

*Privy Council Appeal No. 39 of 1918*

Donald Campbell and Company - - - - - *Appellants*

*v.*

Jeshraj Giridhari Lall - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 5TH DECEMBER, 1919.

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*Present at the Hearing :*

VISCOUNT FINLAY.

LORD PARMOOR.

SIR JOHN EDGE.

[*Delivered by* VISCOUNT FINLAY.]

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This is an appeal against the refusal of the High Court in Bengal to set aside an award. Two questions arise. (1) Whether, on the terms of the agreements between the parties, the arbitration was properly held in Calcutta, instead of being held in London as on a dispute under a contract for the sale of jute. (2) Whether the arbitrator was properly appointed as sole arbitrator under the Indian Arbitration Act.

The appellants are merchants and commission agents carrying on business in London, and the respondents are dealers in jute carrying on business in Calcutta. A document dated the 2nd June, 1914, was drawn up defining the "terms and conditions of business" between the respondents and the appellants. The respondents are described therein as the "shippers" and the appellants as the "importers," and the document deals with purchases of jute to be made by the appellants from the respondents and with agency business to be conducted by the appellants for the respondents. The fifth clause provides that all contracts for the sale or purchase of jute were to be made upon and subject to the terms and conditions as set forth in the usual London Jute Association Contract No. 3 in force for the period of shipment.

Clause 12 makes provision for arbitration in the following terms :—

“*Arbitration.*—Any dispute between the Shippers and Importers which may arise upon a contract or contracts for the sale or purchase of jute made upon or subject to the rules of the London Jute Association, as mentioned in clause 5 hereof, shall be decided by arbitration according to the rules of the London Jute Association. Any other dispute between the Shippers and Importers which may arise out of or in connection with this Agreement shall be referred to arbitration in Calcutta in the usual way under the provisions of the Indian Arbitration Act before two arbitrators and their umpire.”

The main question in dispute on this appeal is whether the present is a case which fell within the former or within the latter of these provisions for arbitration.

On the 8th July, 1914, the appellants and the respondents entered into a contract of that date for the purchase by the appellants from the respondents, on the terms of the London Jute Association Contract No. 3, of 250 bales of jute for shipment in July to Hamburg, at the price of £25 per ton c.i.f., “any dispute arising out of this contract to be settled by arbitration in London as soon as it may arise.” There were eight other contracts in the same form. The terms of the London Jute Association Contract No. 3 referred to in these contracts provided in paragraph 6 (d) as follows :—

“The contract to be considered cancelled for any portion not arriving, owing to loss of vessel or other unavoidable causes, but to be valid for any portion that may be shipped or transhipped on seller’s account and arrive by any other vessel.”

and in paragraph 13 as follows :—

“(a) Any dispute whatever arising out of, or in relation to, this contract or its construction or fulfilment, shall be referred to arbitration in London in accordance with the Bye-Laws of the London Jute Association.”

The shipments under these nine contracts between the appellants and the respondents were made, as to 774 bales, by the SS. “Rappenfels,” and as to 681 bales, by the SS. “Westmark,” both German vessels. These vessels sailed from Calcutta on the 1st August, 1914, and drafts were drawn by the respondents upon the appellants for the price of the jute, and the documents were handed to the Eastern Bank, Calcutta. War broke out between England and Germany on the 4th August. The SS. “Rappenfels” was captured by a British cruiser and brought into Calcutta, where the jute was sold by the authorities. The SS. “Westmark” put into a Dutch port in the East Indies. The present case is concerned only with the jute which was on board the SS. “Rappenfels.”

On the 2nd September, 1914, the appellants wrote to the respondents a letter with reference to the SS. “Rappenfels” and other German steamers, in which they said :—

“According to the King’s Proclamation and the English law, it would appear that buyers are not bound to accept any declaration of jute by these steamers on the grounds that to do so would mean dealing with the King’s enemies, and also that it is impossible to tender jute by a ship which has

already been captured, and also that such portion of the contract is cancelled under clause 6 (d) of the contract."

