

(1930) 08 BOM CK 0018

Bombay High Court

Case No: O.C.J. Appeal No. 68 of 1929 and Suit No. 2470 of 1928

Radhakison Gopikison

APPELLANT

Vs

Balmukund Ramchandra

RESPONDENT

Date of Decision: Aug. 12, 1930

Acts Referred:

- Bombay Cotton Contracts Act, 1932 - Section 4
- Companies Act, 1956 - Section 21

Citation: (1930) 32 BOMLR 1319 : (1931) ILR (Bom) 382

Hon'ble Judges: J.W.F. Beaumont, C.J; Baker, J

Bench: Division Bench

Judgement

J.W.F. Beaumont, C.J.

This is an appeal from a judgment of Mr. Justice Sir Norman Kemp, and the first point which the learned Judge decided was that the action would not lie because it was a condition precedent to any action that there should be a reference to arbitration.

2. The dispute arises on certain contracts made between the plaintiffs and the defendants, all of which are in the same form, the form being Ex. A. That is a document signed by the defendants and addressed to the plaintiff's, dated January 4, 1928, and it says:

We request you to execute the following order on our account subject to the Rules and Regulations of the East India Cotton Association Limited is applicable and also subject to the terms and conditions of your contract.

Then follow various stipulations for the sale of certain cotton providing for payment and so forth. Upon the question whether there is a condition precedent that the matter should be referred to arbitration, the only material part of the contract is that which I have read. The word "is" in the phrase "is applicable" is not

grammatical, but I think it means "so far applicable". Now in order to determine the question what the words "subject to the Rules and Regulations of the East India Cotton Association Limited" mean, and whether they make arbitration a condition precedent, one has to acquaint oneself with the position of that Association. The first thing to look at is the Bombay Cotton Contracts Act of 1922. That Act recites that it is expedient to provide for the regulation and control of transactions in cotton in Bombay. Then Section 3 gives the board, which is the board of directors of the Association, power, subject to the sanction of Governor in Council, to make by-laws for the regulation and control of transactions in cotton, and a lot of subjects are specified which may be covered by the by-laws. One of them is, "(i) providing for arbitration and appeals against awards", and the last one is, "(m) regulating the course of business between parties to contracts in any capacity whether they be members of the Association or not". Then Sub-section (3) of Section 3 provides that bylaws made by the board under Sub-section (7) and sanctioned by the Governor in Council shall be published in the Bombay Government Gazette. Then Section 4 provides: "The constitution and administrative machinery set out in the Articles of Association of the Association are declared to be lawful". Section 5 provides :

Any contract (whether either party thereto is a member of the Association or not) which is entered into after the date on which by-laws under this Act are sanctioned by the Governor in Council and published in the Bombay Government Gazette, and which contravenes any such by-law shall be void.

It is to be noticed, therefore, that under that Act, Section 3 and Section 5 both cover the case of non-members, whereas in Section 4 there is no reference to non-members.

3. The next document to look at is the memorandum and articles of association of the East India Cotton Association Ltd. Nothing, I think, turns upon the memorandum : the Association is formed as a company limited by guarantee. The articles are for the most part in the common form of articles used by companies registered under the Indian Companies Act, and of course in reading articles one has to remember the provisions of Section 21 of the Indian Companies Act, which provides:

(1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

That is a section taken from the English Act, and it is quite clear under that section that the articles are a contract between the company and the members, and between the members inter se, but they do not bind outside parties. Now looking at these articles, it is worth observing that in Article 5 occurs this phrase:

Every person, firm or company who having a place of business in Bombay and who up to May 10, 1922, or such extended date as may be fixed by the Board, applies for Membership of the Association agreeing to be bound by these Articles and the By-laws, Rules and Regulations of the Association from time to time in force.

The actual words used in the contract to be construed " Rules and Regulations" appear in this article and they seem to be used more in connection with the by-laws than with the articles. So far as I can see, the only articles which may be said to affect persons other than members, that is, persons engaged in the cotton trade other than members, are Articles 13-A, 95 and 96. Article 13-A provides :-

Any person, firm or company who has a place of business in Bombay and in the opinion of the Board is or intends to be engaged in bona fide cotton business may in the discretion of the Board be licensed to trade as a cotton broker. Such license shall not be necessary in order to engage in cotton breking business unless the By-laws so provide. Such license shall be granted and held upon such terms including payment and may be suspended or cancelled or renewed as the By-laws may provide.

