
(1875) 05 CAL CK 0003

Calcutta High Court

Case No: None

C. Koegler and Others

APPELLANT

Vs

The Coringa Oil
Company, Limited

RESPONDENT

Date of Decision: May 31, 1875

Acts Referred:

- Contract Act, 1872 - Section 28

Citation: (1876) ILR (Cal) 43

Hon'ble Judges: Phear, J

Bench: Single Bench

Judgement

Phear, J.

As to this claim the defendants maintain there has been no binding award made; and clearly, as it seems to me, the plaintiffs, on their own showing, cannot succeed on this footing alone.

2. In the first place it is not the fact that all the items in the schedule were awarded by any arbitrators, and in the second place there is not a pretence for saying that the award of the 16th April made in respect of the Dumphaile Castle parcel was a decision binding on the defendants on the terms of the contract. Neither of the arbitrators, who assumed to make that award, was appointed by the defendants' agents; nor had the contract at that time been made a rule of Court, and therefore none of the provisions of the Common Law Procedure Act of 1854 (even assuming that they could be of any use to the plaintiff) applied. In other words, the defendants had not then appointed an arbitrator either actually, or constructively, and had in fact absolutely refused to do so.

3. As to the award of the 18th July with regard to the Ivanhoe parcel, which was made after the agreement was made a rule of Court, there might have been some question on account of the operation of the Common Law Procedure Act, were it not for the case of Inre Bouse and Meier (L.R., 6 C. P., 212) the effect of which case in my opinion is that the

plaintiffs get no benefit out of that award. Rouse and Meier were the respective contracting parties. They had agreed that, in the event of any dispute arising out of the contract, every such dispute should be referred, with all usual powers, to two disinterested cotton brokers (or their umpire) for arbitration, buyer and seller each nominating one. This agreement to refer was made a rule of Court; both parties appointed their arbitrators, and the matter was proceeding in due course, when on account of a certain point of difficulty with regard to the nomination of an umpire, the Messrs. Rouse applied to the Court of Common Pleas, of which the agreement had been made a rule, asking, in effect, that the arbitration might be stopped and put an end to, but the Court refused to make any order to this end saying, in substance, you can do it yourselves. You have full power if you think fit to withdraw your submission to arbitration, even though that submission has been made a rule of Court. Willes, J.'s judgment makes the reasons for this decision very plain indeed. This decision is supported to a considerable extent by the views expressed by Malins, V.C., in *Thompson v. Anderson* L.R. 9 Eq. 523 but still more strongly so by the judgment of WOOD, V.C., in an earlier case of *Smith v. Whitmore* 10 Jur. N.S. 65.

4. The result of these decisions is to make it certain that, in the class of agreements to which the present agreement belongs, the effect of making the agreement a rule of Court under the provisions of the Common Law Procedure Act, 1854, is only to give more extended powers to the arbitrators in the matter of the reference, and to render the parties liable as for contempt of Court for improper conduct in the reference. It does not at all deprive the parties of their Common Law right to revoke the authority of the arbitrators, to whom they have submitted the matter of dispute, at any time before the award; and if this be the case when the dispute has been actually referred to the arbitration of specified persons, it is difficult to see how the provisions of the Common Law Procedure Act can have any effect whatever to prevent a party to an agreement from declining to appoint an arbitrator if he chooses to do so.

5. The conclusion then at which I arrive is that the award of the plaintiffs' arbitrators made after the agreement had been made a rule of Court, is in no degree a decision under the contract, which is the basis of this suit. Neither the award of the 16th of April, nor the award of the 18th of July, is such a decision as the parties to the present suit agreed should be final in the event of a dispute and the ground upon which the plaintiffs claim Rs. 7,000 and odd fails them. This being so, the defendant-Company maintains that, if a suit on the contract can be entertained in this Court at all, which he denies for reasons which I shall presently refer to, it is restricted by Section 28 of the Indian Contract Act to a suit for specific performance, which this suit certainly is not. The words of Section 28 are as follows:

Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1.--This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

When such a contract has been made, a suit may be brought for its specific performance; and if a suit other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

6. And assuming for the moment that the present contract is of such a character as to fall within the scope of this section, the defence which is set up seems to me not only effective against the present suit, but also goes to show that the plaintiff is truly in a most unhappy predicament, for he is without any remedy whatever. The specific performance needed is the appointment of an arbitrator, and it is, I need hardly say, quite settled in England that a Court of Equity cannot entertain a bill for specific performance of an agreement to refer. The Master of the Bolls in *Gourlay v. The Duke of Somerset* 19 Ves. 429 seems to say that such a bill was never heard of. If the ordinary rules which govern Courts of Equity in England are to apply, the specific performance of such a contract cannot be decreed. It is in truth impossible to compel a person to select an arbitrator. The only alternative is something which seems to have been attempted in the Common Law Procedure Act, namely, to make an appointment by the Court, or an appointment by the other party, under certain circumstances, equivalent to an appointment by the party who declines to perform his contract.