"Under these circumstances it appears to us that the only possible course is for us to deal with all the parcels in question as being consignments on your behalf, but, of course, at the same time we shall use our very utmost endeavours to place whatever is possible against the various contracts open and do all we can to get buyers to accept."

The appellants declined to accept the drafts for the price of the jute by the SS. "Rappenfels," and a long correspondence ensued. On the 21st January, 1915, the respondents wrote informing the appellants that the goods had been released by order of the Prize Court in favour of the Eastern Bank, Limited, who held the documents, and that the goods were about to be landed, and added :—

"The Eastern Bank inform us that they propose to exercise their right of sale and recoup themselves the amount of their advances and expenses, etc. We have advised the insurance companies concerned and also take this opportunity of keeping you informed likewise."

On the 4th March, 1915, the respondents wrote informing the appellants of the sale of the goods shipped by the SS. "Rappenfels," and on the 22nd April, 1915, the respondents again wrote to the appellants informing them of the price fetched, Rs. 21,731. In acknowledging this last letter, on the 21st May, 1915, the appellants wrote to the respondents :—

"*Rappenfels.*—We thank you for your advices, but why do you pass this information on to us? Please explain. It would interest us to hear what attitude you intend taking up in this matter."

The jute in the SS. "Rappenfels" was insured against war risks. The insurers at first did not admit their liability, but in March, 1916, they expressed their willingness to pay. About the same time the appellants expressed their willingness to meet the drafts upon them in respect of the price. The insurance moneys to be received would considerably exceed the amount of these drafts.

On the 14th April, 1916, the respondents wrote to the appellants the following letter, which is of considerable importance in the case :—

"*Re 'Rappenfels.'*"

"We have all along kept you informed of the proceedings on this side, and that we filed the suits against the insurance companies for recovery of the total amounts of the policies. We are now informed by our solicitors that the insurance companies are admitting liability to pay these amounts. We are also informed by our solicitors that you have made a claim against Lloyds to be paid the total amount of the insurance in respect of the goods insured by us, and covered by the documents which you obtained from the Bank. It is curious that you have not informed us of this claim, as you can only make this claim for and on our behalf and as our agents.

"It will be as well to recall to your memory that these very drafts were refused by you and you cancelled the contracts, but apart from that these contracts became void by operation of law inasmuch as they became impossible of performance. You were, however, at pains to point out to us, in your letter to us of the 2nd September, 1914, various reasons why

the documents were not accepted and why the contracts were cancelled, and you stated therein that 'under the circumstances it appears to us that the only possible course is for us to deal with all the parcels in question as being consignments on your behalf,' and a postscript to the same letter, 'you may rely upon my watching your interests to the utmost.' Again, in your letter to us of the 18th September, 1914, you were kind enough to advise us what course to pursue, viz., 'The course for you to pursue in both these cases is to give Lloyds' underwriters notice of abandonment and to claim from them the amount of the insurance. We require, however, your authority before we can do so,' etc.

"Here you clearly understood the position, and your agency in this matter has not altered since then, nor have we given you authority to claim from Lloyds. It is true that under your credit to the Bank you paid the amount of the drafts to the Bank and are entitled to be indemnified by us to that extent, but you are not entitled to appropriate the balance between the amounts of the drafts and the full insurance value, which, from your silence in the matter, we can only presume you are attempting to do.

"The fact that you hold the documents which enable you to obtain payment from the insurance company does not alter the existing relations between us with regard to the same.

"In the circumstances, however, we are agreeable that you draw from the Lloyds on our behalf the full amount of the insurance money in the documents in your hands, and we authorise you to pay yourselves the amounts of the relative drafts, and remit to us the balance."

In answer to this letter the appellants (through Mr. Borton) wrote, on the 8th May, 1916, refusing to recognise the claim made by the respondents, and saying that it must be submitted to arbitration. This letter went on to say that the arbitration must be held, not in Calcutta, but in London, as it fell under clause 13 (a) (the arbitration clause) incorporated with the contracts of the 8th July. To this the respondents replied by letter of the 11th May, 1916, as follows:—

"You will doubtless remember that you cancelled these contracts, and we accepted the cancellation; it is, therefore, not open to you to claim arbitration of a dispute alleged to arise under the cancelled contracts. It is therefore necessary to look and see how arbitration can be claimed, and we turn to the terms of agreement between us under which we do our business.

