Louis Dreyfus and Co. Vs. R. A. Arunachala Ayya

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Court : Privy Council

Decided On : Jul-23-1931

Judge : LORDS TOMLIN, LORD RUSSELL OF KILLOWEN & SIR GEORGE LOWNDES

Appeal No. : Privy Council Appeal No. 65 of 1930 (From Madras)

Appellant : Louis Dreyfus and Co.

Respondent : R. A. Arunachala Ayya

Advocate for Pet/Ap. : Thos. Inskip and F. Vanden Berg, for Appellants; A.M. Dunne and H. Douglas, for Respondent. Solicitors for Appellant, Burton, Yeates and Hart; Solicitors for Respondent, Hy. S.L. Polak.

Judgement :

Lord Tomlin:

The question in dispute in this appeal is whether the award of an umpire dated 19th February 1923 should be set aside or not. Waller, J., sitting on the original side of the High Court of Judicature at Madras on 6th May 1926, dismissed an application of the present respondent to set it aside. By a decree dated 12th September 1927 of the High Court (appellate jurisdiction) the decision of Waller, J., was reversed and the award was set aside. The appellants thereupon appealed to His Majesty in Council to have the judgment of Waller, J., restored.

The appellants are seed and grain merchants carrying on business in Karachi. On 25th April 1918 an agreement in writing was entered into between the appellants of the first part and R.K. Rajagopala Ayyar (since deceased) and the respondent of the second part. At that time Rajagopala and the respondent were carrying on business together in partnership as Messrs. R. K. Rajagopala Ayyar and Brother, and Rajagopala was managing the affairs of the firm.

The agreement provided for the parties of the second part acting as dubashes to the appellants. It contained inter alia the following clauses :

1. The merchants shall be at liberty to make offers for the purchase from the dubashes of groundnuts, castor-seed and any other article required by them for export from Madras, Pondicherry, Cuddalore and Negapatam (hereinafter referred to as "the said merchandise"), and the dubashes shall be at liberty to accept such offers, provided that at the time of any such acceptance the quantity of the said merchandise required by the merchants shall be under offer to the dubashes, as to which the dubashes shall furnish, if required, evidence satisfactory to the merchants. Failure to

furnish such evidence on demand shall entitle the merchants to cancel the contract with the dubashes for the purchase of the said merchandise.

2. Every contract resulting from an acceptance by the dubashes of an offer made by the merchants under Cl. 1 hereof shall be a contract for the delivery by the dubashes of the said merchandise free on board at Madras or Pondicherry or Cuddalore or Negapatam, as specified at the time by the merchants, and shall be reduced into writing, and signed by the dabashes, and shall provide that the analysis and quality of the said merchandise, the subject of the said contract, shall correspond to the analysis and quality required and stipulated by the merchants. Failure by the dubashes to sign on demand such written contract as aforesaid shall entitle the merchants to cancel the contract.

Clause 12 of the agreement provided for a deposit of Rs. 20,000 being made by the dubashes with the appellants, and under Cl. 14 the agreement was to remain in force for one year from 25th April 1918, unless previously determined under a power thereby conferred on the appellants. The agreement also contained an arbitration clause in the following terms:

15. If any question or difference shall arise between the parties hereto touching these presents or the constructions thereof or the rights, duties or obligations of any person hereunder, or as to any other matter in anywise arising out of or connected with the subject-matter of these presents, the same shall be referred to two arbitrators, being European merchants, and members of the Madras Chamber of Commerce, one to be nominated by each party to the reference. If either party shall refuse or neglect to appoint an arbitrator within seven days after the one party shall have appointed an arbitrator and served a written notice upon the other party requiring him to appoint an arbitrator, then upon such failure the party making the request and having himself appointed an arbitrator, may appoint another arbitrator to act on behalf of the party so failing to appoint, and the arbitrator so appointed may proceed and act in all respects as if he had been appointed by the person failing to make such appointment. The arbitrators shall, within three days after their appointment and before entering upon the business of the said reference, appoint an umpire, in writing, to whom the matters in dispute shall be referred if the arbitrators disagree, and if they fail to appoint an umpire within the said period, then the Chairman or the Acting Chairman for the time being of the Madras Chamber of Commerce shall appoint the said umpire. The arbitrators and umpire acting under these presents shall have all the powers conferred by the Arbitration Act, 1899 or any statutory modification thereof for the time being in force, and these presents shall be deemed to be a submission to arbitration within the provisions of the said Act.

