, 39 Cal. 669. In *Chaitram Rambilas v. Bridhichand*, 42 Cal. 1140 the failure of the Bengal Chamber to take evidence was challenged on the ground that its rules did not bind the parties to the Contract. This contention was rejected & the Ct. of Appeal held that the rules formed part of the contract & were binding upon the parties. To the same effect was the judgment of Chowdhury J. in *Nobin Chandra v. Sinclair Murray & Co.*, A.I.R. (1) 1914 Cal. 818. In *Radha Kishan v. Lachhmi Chand*, A. I. R. (7) 1920 Cal. 150 a case where the Bengal Chamber had been requested to take oral evidence, Rankin J. at p. 153 of the report observed as follows :

'If oral evidence beyond the mere proof of documents of which the factum is not disputed is on the face of the written case relevant & admissible, I think that upon those rules a refusal to hear such evidence would be very difficult to support except perhaps upon such question as market values as to which the arbitrators may themselves be entitled to act on their own expert knowledge or (under Rule 17) that of others. I think, however, this case fails to satisfy the condition which I

have stated. The letter of the 28th May to the Tribunal must be read with reference to the buyer's case & is an offer of irrelevant & inadmissible evidence only, coupled with the argument of Counsel.'

The judgment, was set aside by the Appeal Ct. on another ground but the Appeal Ct. did not deal with the point decided by Rankin J. In *Bhicumchand v. G. & M. Fogt*, 44 C. L. J. 222. The Appeal Ct. held that the Bengal Chamber of Commerce was justified in refusing to hear evidence with regard to market rates but they also observed that occasions might arise where it would be clearly misconduct on the part of the Bengal Chamber of Commerce to refuse to hear oral evidence. In *Chandrabhan v. Ganpatrai & Sons*, I. L. R. (1943) 1 Cal. 153 the Bengal Chamber had taken no evidence but Blagden J. refused to set aside the award. He held that by Section 1, Evidence Act, arbitrators were not bound by the rules of evidence, & under its rules the Bengal Chamber could decide on the statements filed before it.

28. On the authorities it seems to me that where there is a serious dispute about a matter which is peculiar to the parties & is not common to the trade the Bengal Chamber of Commerce would be guilty of misconduct if they refuse to take evidence in spite of request by the parties to take such evidence. Even where no request is made by the parties, if on the document disclosed by the claimant it appears that he has really no case, the Chamber would be guilty of misconduct if they proceed to make an award in favour of the claimant without calling upon him to substantiate his case by oral evidence. In that case the Chamber may be said to be guilty of misconduct on the ground that they did not really apply their minds to the facts of the case & that their award is perverse. But in a case where the award could not be said to be perverse & there was no request by the parties asking the Bengal Chamber to take evidence I am firmly of the opinion that the Bengal Chamber are not guilty of misconduct if they decide the dispute without taking oral evidence. The parties have agreed to be bound by the rules which authorise the Chamber to decide the dispute normally on the written statements & summarily. In a normal case if the Chamber in the exercise of the power so conferred by the parties choose to decide the dispute summarily on such statements they cannot be said to commit by breach of duty. It would be throwing monstrous burden upon the Bengal Chamber to hold that in such a case it is their duty suo motu to call

upon the parties to give evidence. The Bengal Chamber may well have thought that the parties have left it to them to decide the disputes summarily on the perusal of the written statements filed before them.

29. The decisions of this Ct. appear to establish the following propositions : (a) The ordinary measure of damages for non-delivery under a contract of sale of goods is the difference between the contract price and the market price on the date of breach of the contract *Jamal v. Moolla Dawood*, 43 I. A. 6. (b) The difference between the contract price & the market price on the date following the date of the breach of the contract is not the correct measure of damage for nondelivery under such contract (*Bajranglal Ladhuram v. Ganesh Commercial Co.*, 55 C. W. N. 147) even if there was no market for the goods on the date of the breach. Appeal from original order no. 180 of 1949, *Tolaram Nathmal v. Bilasray & Co.*) Whether & how far *Pennalal Sagarmal v. Mukhram Badhakissen*, 39 C. L. J. 77 is inconsistent with these cases may have to be decided by the Ct. on some future occasion, (c) If the date of breach is a date when the Jute Price Control Order was in operation the ordinary measure of damages is the difference between the contract price & the maximum price fixed by the Control Order. Any claim in excess of such difference is illegal & in contravention of the Control Order and the arbitrators are guilty of misconduct if they recognize & allow such claim whether the claim is on the basis of an illegal market price on the date of the breach. (Appeal from original order 80 of 1948, *Khusiram Benarshilal v. Giridharilal Dharamchand*. Appeal from Original Order No. 127 of 1948, *Raghunath & Son v. A. B. Md. Umer & Co.*, *Chhogmal Rawatmal v. Sankalchand G. Shah & Co.*, 53 C. W. N. 828, or on the basis of the price on a subsequent date when the Jute Price Control Order ceased to be in operation (*Bajranglal Laduram v. Ganesh Commercial Co.*, 55 C. W. N. 147) even if there was no market for the goods on the date of breach & the first free market was on a subsequent day. (Appeal from original Order no. 180 of 1949, *Tolarm Nathmal v. Bilasroy & Co.*) (d) When the allegation is that the due date stood extended until after 30-9-1946 which is the date of expiry of the Jute Price Control Order either by agreement and/or assurances of delivery or by a usage of the trade the claim for difference on the basis of the price prevailing after such date is not illegal. (Case No. 139 of 1948, *Khusiram Benarshilal v. Sagarmal Dhanraj*, Case No. 82 of 1948, *Srikissen*