"You will remember that you treated these consignments as being 'consignments on your behalf,' and 'you may rely upon my watching your interest to the utmost.' It will be seen that under the terms of business agreed between us, disputes, etc., arising thereunder should be settled by arbitration, *vide* clause 12, and as there are no contracts existing between us, the same having been cancelled by you, the latter portion of the clause applies, *i.e.*, 'any other disputes between shippers and importers which may arise out of or in connection with this agreement shall be referred to arbitration in Calcutta in the usual way under the provisions of the Arbitration Act before two arbitrators and their umpire.'

"In the circumstances, therefore, we cannot accept your letter now under reply as claiming arbitration under the contracts; on the other hand, we beg to give you notice that we claim arbitration under clause 12 (latter portion) of the agreement dated the 2nd June, 1914, and we hereby appoint Mr. F. M. Leslie, of Messrs. Leslie and Hinds, Calcutta, our arbitrator. We also ask you to appoint your arbitrator immediately, and give you notice that, unless we receive the name of your arbitrator within seven days from date hereof, we shall proceed under the Arbitration Act."

The appellants (through Mr. Borton), in a letter of the 12th May, 1916, denied that the contracts had been cancelled, and that

the respondents were entitled to receive the insurance moneys. As regards arbitration, they insisted that it must be in London.

On the 15th May the respondents' solicitors (Messrs. Leslie and Hinds), in a letter addressed to Mr. Borton in reply to his of the 12th May, said :—

“ With regard to the other shipment, *i.e.*, SS. ‘ Rappenfels,’ our clients have clearly stated to you in their letter to you of the 11th instant, their views, and furthermore the contracts became void by operation of law, and we are instructed to state that our clients decline to be bound by the arbitration proposed by you under clause 13 (a), but, on the other hand, will proceed to arbitration as indicated in the said letter, and we would remind you that the 18th instant is the last date for you to put in the name of your arbitrator, and in default our clients will proceed *ex parte*, which kindly note.”

and again on the 26th May, 1916, Messrs. Leslie and Hinds wrote to the appellants the following letter :—

“ SS. ‘ Rappenfels.’

“ With reference to our clients' Messrs. Jeshraj Giridharilall's letter to you of the 11th May, 1916, giving you notice that they had appointed Mr. F. M. Leslie to act as their arbitrator, we are requested to inform you that, as the arbitration must now proceed *ex parte*, you not having appointed an arbitrator within the specified time, our Mr. Leslie is unwilling to act as sole arbitrator for obvious reasons. Our clients, however, have appointed Mr. H. G. Pearson, of 10, Old Post Office Street, to be their arbitrator in the place and stead of the said Mr. F. M. Leslie, which please note.”

On the 1st June, 1916, Mr. Dutt, solicitor for the appellants, wrote to Messrs. Leslie and Hinds strongly protesting against the Calcutta arbitration, and adding :—

“ If in spite of this you proceed with the Calcutta arbitration we must ask you to give us due notice of the time and place where such arbitration will be held, so that we may appear and protest against the same. We must, however, warn you once more that if your clients choose to proceed with the Calcutta arbitration they will do so at their own risk.”

Messrs. Leslie and Hinds, on the 5th June, 1916, wrote to the respondents' arbitrator, Mr. Pearson, as follows :—

“ Arbitration between Jeshraj Giridhari Lall and Messrs. Donald Campbell and Company.

“ We send you herewith our client's case for arbitration herein. We have heard from Messrs. G. N. Dutt and Company, who represent Messrs. Donald Campbell and Company, and we send you a copy of their letter to us for reference. Please inform us a date and place when you propose to sit, and give notice thereof also to Mr. Borton, Messrs. Donald Campbell and Company's representative in India.”

The “ case for arbitration ” enclosed in this letter was a lengthy document giving a history of the dispute from the point of view of the respondents. It summarised the controversy as follows :—

“ The disputes between the parties and upon which arbitration is claimed by Messrs. Jeshraj Giridharilall and Company, the shippers, [are] as follows :—

“ (a) Whether the disputes which have arisen should be dealt with (1) under the first portion of paragraph 12 of the agreement of the 2nd June, 1914, or (2) under the latter portion of the said clause.

