1950

Nov. 30.

A. M. MAIR & CO.

v.

GORDHANDASS SAGARMULL.

[SAIYID FAZL ALI, PATANJALI SASTRI and MEHR CHAND MAHAJAN JJ.]

Arbitration—Contract by broker for sale of goods by "sold" and "bought" notes—Arbitration clause—Seller denying right of broker to enforce arbitration clause—Jurisdiction of arbitrators—Validity of award—Construction of contract.

The appellants, a firm of brokers, entered into a contract for the sale and purchase of a quantity of jute under a "sold note" addressed to the respondents which they signed as "A & Co., brokers" and a "bought note" of the same date and for the same quantity of jute addressed to a third person in which also they signed as "A & Co., brokers". The "sold note" contained the usual arbitration clause under which "all matters, questions, disputes, differences and/or claims, arising out of and/or concerning, and/or in connection and/or in consequence of, or relating to, the contract.....shall be referred to the arbitration of the Bengal Chamber of Commerce." A dispute having arisen with regard to a matter which admittedly arose out of the contract evidenced by the sold note, the appellants referred the dispute for arbitration. The respondents raised before the arbitrators the further contention that as the appellants were only brokers they were not entitled to refer the matter to arbitration. The arbitrators made an award in favour of the appellants. The respondents made an application to the High Court under the Indian Arbitration Act for setting aside the award:

Held that, assuming that it was open to the respondents to raise this objection at that stage, inasmuch as this further dispute

was also one which turned on the true interpretation of the contract and the respondents must have recourse to the contract to establish their claim, this was also a dispute arising out of or concerning the contract and as such fell within the arbitration clause, and the award could not be set aside under the Indian Arbitration Act, 1940, on the ground that it was beyond jurisdiction and void.

Heyman v. *Darwins Ltd.* ([1942] A.C. 356) referred to.

APPELLATE JURISDICTION: Civil Appeal No. XLII of 1950.

Appeal from the judgment of the Calcutta High Court (Harries C.J. and Chakravarthi J.) in Appeal from Original Order No. 78 of 1948.

N. C. Chatterjee (*B. Sen*, with him), for the appellants.

A. N. Grover, for the respondents.

1950. November 30. The judgment of Fazl Ali and Patanjali Sastri JJ. was delivered by

Fazl Ali J.

FAZL ALI J.—This is an appeal from a judgment of a Bench of the High Court of Judicature at Calcutta in West Bengal, reversing the decision of a single Judge of that Court, who had refused to set aside an award given by the arbitration tribunal of the Bengal Chamber of Commerce on a submission made by the respondents. The facts of the case are as follows.

On the 25th January, 1946, the appellants entered into a contract with the respondents for the sale of 5,000 maunds of jute, which was evidenced by a "sold note" (Exhibit A), which is in the form of a letter addressed to the respondents, commencing with these words: "We have this day sold by your order and for your account to the undersigned, etc." The word "undersigned" admittedly refers to the appellants, and, at the end of the contract, below their signature, the word "brokers" is written. On the same day, a "bought note" (Exhibit B) was addressed by the appellants to the Bengal Jute Mill Company, with the following statement: "We have this day bought by your order and for your account from the undersigned,

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etc." In this note also, the word "undersigned" refers to the appellants, and, underneath their signature, the word "brokers" appears, as in the "sold note." There are various provisions in the sold note, relating to delivery of jute, non-delivery of documents, non-acceptance of documents, claims, etc., but the most material provisions are to be found in paragraphs 10 and 11. Paragraph 10 provides that the sellers may in certain cases be granted an extension of time for delivering the jute for a period not exceeding thirty days from the due date free of all penalties, and if the contract is not implemented within the extended period, the buyers would be entitled to several options, one of them being to cancel the contract and charge the sellers the difference between the contract rate and the market rate on the day on which the option is declared. In the same paragraph, there is another provision to the following effect :—

"Sellers shall notify Buyers that goods will or will not be shipped within such extended period referred to in (a) and in the case of sellers intimating that they will be unable to ship within the extended time Buyers shall exercise their option within 5 working days of receiving notice and notify Sellers. In the absence of any such notice from Sellers it shall be deemed that the goods have not been shipped and Buyers shall exercise their option within 5 working days after expiration of extended date and notify Sellers."

The 11th paragraph provides among other things that "all matters, questions, disputes, differences and/or claims arising out of and/or concerning and/or in connection and/or in consequence of or relating to this Contract whether or not obligations of either or both parties under this contract be subsisting at the time of such disputes and whether or not this contract has been terminated or purported to be terminated or completed shall be referred to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted."

