Ojamshee Purushottamdas and Co. Vs Abdul Rahim Oosman and Co.

Court: Calcutta High Court

Date of Decision: March 21, 1928

Citation: AIR 1929 Cal 705

Hon'ble Judges: Rankin, C.J; Mukerji, J

Bench: Full Bench

Judgement

Rankin, C.J.
In this case the plaintiff firm brought a suit on 5th April 1921 to have it declared that seven different awards were not binding

upon the plaintiff firm. It appears that by seven contracts all dated 10th November 1920 the defendant firm sold to the plaintiff firm a quantity of

187 1/2 tons of white Java sugar at Rs. 26 per maund to be shipped by S.S. ""Rajput"" on certain terms particularized in the contracts. The

contracts contain an arbitration clause being Clause 15 upon the terms of which, if any difference should arise regarding the contract or any matter

connected therewith, it was to be optional 1929 C/89 & 90 to the sellers to require buyers to submit the matter in difference to arbitration in one

or other of the two ways. The way which matters for the purposes of the present case is:

the arbitration of two European merchants in Calcutta (one to be appointed by the sellers and one by the buyers).

2. There is a provision that if the buyers should fail to appoint an arbitrator to join in such arbitration within three days after notice in writing by

sellers so requiring them the arbitration shall at the option of the sellers proceed ex parte and the award by the arbitrator shall be binding upon the

buyers.

3. Now the S. S. Rajput arrived with 1,000 tons of this Java sugar consigned to the sellers. The arrival notice was given on 16th December 1920.

At that time the market had gone against the buyers and the price had fallen. Prom 16th December onwards the price continued to sag. The buyers

did not take delivery. Accordingly the arrival notice of 16th December 1920 was followed by a letter of 28th December requiring the plaintiffs to

arrange at once to pay for and to take delivery of the goods. Again on 3rd January a similar demand was made. On 5th January there was a

solicitor"s letter which informed the plaintiffs that unless they paid the defendants" bills for the price of the "goods including interest in exchange for

the delivery order, the defendants would resell the goods on the following day namely on 6th. On the following day the goods were sold by the

defendants against the plaintiffs and as the plaintiffs professed by their letter of 7th January that they had been ready and willing to pay for and to

take delivery of goods and disputed their liability to pay damages on the basis of resale as claimed by the defendants, Messrs. Pugh and Co. acting

on behalf of the defendants wrote to the plaintiffs a letter on 10th January 1921 which is as follows:

Our clients wrote to you together with their bill for the above sum and demanded payment but you have so far failed and neglected to do so. Our

clients now want to refer the matter to arbitration in terms of the contract. Our clients appoint Mr. A. Duggan of Messrs. Shaw Wallace and Co.,

to be their arbitrator. ""We have to call upon you to appoint your arbitrator within three days failing which our client will appoint the said Mr.

Duggan as the sole arbitrator in terms of of the contract.

4. To that letter a reply was sent by the plaintiffs" solicitors on 12th. It restated the plaintiffs" refusal to pay the sum claimed as damages and went

on to say:

As regards your client"s proposal for arbitration our clients contend that there is no valid agreement for submission to arbitration and your clients

cannot submit their alleged claim to arbitration. However, without prejudice to our clients" contention they will nominate an arbitrator in the course

of this week.

5. On 13th January Messrs. Pugh and Co. continued the controversy and claimed that

under Clause 15 of the contract a valid and proper agreement between the parties has been made for reference of any dispute under the contract

to arbitration. Should your clients fail to nominate their arbitrator duly our clients shall appoint their arbitrator as the sole arbitrator.