The deposit of twenty thousand rupees referred to in Cl. 12 of the agreement was duly paid, and under the terms of the agreement a number of contracts were made between the appellants and the dubashes, including four contracts in August 1918 for the sale by the dubashes to the appellants of goods for delivery at various dates between September 1918, and February 1919. Each of these four contracts contained the words "Conditions as per agreement with you" (i.e., the appellants) dated 25th April 1918. In their Lordships' judgment, the combined effect of the agreement of 25th April 1918; and the four contracts was to import into each of the four contracts a provision for arbitration in the terms of Cl. 15 of the agreement of 25th April 1918.

Shortly after the contracts of August had been made differences arose between the

respondent and his partner Rajagopala, and the firm found itself unable to deliver punctually the goods agreed to be sold under the several contracts entered into between the firm and the appellants. Accordingly on 25th September 1918, the respondent wrote a letter to the appellants suggesting modifications of the subsisting arrangements, with the result that on 3rd November 1918, a document was signed by the appellants, the respondent, and certain sureties and one Sunderesa. This document was not signed by Rajagopala Ayyar, who was ill and died a day or two later. This document was in the following terms :

1. The difference in price due to the firm for September contracts as per their two bills to Messrs. R. K. R. Rs. 20 to be paid in cash.

2. All contracts outstanding to be extended up to February 1910.

3. Messrs. C. K. Narayana Ayyar and Sons and S. Kuppuswami Ayyar stand sureties for the due fulfilment of all outstanding contracts, each agreeing to deliver one-half of the above at the respective contracted rules at the aforesaid time.

4. The contract for 500 tons at 38 due October to be cancelled by the firm.

5. The dubashy to go in future under the name of "Arunachala Ayya and Sunderesa Ayyar."

6. All sales made to the firm to be confirmed especially by Mr. Sunderesa Ayyar.

7. An amount of Rs. 50,000 to be deposited with the firm by the aforesaid dubashes as per the new agreement.

In their Lordships' opinion, the effect of this document is plain and may be stated as follows:

Certain moneys due to the appellants under subsisting contracts were to be paid in cash. One outstanding contract, not being one of the four August contracts, was to be cancelled. Time for delivery under all outstanding contracts, including the four August contracts, was to be extended to February 1919. Two sureties were to guarantee the performance of all outstanding contracts. Sunderesa Ayyar was to take Rajagopala's place as one of the dubashes in respect of future contracts, and the deposit was to be increased to Rs. 50,000. There was nothing in this agreement to free the firm of B. K. Rajagopala Ayyar and Brother or the respondent from the submissions to arbitration contained in the four August contracts. These contracts remained unaffected except that the time for delivery was extended.

The deliveries under the four August contracts were not in fact made within the extended time, and on 8th March 1919, the appellants wrote to the dubashes firm and to the respondent calling attention to the default, claiming damages, and asking to have the matter settled by arbitration. The respondent in his answer on 14th November 1919 did not repudiate the August contracts or suggest that there was no submission to arbitration, but took the line that there had been no default.

Apparently the appellants did nothing farther until 14th June 1920 when they again wrote to Messrs. R. K. Rajogopala Ayyar and Brother and the respondent a letter claiming Rs. 1,34,053 9-6 by way of damages in respect of the four August contracts,

and stating that, failing a settlement, they should refer the matter to arbitration under Cl. 15 of the agreement of 25th April 1919.