It is common ground that the respondents delivered 2,256 maunds of jute under the contract, but the balance of 2,744 maunds could not be delivered within the stipulated period, and, by mutual agreement, time was extended up to the 30th June, 1946. On the 2nd July, 1946, the respondents addressed a letter to the appellants stating that the balance of jute could not be despatched owing to lack of wagons, and "extension" was requested for a period of one month. In reply to this letter, which was received by the appellants on or about the 3rd July, 1946, time was extended till the 31st July, 1946. On the same day on which the reply was received by the respondents, *i.e.*, on the 9th July, 1946, they addressed a letter to the appellants pointing out that the extension of time had not been intimated within the 5th working day as provided in the contract and therefore the contract was automatically cancelled. After this letter, some further correspondence followed between the two parties, and finally a bill of difference amounting to Rs. 4,116 was submitted by the appellants to the respondents, who, in their turn, denied their liability to pay the sum. The appellants thereupon claimed arbitration under clause 11 of the sold note and submitted the dispute between them and the respondents to the Bengal Chamber of Commerce. On the 6th February, 1947, the Tribunal of Arbitration made an award to the effect that the due date of contract had been extended by mutual agreement up to the 31st July, 1946, and accordingly the respondents should pay to the appellants a sum of Rs. 4,116 together with interest at the rate of 4% per annum from the 10th August, 1946, until the date of the award. A sum of Rs. 210 was also held to be payable by the respondents on account of costs. Nearly a year later, on the 19th February, 1949, a petition was presented by the respondents under the Indian Arbitration Act, 1940, to the High Court at Calcutta, in its ordinary original civil jurisdiction, praying *inter alia* that the award may be adjudged to be without jurisdiction and void and not binding on the respondents, and that it may be set aside. The main point raised by the

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respondents in the petition was that it was not open to the appellants to invoke the arbitration clause, as the Bengal Jute Mill Company and not the appellants were the real party to the contract and the appellants had acted as mere brokers. The appellants asserted in reply that the allegation made by the respondents in regard to there being no privity between them and the appellants was wrong. and in paragraph 16 of their affidavit they stated as follows :—

"With regard to paragraph 7 of the petition I crave reference to the said contract for its true construction and effect. I say as I have already stated that according to the custom or usage or practice of the trade the respondent is entitled to charge brokerage and also to enforce the terms of the said contract."

The case was heard by Sinha J., who dismissed the petition on the ground that the contract was directly between the respondents and the appellants. The learned Judge also observed that if the right of the appellants to enforce the contract depended upon the existence of custom it would have been necessary to take evidence and the arbitrators would have had jurisdiction to decide the question of the existence of custom.

The respondents being dissatisfied with the judgment of Sinha J., preferred an appeal, which was heard and disposed of by a Division Bench of the High Court consisting of the learned Chief Justice and Chakravarthi J. The learned Judges held that having regard to the fact that the appellants' own contention was that they had entered into the contract as brokers and were entitled to enforce its terms by reason of the usage or custom of the trade, it was not open to Sinha J. to treat them as principals, and the award was liable to be set aside on the ground that the arbitration tribunal had no jurisdiction to make an award at the instance of a person who was not a principal party to the contract. The appellants thereafter having obtained a certificate from the High Court under section 109 (c) of the Code of Civil Procedure, preferred this appeal.

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It seems to us that this appeal can be disposed of on a short ground. We have carefully read the affidavit filed on behalf of the appellants in the trial court, and we are unable to hold that their case was that they were *not* parties to the contract or that they had asked the court to proceed on the sole ground that they were entitled to enforce the contract by virtue of the custom or usage of the trade. In our opinion, the position which was taken up by them may be summed up as follows:—

(1) They did not accept the allegations made by the respondents that they were not parties to any arbitration agreement with the respondents.

(2) They asked the Court to construe the contract and its effect and asserted that they were entitled to enforce it.

(3) They also stated that they were entitled to enforce the contract according to the custom or usage of the trade.

The principal dispute raised in this case was whether the extension of time for delivery was granted within the time limited in the contract. That dispute is certainly covered by the arbitration clause. The further dispute that the brokers (appellants) were not parties to the contract in their own right as principals but entered into the contract only on behalf of the Bengal Jute Mill Company does not appear to have been raised until the matter went to the arbitrators. Assuming that at that stage it was open to the respondents to raise such an objection, after the other dispute which clearly fell within the arbitration clause was referred to the arbitrators, this further dispute is also one which turns upon the true interpretation of the contract, so that the respondents must have recourse to the contract to establish their claim that the appellants were not bound as principals while the latter say that they were. If that is the position, such a dispute, the determination of which turns on the true construction of the contract, would also seem to be a dispute, under or arising out of or concerning the contract. In a

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passage quoted in *Heyman* v. *Darwins Ltd.*(1), Lord Dunedin propounds the test thus:—"If a party has to have recourse to the contract, that dispute is a dispute under the contract". Here, the respondents must have recourse to the contract to establish their case and therefore it is a dispute falling within the arbitration clause. The error into which the learned Judges of the appellate Bench of the High Court appear to have fallen was their regarding the dispute raised by the respondent in respect of the position of the appellants under the contract as having the same consequence as a dispute as to the contract ever having been entered into.

If, therefore, we come to the conclusion that both the disputes raised by the respondents fall within the scope of the arbitration clause, then there is an end of the matter, for the arbitrators would have jurisdiction to adjudicate on the disputes, and we are not concerned with any error of law or fact committed by them or any omission on their part to consider any of the matters. In this view, it would not be for us to determine the true construction of the contract and find out whether the respondents' contention is correct or not. Once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute.

In the result, we allow this appeal, set aside the judgment of the appellate Bench of the High Court and restore the order of Sinha J. The appellants will be entitled to their costs throughout.

Mahajan J.

MAHAJAN J.—I agree with my brother Fazl Ali that this appeal be allowed with costs.

Appeal allowed.

Agent for the appellants: *P. K. Chatterjee.*

Agent for the respondents: *M. G. Poddar.*

(1) [1942] A.C. 356.