6. On 14th January Mr. Duggan who had been appointed by the defendants wrote to inform the plaintiffs" solicitors that he had been appointed

arbitrator on behalf of the defendants and asked for the name of the plaintiff"s arbitrator by Wednesday morning the 16th, failing which he

intimated that he would proceed with the arbitration ex parte. On 17th January Mr. Duggan was written to by the plaintiffs" solicitors in the

following terms:

We have to point out to you that you are not eligible to become an arbitrator inasmuch as you are not a merchant. It is not therefore necessary on

our clients" part to nominate an arbitrator at this stage. If in spite of this you proceed with the arbitration ex parte you will do so at your risk and

our clients will not be bound by your acts. This letter is written of course without prejudice to our clients'' contention that there has been no valid

agreement for arbitration.

7. A similar contention was addressed on the same day to the defendants'' solicitors. On 18th the defendants'' solicitors intimated that the

defendants had appointed Mr. Duggan as .the sole arbitrator and requested him to proceed with the arbitration.

8. The question which I propose to deal with first is whether or not the plaintiffs'' contention is correct that Mr. Duggan was not eligible under

Clause 15 of the contract to act as an arbitrator. The phrase to be a construed is an extremely short one, namely, the arbitration of two European

merchants of Calcutta."" It is clear to me that if Mr. Duggan is not in the ordinary meaning of the term, a European merchant of Calcutta, the awards

must be set aside. The objection was taken at the earliest moment and the plaintiffs took no part in the arbitration proceedings. They brought first

of all an application under the Arbitration Act to set those proceedings aside, and on it being ruled that it was necessary to proceed by a suit, they

brought this present suit taking their stand on this ground amongst certain others which I shall mention hereafter. There can be no doubt that Mr.

Duggan is a European and there is no doubt that he is living in Calcutta and is in business in Calcutta. The question is whether he is a merchant

within the meaning of that expression in these contracts. As regards that question we have the evidence of Mr. Duggan himself. He was called as a

witness on behalf of the plaintiffs and the answers upon this point commenced with the question No. 20. These answers are given in examination-

in-chief. I do not find that in cross-examination the witness is asked any question upon this particular matter or that in re-examination any addition

is made to the evidence which he had given. The evidence with which we are concerned therefore is this:

Q. You said that you are connected with Shaw Wallace & Co. How are you employed there ?

A. I am an assistant in the firm.

Q. What are you exactly ?

A. I am in charge of the sugar department.

Court.-Are you the head of the department ?

A. Of the sugar department only.

Court -Do you buy and sell on behalf of your firm ?

A. Yes.

Court.--Do you ''make contracts on behalf of the firm for sale of sugar ?

A. I give out offers to the brokers and also send out the offers to Java or where-ever we are buying from. I give out the offers personally to the

brokers.

Court.--What happens when you buy sugar ?

A. I instruct the brokers to buy.

Court.-- When you sell ?

A. Also to sell I instruct the brokers

Court.--You give the price?

A. Yes.

Court.--They sell and you fix the price ?

A. Yes.

Q. Are you a partner of that firm?

A. No.

Court.--When you buy and sell sugar is that subject to the general supervision of the partners

A. No, not an ordinary offer. Not on offers received or which I send out. If I wanted to buy anything on our own account I consult one of the

partners. If I want to buy or sell sugar in the market, if we are short of sugar and I wanted to buy I would consult one of the partners. We have a

limit, should I exceed the limit in any way I would consult the partners but firm offers which I receive I can sell any quantity I like without consulting

anyone.

9. These are the facts upon which the question is to be decided whether or not Mr. Duggan is a merchant of Calcutta. The learned Judge has dealt

with the matter in this way. After pointing out that Mr. Duggan is a gentleman of great experience in commercial matters and has in addition long

experience of arbitration in cases of this kind, that he holds a responsible position and that he is in the habit of buying and selling goods acting on

his own authority, the learned Judge observes as follows:

In my opinion in a case of this kind and indeed in any commercial case the Court ought not to be too strict in the interpretation of words of

mercantile usage, that is to say, I think the Court should not seek to go out of its way to do anything to upset the arrangements and the dispositions

of the commercial community. Now in the present instance these buyers and sellers were commercial people. They provided in their contract that

their disputes should be referred to a European merchant and I think that all that they meant was that the person to act as an arbitrator should be

an European who had experience of business transactions of the kind with which these contracts were concerned. It is quite manifest that Mr.