On 18th September 1920 no arbitrator having been nominated on the respondent's side, the appellants appointed two arbitrators. On 26th January 1921 the arbitrators affected to enlarge the time for making their award until 28th February 1921. This extension was undoubtedly made too late, as the original time for making the award had already expired. The arbitrators disagreed and appointed Mr. Chettle to be umpire. Mr. Chettle made his award on 21st February 1921, and awarded that the respondent and his firm should pay the appellants Rs. 134,053-9-6, with interest at 6 per cent from 28th February 1919, and costs. Neither the respondent nor his firm was represented in the arbitration or took any part in the proceedings.

On 10th August 1921, a motion was launched by the respondent to have the award of Mr. Chettle set aside. In his affidavit in support of the motion the respondent allotted among other reasons for setting the award aside that the effect of the document of 3rd November 1918, which he said was a concluded agreement, was to override the agreement of 25th April 1918, and thus to eliminate the submission to arbitration contained in that document. He did not repudiate the agreement of 25th April 1918, or contend that he was not bound by the August contracts.

On 6th September 1921, Phillips, J., set the award aside. The learned Judge held that the award was bad because the affected extension of time for making the award was ineffectual and because the umpire did not send the respondent any notice of his proceedings. While expressing his inclination to the view that the document of 3rd November 1918 did not wholly supersede the agreement of 25th April 1918 he held that it was not necessary for him to decide this point.

The appellants appealed, and on 20th July 1922, Sir Walter Sehwabe, C. J., and Wallace, J., made an order setting aside the award, but remitting the matter back to the umpire. The learned appellate Judges held that the award was bad on the grounds on which Phillips, J., had based himself, but they also held that the document of 3rd November 1918 had not wholly superseded the agreement of 25th April 1918. It is plain that they remitted the matter upon the basis of a determination that there was in existence a submission to arbitration binding upon the respondent. Subsequently the respondent appealed to His Majesty in Council against the order of 20th July 1922, but this appeal was on 8th December 1921, dismissed because the respondent did not appear to support it.

In the meantime, the respondent, by way of counterblast to the arbitration, launched a suit against the appellants for damages under the document of 3rd November 1918, in respect of transactions subsequent to that agreement. This suit was dismissed on 12th April 1923. The trial Judge, Mr. Coutts-Trotter, in the course of his judgment expressed the view that the document of 3rd November 1918, superseded the agreement of 25th April 1918. The respondent appealed, but without success.

After the order of 20th July 1922, had been made it was found that Mr. Chettle was no longer available to act as umpire, and ultimately by an order of the Court Mr. Rae was appointed umpire in his place. The proceedings under the remit pursuant to the order of 20th July 1922, were therefore held before Mr. Rae and the respondent was represented thereat. On 19th February 1923, Mr. Rae awarded that Messrs. R. K. Rajagopala Ayyar and Brother (of which firm the respondent was the sole surviving

partner) should pay to the appellants the sum of Rs. 1,34,053-9-6, with interest thereon at 6 percent from 28th February 1919, to payment and also certain costs. The award was therefore identical in effect with that made by Mr. Chettle. Mr. Rae prefaced his award by stating that it was made

" after taking independent legal opinion having decided that the alleged agreement dated 3rd November 1918 at no time constituted a concluded contract and did not therefore override the agreement of 25th April 1918."

As will hereafter appear, this preface formed the basis for an attack subsequently made upon the validity of Mr. Rae's award. On 23rd February 1923, the respondent gave notice of motion for an order that Mr. Rae's award be declared ultra vires, illegal and not binding upon him, and that the award be set aside. This is the application which has led to the present appeal before their Lordships' Board. In his affidavit in support of his motion the respondent for the first time set up, amongst other grounds for attacking the award, that the agreement of 25th April 1918, was made by his partner without his authority and that he was not bound by it. He also contended that the award was bad because the umpire had refused to state a special case and had taken legal advice without notice to him.