Beriwala v. Harikissen Sadani). (e) In a contract of reference to the arbitration of the Bengal Chamber of Commerce the rules of the Chamber are imported into the contract & the parties are bound by the rules under which the Chamber can decide the dispute without taking oral evidence (Chaitram Rambilas v. Bridhichand, 42 Cal. 1140. Chandrabhan v. Ganpatrai & Sons, I. L. R. (1943) 1 Cal. 156). The written statements of the parties before the Bengal Chamber are in the nature of evidence upon which the Chamber can make their award. (Appeal from Original Order No. 2 of 1949 Mukhram Lachminaran v. Khusiram Benarshilal, Case No. 139 of 1948, Khusiram Benarshilal v. Sagarmal Dhanraj.) (f) In spite of the rules of the Bengal Chamber in a proper case it is the duty of the Chamber to take evidence. (Bhicumchand Chororia v. G. & M. Fogt. 44 C. L. J. 422.) The power not to take evidence involves a duty to take evidence when the circumstances demand it. (g) The Arbitration Tribunal of the Bengal Chamber of Commerce being experts in the trade may decide on a question which is common to the trade without taking evidence, such as the market price (Bhicumchand Chororia v. G. & M. Fogt, 44 C. L. J. 422) or usage of Trade, (Appeal No. 48 of 1949, Balabux v. Ramdeo Satyanarain.) The Chamber can decide a custom (sic) of automatic extension of the due date without taking evidence (Appeal from original order no. 6 of 1948, Tolaram Nathmal v. Ganesh Commercial Co., Appeal from original Order No. 180 of 1949, Tolaram Nathmal v. Bilasroy & Co.) (h). If there is a serious dispute as to any material fact which is peculiar to the parties & not common to the trade e. g. whether or not there has been oral extension of the due date of the contract and the parties offer to call relevant & admissible evidence or request the Bengal Chamber to give opportunity for the calling of such evidence it is the duty of the Bengal Chamber to take such evidence & to allow such evidence to be called. Radhakissen Khetri v. Lachmichand Jhawar., A. I. R. (7) 1920 cal. 150 at p. 153). (i) Even if there is a dispute between the parties on a matter of fact peculiar to the parties e. g. a dispute whether or not there was oral extension of the due date, the Arbitrators are ordinarily justified in deciding such dispute upon the written statements & without calling oral evidence in the absence of and request from the parties to take oral evidence. (Award Case No. 39 of 1948 Re: Arbitration Sree Kissen Beriwalla Case No. 82 of 1948, Re: Arbitration Sri Kissen Beriwalla v. Hari Krishna Sadani, Appeal from. Original Order No. 2 of 1949, Mukhram

Lachminarain v. Khusiram Banarshilal, (j) Even in the absence of any request by the parties to take oral evidence when the statements of the claimant disclose that he has no case it is the duty of the Bengal Chamber to call upon the claimant to sub-ststantiate his case by calling oral evidence & if an award is made without calling such evidence the award is perverse & ought to be set aside. (Khusiram Banarshilal v. Mathuradas Goverdhandas, 52 C. W. N. 826). Before the Ct. can say that the award is perverse a very special & strong case must be made out (Appeal from Original order No. 2 of 1949 Mukhram Lachminarain v. Khusiram Banarshilal. Award Case No. 39 of 1948 In re Srikissen Beriwalla).

30. In the present case the claim is made on the basis of a re-purchase on 1-10-1946. The claim is also made alternatively on the footing of the difference between the contract price & the price prevailing on 1-10-1946. There is an allegation of extension of the due date. The claim, therefore, is a claim for award of legal damages, & cannot be said to be in contravention of the Jute Price Control Order. I am, therefore, unable to hold that the award is against public policy & illegal, on the principle of Mohamed Umer's case,

31. As I read the statements there is plainly an averment of extension. There is an allegation that there was an assurance by the sellers that they would deliver the goods on receipt thereof from their sellers. In Appeal No. 2 of 1949, Mukhram Lachminarain v. Khushiram Banarsilal there were substantially similar allegations and they were held to be sufficient allegations of oral extension of the due date. The statements are not technical pleadings & are to be construed liberally.' Judgment of Das J. in Tolaram Nathmal v. Ganesh Commercial Co., Award Case 92 of 1947 In Harnandrai Fulchand. v. Pragdas Budhsen, 50 I. A. 9 the judgment of the Judicial Committee proceeds upon the assumption that the contract may provide for delivery of the goods as & when the same is received from the Mills. The allegation here is not that the contract was extended up to 30-9-1946, but that by reason of the assurances of the petnr. the contract was extended until the goods could be available in the free market or it was possible to assess the damages. It was for the Arbitrators to decide up to what point of time there was an extension. It was for them to decide whether the due date was extended until 30-9-1946, or whether it was extended upto 1-10-1946.