Duggan was and is a person of that kind, and although he is not actually in business on his own account, I think he can properly be described as a

merchant without any undue straining of the English language, and I think it would be too pedantic to say that merely because he is not trading on

his own account he does not come within the description of an European merchant as mentioned in this contract.

10. Now in my judgment it is very necessary to keep this question entirely clear from any consideration as to whether or not the decision of this

question will be upsetting arrangements and disposition of the commercial community. I am quite satisfied that Mr. Duggan has very frequently

acted as an arbitrator. How often if it all, he has acted as an arbitrator under a clause framed precisely as the present clause^ is a question upon

which I have no information. I have no doubt that he is duly qualified to act as an arbitrator under many sale contracts and I have no doubt that he

would be an admirable person for the parties to appoint when they have a free choice of their own as to the arbitrators. It is news to me that there

are any arrangements or dispositions of the commercial community which involve the proposition that an assistant in a Calcutta business house is a

merchant. But there is no question here of those words having any special meaning.

11. The question is as to the natural and ordinary meaning of an English word. In the case of Gill v. Manchester Sheffield and Lincolnshire Railway

Co. [1873] 28 L.T. 589 cited to us, it is called ""ordinary popular meaning."" That is the first thing. In the second place it is not a question whether

there is any undue strain on the English language. I do not feel called upon to put any strain in either direction. The question is whether or not

drawing the line fairly as best one can, according to the popular usage of English words, Mr. Duggan comes on the one side of the line or on the

other side. Approaching the question in that way I notice that Mr. Duggan when he is asked ""how are you employed there,"" says ""I am an assistant

in the firm."" He is of course, not an ordinary assistant because he appears to be the head of the sugar department. How many assistants are

engaged in the sugar department I do not know but I should presume that there are several. He is an assistant of some seniority with more

responsible duties than many other assistants. It is quite clear that the mere fact that he is an assistant to a firm of merchants would not make him a

merchant in Calcutta. It is quite clear also that the mere fact that he is the head of a department would not make him a merchant in Calcutta.

12. It is contended, however, that upon the evidence that he is daily engaged in buying and selling sugar on behalf of his firm by giving out orders to

brokers, this consideration makes him a merchant within the true meaning of that term. It is said that he is none the less a merchant, that he is

merely acting on behalf of other people all the time. It is said that he is none the less a merchant because his authority is limited and he has in certain

exceptional matters to take authority from the partners. Stress being laid upon the circumstance that he is daily engaged in the matter of buying and

selling Mr. Sircar presses upon us that we ought to hold that he is a merchant. It is also said that as a merchant''s business may be conducted by a

company, by means of managing agents, one ought not to regard it as an essential part of the connotation of the term ''merchant"" that the man in

question should be in business for himself trading for his own profit as distinct from assisting other people to trade for their profit. ""Merchant"" is a

term which has been defined in several dictionaries to which we have been referred. One definition has been cited to us from Websters''

Dictionary. ""Merchant"" -- Any one making a business of ""buying and selling commodities."" Another from the New Oxford Dictionary:

Merchant--One whose occupation is the purchase and sale of marketable commodities for profit.

13. I agree with Mr. Sircar in the view which he cited to us from the observations of Lord Blackburn in Gill''s case [1873] 28 L.T. 589 that when

one is enquiring after the ordinary popular meaning of a term the Court is as good a judge of that meaning as any learned authority. I am far from

saying that the Court is not put in a better position for judging by a consideration of the definitions which are to be got from dictionaries. But it is

essential in this case to remember that the duty of the Court is to take a particular case and decide whether or not that case comes within the term

that is in question, and that it is not any necessary part of the duties of the Court to affirm a definition as one which can safely be relied upon to

govern all other cases.