On 30th April 1925, over two years later, the motion to set aside Mr. Rae's award was heard by Waller, J., who gave his final judgment on 6th May 1926. The learned Judge dismissed the motion with costs holding, amongst other things, that the agreement of 25th April 1918 was operative and was binding on the respondent, that the umpire had a discretion as to stating a special case, and that he did not do wrong in taking independent legal advice. On 19th July 1926, the respondent gave notice of appeal. On 12th September 1927, the appellate side of the High Court allowed the appeal and set aside the award.

The Court held inter alia (1) that the decision of Schwabe, C. J., and Wallace, J., did not determine the question whether there was an agreement to submit to arbitration binding on the respondent; (2) that there was in fact no agreement to submit to arbitration binding on the respondent either because, he was not bound by the agreement of 25th April 1918, or because if he was so bound such agreement was superseded by the document of 3rd November 1918, which contained no arbitration clause ; (3) that the umpire was not guilty of misconduct in refusing a special case, and (4) that he had been guilty of misconduct by taking independent legal advice.

The appellants now appeal to His Majesty in Council against the decision of 12th September 1927, contending inter alia that the question of the umpire's jurisdiction was res judicata between the parties having regard to the decision of Schwabe, C. J., and Wallace, J., of 20th July 1922, and the subsequent dismissal of the appeal from that decision to His Majesty in Council, and that the umpire was not guilty of misconduct.

The respondent on his part contends that he was not bound by the submission in the agreement of 25th April 1918, and that, if he was, that agreement was superseded by the document of 3rd November 1918, that there is no res judicata, and that anyhow the award is bad because the umpire took independent advice after refusing to state a special case. It is remarkable that throughout this lengthy litigation no Court has in terms called attention to the fact that each of the four August contracts by direct reference to the agreement of 25th April 1913, embodied the arbitration clause and

that the respondent never repudiated such contracts or suggested that he was not bound by them.

Their Lordships are of opinion that the respondent was in respect of each of the four August contracts bound by a submission to arbitration in the terms of Cl. 15 of the agreement of 25th April 1918, whether or not Rajagopala had originally authority to enter into that agreement so as to bind his partner.

In any case, their Lordships are of opinion that the question of the umpire's jurisdiction is res judicata between the parties. Under the order of 20th July 1922, the appeal from which to His Majesty in Council was dismissed, the matter was remitted to the umpire. This could have been done only upon the footing that the respondent was bound by a submission to arbitration. In their Lordships' judgment, the Court did in fact determine that the respondent was so bound, whatever may have been the reasons upon which that determination was based. The award must therefore stand unless it can be shown that the umpire was guilty of misconduct.

The precise length to which an arbitrator may go in seeking outside advice upon matters of law may be difficult to prescribe in general terms. It is less difficult in a particular case to determine whether or not an arbitrator has gone further than is justifiable. Here unless the language of the award is itself sufficient to fix the umpire with misconduct, the charge against him must fail.

In their Lordships' judgment, the language of the award does no more than indicate that the umpire took advice upon; the general rules of law bearing upon the case and does not mean that he left to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon. The case against the umpire in this respect is not in their Lordships' view, strengthened: because the umpire in the exercise of his discretion refused to state a special case. Their Lordships are therefore of opinion that the award is good and ought to stand.

Their Lordships cannot however part with this case without calling attention to the remarkable and unexplained delay which has occurred at various stages of its course. Lord Buckmaster, in delivering the judgment of their Lordships' Beard in Banga Chandra Dhur Biswas v. Jagat Kishore Choudhuri (1) indicated that in cases of unexplained delay costs might be refused.

Although in the present case their Lordships do not think fit to refuse costs to the appellants, they desire to re-affirm the views expressed by Lord Buckmaster in order that the penalty liable to be incurred by unexplained delay may be fully understood. For the reasons which have been indicated their Lordships will humbly advise His Majesty that the appeal should be allowed and that the decree of the appellate side of the High Court; of 12th September 1927, should be set aside and the order of 6th May 1926, should be restored. The appellants' costs here and on the appellate side of the High Court must be borne by the respondent.

Appeal allowed.