“(b) Did Messrs. Donald Campbell and Company cancel the contracts and refuse to take up the bills on their own account ?

“(c) Did Messrs. Donald Campbell and Company agree to and act as agents of the shippers to recover the policy moneys and otherwise on their behalf ?”

and they added under a fourth head (d) certain specific questions as to amounts specified.

Mr. Pearson, the arbitrator, on the 12th June, 1916, sent notice to Messrs. Leslie and Hinds and to the appellants that he would proceed with the arbitration on the 14th June, 1916. On that day Messrs. Dutt and Company wrote to Messrs. Leslie and Hinds informing them that the appellants agreed to the respondents' contention in treating the contracts as to shipments as cancelled, and added: “It therefore follows that there are no longer any matters in dispute which need arbitration,” and on the same day they sent a copy of this letter to the arbitrator, Mr. Pearson, adding: “Under the circumstances we presume you will not proceed with your arbitration, but if you still think fit to do so, please give us a fresh notice for the same.” The arbitrator replied on the same day that the arbitration must proceed at 4.30 as arranged. Messrs. Dutt and Company wrote again on the 14th at 4.15 pressing for a postponement, and the arbitrator granted an adjournment of the arbitration proceedings, which had already begun, to the next day, the 15th, at 4.30, peremptorily.

On the 15th Messrs. Dutt and Company wrote to Messrs. Leslie and Hinds as follows:—

“*Re SS. ‘Rappenfels’ and SS. ‘Westmark.’*”

“In continuation of our letter to you of the 14th instant, in which we stated that our clients agreed to your clients' contention that the contracts were cancelled, we have now been instructed to confirm same and write to you that our clients paid for the documents and goods on your clients' account and at their risk.”

There was some correspondence as to the precise import of this letter, which is not material.

The first meeting before the arbitrator was adjourned, as already stated, from the 14th to the 15th June, and on the 15th the arbitrator sat again. Mr. Perkins, of the respondents' firm, with Mr. S. C. Mookerjee, and Mr. N. N. Dutt, solicitor, with Mr. Borton of the appellants' firm, attended before him. The following is the arbitrator's note of what took place:—

“Mr. N. N. Dutt protests against the arbitration here, on the ground of jurisdiction and construction of the agreement. Further states that there is now no matter of dispute with regard to the shipments by the ‘Rappenfels’ and ‘Westmark,’ as stated in his letter to Messrs. Leslie and Hinds, dated the 14th June, 1916. After some considerable discussion without prejudice, Mr. N. N. Dutt and Mr. Borton then withdrew. Mr. Perkins then asked that the matter should be adjourned for the present. Adjourned accordingly.”

The adjourned meeting was resumed on the 20th, Mr. Perkins and Mr. Mookerjee attending before the arbitrator on behalf

of the respondents. During the sittings a letter was received from Mr. Dutt expressing his surprise at having received a notice to attend, as at the last meeting he had stated there was no point in dispute and had left the meeting under the impression that the matter was ended. The arbitrator proceeded *ex parte* and on the 23rd June, 1916, the Award was made, which, after recitals, is in the following terms :—

“I award that the contracts between the parties hereto relating to shipments by the said SS. ‘Rappenfels’ were cancelled by Messrs. Donald Campbell and Company, and that Messrs. Donald Campbell and Company, in subsequently retiring the drafts and taking up the relative documents from the Eastern Bank, Ltd., acted and are accountable as agents to Messrs. Jeshraj Giridhari Lall both in regard thereto and in regard to any dealing with the goods or the proceeds thereof or the relative moneys recovered from the insurance companies or insurers concerned, and I award further that Messrs. Donald Campbell and Company do pay to Messrs. Jeshraj Giridhari Lall in respect of the premises the sum of Rs. 25,352.4.0, together with Rs. 250 as costs of this arbitration, making Rs. 25,602.4.0 in all.”