32. Furthermore, in this case there was no request by either of the parties calling upon the Arbitrators to take evidence. It is impossible to say that the Arbitrators could not, as reasonable men, decide as they did. There was evidence that the petnr.'s sellers had failed to give delivery of the goods to the petnr. with the result that the petnr. may well have assured the resp. that the goods would be delivered on its receipt from the petnr.'s buyers. The Chamber could also take in to account the fact that there was no reply by the petnrs. to the letters dated 7 & 18 10-1946 whereby the resp. asserted repurchase & claimed damages & the reason may well have been that the petnr. had no answer to the claim then made by the resp. Prior to the arbitration proceedings the petnr. never protested that he had no concern with the purchase by the resp.'s buyers. The rules of the Bengal Chamber of Commerce empower the Chamber to decide on the statements which had been filed before them. In the exercise of their discretion they have decided the disputes on such statements without taking any oral evidence. It seems to me that it cannot be said that the Bengal Chamber acted unreasonably or was guilty of misconduct in any way.

33. It is true that in the first statement which was filed before the Arbitrator there was no allegation of extension, but the allegation is clearly made in the second statement of the resp. & the petnr. had an opportunity of meeting that allegation. As observed by Das J. in *Re Arbitration Ganesh Commercial Go. v. Tolaram Nathmall*, it will be taking a too narrow view of arbitration proceedings to say that the claimant must be strictly confined to the allegations made in the first statement. All the statements are before the Arbitrators & should be read together.

34. Mr. Meyer further contended that there was an error of law & such error appears on the face of the award. Mr. Meyer contended that the finding in Para 1 of the award that there was no free market on the contract the due dates & the first free market available thereafter was 1-10-1946, is the basis of the award & as that finding is not sufficient to support the award there is an error of law on the face of the award. This contention must be rejected. The error of law on the face of the award must be some legal proposition, which is the basis of the award & which is erroneous & which can be found in the award or in a document actually incorporated therewith. It is not permissible to refer to any other document to show

that the award is erroneous. *Champsay Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co, Ltd.*, 50 I. A. 324, *Saleh Mohamed Umer Dossal v. Nathoomal Kessamal*, 54 I. A. 427 & *Durga Prasad v. Anardevi Sethani*, 50 C. W. N. 880. No legal proposition is stated in the present award & it cannot be said that there is an error of law on the face of the award. Besides, the legal proposition must be plainly stated, & the Ct. cannot act upon a mere surmise that the Arbitrator was acting upon a supposed legal proposition. In *James Clark Brush Materials Ltd. v. Carters (Merchants) Ltd.*, 1944 K. B. 566 the award was

'freight space was not obtainable without the period defined in the contract & I award that the contract be forthwith dissolved without penalty or allowance to either party.' Tucker J. observed as follows:

'I think Mr. Devlin is right when he contends that it is not right for me to read in words into this document but must take it at its face value. Mr. Hodgson says that I should draw from the document the inference that the award is based only on this finding. I do not think, however, that I am entitled to draw any inference. To my mind I must look at it to see if it says that the award is based on this finding alone. If it does not so state it appears to me to be impossible for me to draw any inference one way or the other..... This would in itself be sufficient reason for my holding that I have no jurisdiction to accept or set aside the award even if I suspect or am inclined to think that it was highly probable that the finding stated was the foundation for the award.'

35. In *S. C. Nordlinger v. Chandmull Mulchand*, 28 C. W. N. 688 the award was that as the buyers were unwilling to produce the bales required for inspection their claim could not be upheld. The appeal Ct. refused to set the award & observed as follows:

'The learned Judge seems to have thought that the arbitrators had decided against the buyers relying upon the mere fact that the buyers were unwilling to produce the hales. In my judgment with great respect to the learned Judge that is not a legitimate inference to be drawn from the terms of the award. The arbitrators said that they had certain papers. I am not in a position to say what these papers were or to speculate what their contents were. They certainly had some materials before

them which were contained in the papers refd. to in the award.'

36. I, therefore, hold that there is no error of law on the face of the award.

37. In the petn. the award was also challenged on the ground that the Arbitrators had exceeded their jurisdiction in coming to a finding as to free market in the award. Mr. Meyer did not press this contention before me, and in my judgments rightly so.

38. The result is that this appln. must be dismissed with costs.

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