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In Re: the Indian Arbitration Act of 1899;

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Court : Kolkata

Decided On : Dec-09-1919

Reported in : 59Ind.Cas.439

Judge : Greaves, J.

Appellant : In Re: the Indian Arbitration Act of 1899; ;In Re: an Arbitration Between Baijnath Kalooram and Alib

Judgement :

Greaves, J.

1. This is an application by Allibhoy Mahomed to set aside two awards of the Bengal Chamber of Commerce, Nos. 663 and 664, both dated the 27th August 1919, in favour of Baijnath Kalooram and to restrain Baijnath from withdrawing a sum of Rs. 21,067.10-0 deposited by Allibhoy Mahomed with the Sheriff of Calcutta on the 4th September 1919 in respect of the execution of the awards.

2. On the 24th June 1918 Baijnath applied for arbitration in respect of difference due to him from Allibhoy Mahomed on Advise Notes Nos. 23 and 31 and also in respect of Advice Note No. 34. On the 20th January 1919 Allibhoy Mahomed commenced against Baijnath Suit No. 223 of 1919 to stay the arbitration on the ground that there was an interpolation in Advise Note No. 31 stating that thereby Advise Note No. 28 was settled. Mr. Justice Chaudhuri refused an interlocutory application for stay and intimated, so I am told, that the question of interpolation

was for the arbitrators to decide. Against Mr. Justice Chaudhuri's refusal to stay the arbitration there was an appeal which was dismissed. The order stages that Counsel who appeared on the appeal stated that he had then no materials to establish the interpolation but that he reserved his rights to raise the question when the suit was heard.

3. On the 12th September last Allibhoy Mahomed applied in the suit to restrain the withdrawal by Baijnath of the Rs. 21,067-10-0. It was argued before Mr. Justice Rankin that the awards were bad as there was a suit pending when they were made whish had not been restrained, reliance being placed on the case of Dcleman & Sons v. Ossett Corporation (1912) 3 K.B. 257: 81 L.J.K.B. 1092 : 107 L T. 581 : 16 J P. 457 : 10 L.G.R. 915. Mr. Justice Rankin held that this case had no application, as the arbitration had been allowed to proceed and he left the applicant to apply in the arbitration to set aside the awards, he stated in his judgment that, although the question whether or not there had been an interpolation had been determined by the arbitrators that no question upon whish the validity of the submission depended could be finally determined by the arbitrators, and that it must be open to the complaining parties to make that contention on motion to set aside the award. This is the application which is now before me. On behalf of the applicant it is first argued that I should grant the relief sought or, at any rate, the later portion, on the ground that as the suit was not stayed the arbitration could not continue and the awards are of no avail; and, secondly, it is said that the question of interpolation goes to the root of the contract, inasmuch as if this is established, the contract is void and that this is a matter to be decided by the Court on evidence. On behalf of Baijnath it is said that the first point is not open as it has already been decided by Mr. Justice Rankin adversely to the applicant, and as to the second point reliance is placed on Produce Brokers Co. Ltd. v. Olympia Oil and Cake Co., Ltd. (1916) 1 A.C. 311 : 85 L.J.K.B. 160 : 114 L.T. 94, 21 Com. Cas. 320 : 60 S.J. 74 : 32 T.L.R. 115 as deciding that the question of what the contract is and the terms thereof are matters to be derided by the arbitrators who have already decided adversely to the applicant.

4. With regard to the question of the failure to stay the suit invalidating the arbitration, this point has already been decided by Mr. Justice Rankin adversely to the applicant and I do not think that it is open to the applicant to re open it in this Court. As to the second question, although Mr. Justice Rinkin expressed the opinion that the arbitrators could not decide finally with regard to the interpolation, it seems to me that this was an expression of opinion rather than a decision and that I am bound to decide this point. Moreover, I am told that Mr. Justice Chaudhuri expressed a contrary opinion although he, too, did not decide this point. By the terms of the contract it was provided (Term 13) that any dispute whatsoever arising on or out of the Advice Note should be referred to arbitration under the Rules of the Bengal Chamber of Commerce, for the time being, for decision and that such decision should be accepted as final and binding on both parties to the Advise Note. Now, as I read the decision in Produce Brokers Co. Ltd. v. Olympia Oil and Cake Co. Ltd. (1916) 1 A.C. 311 : 85 L.J.K.B. 160 : 114 L.T. 94, 21 Com. Cas. 320 : 60 S.J. 74 : 32 T.L.R. 115 it is a decision that, under a submission to refer all disputes arising out of a contract, which are the same words as in the Advice Note before me, the arbitrators have authority to decide what are the terms of the contract. This being so, it is difficult to escape from the conclusion that they have authority to decide whether a particular term was included in the contract at the time it was made, I suppose that, strictly speaking, the decision referred to above is not binding on me although it would, of course, demand my respectful consideration but, if I may say so, I respectfully agree with it and I think it would be a pity to be compelled to hold that, where business men have agreed that an Arbitration Tribunal shall decide any dispute arising on or out of the Advice Note in suit, it is not competent for them to decide whether or not a particular term was included in the contract when it was made. I do not think that I am forced to any such conclusion and I accordingly hold that it was competent for the arbitrators under the terms of the submission to decide whether or not this particular term was in the contract as originally made. With regard to Mr. Chaudhuri's argument that the question goes to the root of the contrast itself and raises the question whether in fact there was any contract at all under which there could be a submission there seems to me to be a difference between a dispute which raises the question whether in fact X entered into a contract at all or a question whether

X. was induced to enter into a contrast by fraud and a question cash as the present whether a contract contained a particular term at the time it was made. In the result, the application fails and must be dismissed with costs.

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