A Rule *nisi* to set aside the Award was obtained by the appellants on the 4th July, 1916, in the High Court (Bengal). This rule was discharged by Greaves, J. on the 13th February, 1917, and an appeal against his decision to the High Court in its Appellate Jurisdiction was dismissed on the 4th July, 1917. From this decision the present appeal has been brought.

It appears to their Lordships to be clear that Greaves, J., and the High Court were right in holding that the claim of the respondents against the appellants was not a claim arising upon a contract for the sale or purchase of jute falling to be decided by arbitration, according to the rules of the London Jute Association, under the first sentence of clause 12 of the “Terms and Conditions of Business” between the appellants and the respondents. It therefore fell under the second sentence of paragraph 12, and had to be decided by arbitration under the Indian Arbitration Act. The real dispute between the parties was as to carrying out the agency on the part of the appellants for the respondents in respect of the jute consigned by the SS. “Rappenfels.” This agency was constituted when the contract of sale was treated as at an end, and the arbitrator has rightly found that it was under this contract of agency that the parties acted. If there were any doubt as to this on the terms of the earlier correspondence, it is completely removed by the letters written on behalf of the appellants on the 14th and 15th June, 1916, to the respondents’ solicitors, Messrs. Leslie and Hinds. In the former of these letters the appellants state that they agree to the respondents’ contention in treating the contracts with regard to shipments as cancelled, and in the latter they state that the appellants paid for the documents and goods on the respondents’ account and at their risk. The arbitrator was right in finding that the contract of sale had been cancelled, and that the appellants thereafter acted in the matter as agents for the respondents and were accountable to them. The arbitration

was therefore rightly held in Calcutta, and the arbitrator had jurisdiction to make the award.

There remains for consideration the question whether Mr. Pearson was rightly appointed sole arbitrator.

The mode of appointment is prescribed by the Indian Arbitration Act, 1899, section 9, which is in the following terms :—

“ Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed therein,

“ (a) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies or is removed, the party who appointed him may appoint a new arbitrator in his place ;

“ (b) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent :

“ Provided that the Court may set aside any appointment made in pursuance of clause (b) of this section.”

The respondents had appointed as their arbitrator Mr. Leslie, their solicitor. Mr. Leslie very properly expressed his unwillingness to act as sole arbitrator on his clients' claim. It appears to their Lordships that Mr. Leslie never was appointed sole arbitrator. Such an appointment could have been made only after a written notice under head (b) of the section. There is no trace of any such notice having been given, and it is obvious that all idea of appointing Mr. Leslie sole arbitrator was abandoned in consequence of his unwillingness so to act.

The respondents' letter of the 26th May, 1916, states that they had appointed Mr. Pearson to be their arbitrator in the place of Mr. Leslie, but in order that Mr. Pearson should become sole arbitrator there would be necessary a written notice to the appellants to appoint their arbitrator, in which case, on their default for seven days, the respondents might have appointed Mr. Pearson sole arbitrator. No such notice was ever given, but Mr. Pearson, at the request of the respondents, acted as sole arbitrator. It was not necessary that the appointment as sole arbitrator should be in writing, but the failure to give the notice in writing prescribed by section 9 (b) would have been fatal to the authority of Mr. Pearson as sole arbitrator but for the fact that any objection on this head was waived by the appellants. They, of course, knew that no notice in writing to appoint their arbitrator to act along with Mr. Pearson had been sent to them. They knew that he was proceeding as sole arbitrator. They objected to his proceeding with the arbitration on the ground of jurisdiction and construction of the agreement, and on the ground that there was now no matter in dispute with regard to the shipments. Not a word was said by them as to



any defect in his appointment as arbitrator. All the facts on this head were within their knowledge, and if they had raised the objection as to the failure to give the notice in writing it could have been cured in a week. The appellants rested their case on their contentions as to the invalidity of any arbitration in Calcutta, and they cannot now be permitted to rely on a defect in procedure which could have been remedied at once if they had raised the point.

For these reasons their Lordships are of opinion that the conclusion arrived at in the Court below was right, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

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DONALD CAMPBELL AND COMPANY

v.

JESHRAJ GIRIDHARI LALL.

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DELIVERED BY VISCOUNT FINLAY.

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