14. I examine this matter with a view to ask myself whether in the ordinary popular acceptation of the word, Mr. Duggan would be recognized as

accurately describing himself if he said ""I am a Calcutta merchant."" I cannot doubt that without straining the word Mr. Duggan does not come

within the ordinary popular acceptation of the term. The learned Judge on this short question of the English language was in as good a position to

form an opinion as I am and I find some consolation in the fact that there are expressions in his judgment which seem to show that in the interest of

business arrangements he found room for Mr. Duggan within the definition of ""merchant"" by putting some little strain upon the ordinary popular

acceptation of the term. Mr. Sircar on behalf of the defendant has very properly pointed out to us that the question is in this case, not whether Mr.

Duggan is carrying on business as a merchant in Calcutta but whether, he can be described as a merchant--that term being given to express the

general nature of his calling. A man certainly can be a merchant although for the moment he is out of business. A man who has a business of a

merchant and turns it into a limited liability company of which he becomes the managing director could not be refused the designation ""merchant

merely because for a few months he had ceased to be trading on his own account.

15. Again it is quite clear that in the case of a profession which has a definite qualification such as solicitor, a man might be described as a solicitor

although he is not in practice for himself. I quite appreciate these points but still the question is whether Mr. Duggan is a merchant. In my judgment

taking it as a concrete case, he comes under a different and well known category viz., that of ""assistant"" in a. firm of merchants but he is not within

the meaning of merchant in the contract with which we are concerned. In the arbitration clause it is not provided that the arbitrator must be a

person with special knowledge of sugar. There is nothing to show that he has to be a sugar merchant. He is to be a European and he is to be of

Calcutta. He has certainly according to any definition of ""merchant"" to be accustomed to buy and sell by himself or by others. But if the ordinary

popular meaning of the word "" merchant"" connotes a certain status, there is nothing in this clause to show that the Court is entitled to disregard that

part of the meaning of the expression. If all that is required is a certain acquaintance with or experience in buying or selling or even in the buying or

selling of sugar then persons would be qualified under 01. 15 who might be persons occupying a very modest position in life and in the business

world. If that were so it might go down to such persons as Head Clerks or people of even less position who mythic be entrusted by their masters

or employers with buying or selling on their behalf. When the defendants insisted upon appointing Mr. Duggan and carrying the arbitration ex parte,

they took a risk. Giving the best consideration I can to this matter I am of opinion that the true exposition of 01. 15 is one under which Mr. Duggan

is not such a person that the defendants could insist upon his arbitration in spite of the opposition of the plaintiffs. If Mr. Duggan is not qualified then

these awards are not binding upon the plaintiffs. That appears, in my judgment, to be abundantly clear from the decision of Pick-ford, J., in the

case of Mughe in, Hopkins & Co. v. Foukelmann [1909] 2 K.B. 948 and also upon principle.

16. Now, there remain two points in this case and on both of them I am in entire agreement with the learned Judge. The first is the question

whether there was something informal in the way in which Mr. Duggan was made the sole arbitrator by the defendants. That question depends

upon a contention to the effect that the concluding words of 01. 15 do not form a Code of their own, but that we have to read into them the

requirements of the Arbitration Act. I mean the requirement of due notice and so on. In my judgment the clause must be construed as it stands and

it is not shown that the defendants acted in any way in disconformity with their rights under the contract.

17. The third and last question is one which has occupied the greatest amount of the time and attention of the Court below and indeed of this