7. And further, to enforce the specific performance of such a contract would be a direct violation of the principle which Willbs, J., and Wood, V.C, in the two cases which I have just referred to, laid down as constituting the reason why, in spite of all inconveniences, a party was at liberty under the Common Law to decline to refer to arbitration a matter which he had previously agreed to refer.

8. I am not certain whether the Indian Legislature in making the Indian Contract Act intended to clear the ground of all such rules in the matter as govern the Courts of Chancery in England, and intended that in spite of them the Courts of this country should entertain such a bill, and should attempt to do that which the Court of Chancery holds it cannot do or, at any rate, ought not to do. If it had so intended, however, I should have expected that it would have made its meaning more plain than it is, and would probably also have directed the Courts of this country how to proceed in such a suit.

9. It is not incumbent on me fortunately now to determine the question which thus presents itself, because the defence raised, if good, is a sufficient answer to this suit, and we can wait till a suit for specific performance is brought for the determination of this point.

10. There is however a third alternative even in cases where this section applies, viz., an action for damages for breach of the agreement to refer. Mr. Phillips was desirous of arguing that this would be forbidden by the words of Section 28, but I think it is not so. The words are: "If a, suit, other, than, for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit." It seems to me that the suit would not be a suit in respect of the subject which the parties had agreed to refer, but a suit for damages for breach of the contract to refer. No doubt, in such a suit, there would be great difficulty as to the measure of damages. Cases would occur in which the damages for breach of contract to refer might be precisely the same as the money which it would fall to the arbitrators to award if they were called on to arbitrate. But, in the majority of cases, this would not be so, and it would be difficult, if not impossible, to pass from the damages for breach of the contract to refer to the amount which the arbitrators might or should have awarded, had they carried out the arbitration.

11. However this may be, I come to the third question whether this contract is in fact a contract lying within the scope of Section 28 of the Indian Contract Act; and upon looking a little closely into it, I have come to the opinion that it is not. The text of the section (if I may call it so) enacts that every agreement by which a party is restricted absolutely from enforcing his rights under any contract by the usual legal proceedings in the ordinary tribunals is void. The words of the enactment relied upon in the present case form an exception to the operation of that text, and the matter excepted is an agreement that any dispute shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of such dispute," which means (as I understand it) that an agreement by which the party is not absolutely restricted from enforcing all his rights under or in respect of the contract by the usual legal proceedings, but is only restricted from enforcing any such rights as are not given to him by the arbitrators in the shape of money-compensation, is not forbidden or made illegal by the section. In order to make the agreement conform to Exception 1, there must be an exclusion of the Courts in all respects except the matter which is the result of the arbitrator's award. This was so in the leading case of *Scott v. Avery* 2 Jur. N.S. 815 : S.C. 5 H.L.C. 811 and so also in the subsequent case of *Tredwen v. Holman* 8 Jur. N.S. 1080 : S.C. 1 H. & C. 72. The excluding words there were: "No action at law shall be brought until the arbitrators have given their decision." The Court of Exchequer held that *Scott v. Avery* 2 Jur. N.S. 815 : S.C. 5 H.L.C. 811 governed the case, and decided that exclusion of the kind was not void at law. I imagine that the intention of the Legislature in enacting Exception 1 to Section 28 was to make contracts similar in character to those in *Scott v. Avery* 2 Jur. N.S. 815 : S.C. 5 H.L.C. 811 and *Tredwen v. Holman* 8 Jur. N.S. 1080 : S.C. 1 H. & C. 72 lawful contracts, notwithstanding that they excluded the jurisdiction of the Courts until the arbitrators had made their award; and I do not interpret these words "and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred" in any larger sense. Now, on going back to the words of the contract between

the plaintiffs and defendants, we find nothing whatever to exclude the jurisdiction of the Civil Courts even for the most limited period. It is the ordinary case of mutual stipulation that in case of dispute the same is to be decided by two arbitrators, one to be appointed by the buyer, and one by the seller, and there is an absence of any clause forbidding recourse to the Court.

12. On the whole I am of opinion that Section 28 does not apply to this case, and also that there has been no decision of the arbitrators according to the contract upon which the plaintiffs can claim the damages awarded. The matter is entirely open, and there is no reason why the plaintiffs should not apply to the Civil Court for their remedy. With this view the first issue will be-

Was there a breach, and if so, what are the damages?