Court. The contention was that Mr. Duggan"s award had been improperly procured in the sense that the defendants had no goods to offer to the

plaintiffs in December 1920, that they fraudulently professed to have them and that they effected a bogus re-sale of goods which they did not

possess on 6th January 1921 and fraudulently put their case before Mr. Duggan concealing from him all these material facts. This case was allowed

to be raised by an amendment of the plaint in April 1925, some four years after the. institution of the suit. It was allowed on the representation that

the plaintiffs had been put upon enquiry by a letter of September 1924 whereby the defendants" solicitors wanted to withdraw from examination

certain documents mentioned in their affidavit of documents. The leave to amend was granted in April 1925 and Mr. Sircar on behalf of the

defendants maintains before us that in this appeal he is entitled to question that interlocutory order and that such leave ought not to have been

granted. Speaking for myself, I should not interfere with an order of that character. The matter has been open to the plaintiffs and the whole case

has been thrashed out upon the evidence. But the question upon which it is right that we should express an opinion is the question whether these

awards can be set aside as being fraudulently procured by the plaintiffs. As I have said, en that question I am in entire agreement with the judgment

of the learned Judge. It is only necessary to make one or two observations so as to show that this part of the case has been duly considered by this

Court.

18. The plaintiffs" case is that 1000 tons of white Java sugar arrived for the defendants in due course. They are unable to show that from 16th

December right down to 4th January the defendants had not ample supplies with which they could make delivery to the plaintiffs. It is quite clear

that in the second half of December the defendants were pressing the plaintiffs to take delivery but the plaintiffs did not take the goods as the

market had gone against the plaintiffs heavily. It is said, however, that if you go to 5th January (by win oh time it was abundantly clear that the

plaintiffs had no intention of taking these goods) it can be seen that the defendants had parted with so much of the 1000 tons that they had no

longer any desire or ability to make delivery. In my opinion that case breaks down altogether. It depends upon the process of taking delivery

orders according to their dates and dealing with delivery orders after the manner of Claytons case in the basis that the moment a delivery order had

been issued the goods entirely ceased to be in the defendants'' control. Even on that basis I do not say that the plaintiffs have made out their case.

But I think it is a wrong basis. It is quite clear to me that if on 5th or 6th plaintiffs had paid for and taken delivery orders they could and would have

got their sugar from the docks. It is not the case on the evidence that the moment a delivery order is signed any particular goods cease to be under

the control of the defendants, nor is it any concern of the plaintiffs in what way any outstanding delivery orders given to other people would have

been dealt with had the plaintiffs chosen to take delivery of the goods. On that point I entirely agree with the learned Judge. I think, therefore, that

there was enough of this sugar to answer not only the plaintiffs contract but also the contract of Kala Chand whose goods were included in the

same re-sale. That is the first question. In my judgment the defendants had the goods. Then it is said that when the re-sale was made on 6th

January that was a bogus re-sale. In my opinion the evidence called by the plaintiffs themselves disproves that contention. There was re-sale in the

ordinary manner. There were several bidders there and the price obtained was a reasonable rate.

19. The third thing that is said is that after all the goods were sold to Sattar and we find that Sattar parted with the goods back again on the same

day at the same price ; and that is a circumstance which shows that it was a bogus re-sale and the awards are liable to be upset because this

circumstance was not fairly and fully laid before Mr. Duggan in this ex parte arbitration. The learned Judge has dealt with that contention in a

manner which seems to me to be adequate and correct. I will take it that Sattar may be regarded as a mere nominee of the defendants for this

purpose. Still every other person was given an opportunity to bid. A reasonable rate was obtained, and in the end Mr. Duggan awarded the rate of

damages claimed because he was satisfied that it was based upon a reasonable market rate in accordance with his experience. In these

circumstances, the plaintiffs'' case on that part of the matter has been rightly dismissed by the learned Judge on the original side.

20. However this appeal must be allowed and there must be a declaration that the awards are not valid or binding upon the plaintiffs.

21. On the question of costs it is manifest that the defendants have in the end succeeded upon the chief matters which required the taking of

evidence; and while the plaintiffs have succeeded ultimately in the suit we are of opinion that; there should be no order as to costs either in this

Court or in the Court below.

22. There will be an order for repayment of the sum of Rs. 26,220-7-3 with interest thereon at 6 per cent per annum from the date of the

withdrawal of the money by the defendant firm till the date of payment.

Mukerji, J.

23. I agree.