So that, although that article seems to deal with persons who are not members, it does not have any effect except so far as the by-laws provide. Article 95 deals with hedge contracts, which are a particular form of contract in the cotton market, but that article is also incorporated in the by-law. Article 96 provides as follows:-

Whenever any difference arises between Members or Associate Members or Special Associate Members or between one or more of them and another or others who are not Members or Associate Members or Special Associate Members touching or in connection with the cotton trade or any transaction therein it shall be referred to arbitration in such manner as shall be prescribed by the by-laws. And it is hereby expressly declared that the holding of such an arbitration " (which seems to be an arbitration between members or between members and non-members)" and the obtaining of an award thereunder shall be a condition precedent to the right of any Member or Associate Member or Special Associate Member or non Member to commence legal proceedings against any other Member or Associate Member or Special Associate Member or non-Member in respect of any such difference as aforesaid and any Member or Associate Member or Special Associate Member or non-Member shall have no right of action against any other Member or Associate Member or Special Associate Member or non-Member except to enforce the award in any such arbitration.

4. That is an arbitration provision inserted in the articles which makes arbitration a condition precedent to any right of action. The second part of it covers in terms non-members. It covers a difference between one non-member and another non-member and taking it quite literally it appears to impose as a condition precedent to an action between one non-member and another non-member, the

holding of an arbitration between members inter se or between members and non-members under the first part of the article, But whatever the article means it cannot under the ordinary law bind non-members. In order to bind non-members it will be necessary to show that it has been given some special statutory effect.

5. The next document to consider is the by-laws, which contain provisions for arbitration in Clause (35) which deals with arbitrations in respect of disputes as to quality, and Clause (88) which deals with other disputes. This case falls under Clause (38), and not Clause (35) because there is no dispute here as to quality. Clause (38) provides that:-

All unpaid claims whether admitted or not and all disputes (other than those relating to quality) arising out of, or in relation to (a) contracts (whether forward or "ready" and whether between members or between a member and a non-member) made subject to these by-laws or (b) the rights and/or responsibilities of commission agents, muddams and brokers not parties to such contracts, shall be referred to the arbitration of two disinterested persons one to be chosen by each disputant.

I can see nothing in that clause to make arbitration a condition precedent to the right to bring an action. It seems to me to be an ordinary provision for referring disputes to arbitration, and such a provision does not in any way oust the jurisdiction of the Court. If an action is brought in respect of a matter covered by the arbitration clause, the defendant can apply under the Indian Arbitration Act to stay the action, but it is not open to him to say that the action does not lie.

6. Now, coming back to the form of contract Ex. A, one has to see what is meant by the contract being expressed to be subject to the rules and regulations of the East India Cotton Association Limited. Does the expression "rules and regulations" mean the by-laws, or does it mean the by-laws and the articles of association? Sir Chimanlal Setalvad for the defendants points out that in Sections 17 and 18 of the Indian Companies Act the word "regulations" is used in connection with the articles of association. I have no doubt that in many contexts a reference to regulations of the Association would mean the articles and nothing else, but the question is whether in this commercial contract the parties, when they say the contract is made subject to the rules and regulations of the Association, mean anything more than the by-laws. The by-laws are the Code which the Association has framed for governing cotton transactions, and they have to be published in the Bombay Government Gazette. Articles of association, prima facie, according to the ordinary law, bind nobody except the Association and the members of the Association, and it seems to me that the parties here, when they refer to rules and regulations in this contract, are referring only to the by-laws and not to the articles of association. I should have mentioned that at the date of the first contract neither the plaintiffs nor the defendants were members of the Association, although at the dates of the subsequent contracts which were in January, February, and March, 1928, plaintiffs had become associate members, while the defendants were not members. As a

matter of construction of this contract I hold that the contract is made subject to the by-laws of the Association, but not subject to the articles of association.

7. Then Sir Chimanlal Setalvad says that even if that is so, nevertheless Article 96 of the articles of association applies, because the Bombay Cotton Contracts Act in Section 4 says that the constitution and administrative machinery set out in the articles of association of the Association are declared to be lawful. He says that that means that the constitution and administrative machinery set out in the articles are to have the force of law, and that is the view which the learned Judge in this case adopted. He held that this arbitration provision is part of the administrative machinery, and that u/s 4 it must have the force of an Act of Parliament. In my opinion that is not the fair or proper meaning to be attributed to the words "declared to be lawful". I think that all that those words mean is that the constitution and administrative machinery set out in the articles of association of the Association are not to be attacked as unlawful. Why it was thought necessary to make that provision in the Act I do not know. It may very well be that some of the provisions of the articles were thought not to comply, or that there might be a question whether they complied, with the Indian Companies Act; or it may have been thought that there was some question as to there being provisions in restraint of trade or in the nature of wagering or something of that sort. Whatever the reason for its enactment, it seems to me that all that provision in Section 4 of the Act means is that the constitution and administrative machinery as set out in the articles are not to be challenged as being illegal, but it seems to me quite impossible to say that the whole of the provisions of the articles relating to the constitution and administrative machinery are to have the force of law. Whether the arbitration provision in Article 96 can fairly be described as administrative machinery I think extremely doubtful, but it is not necessary to decide that point.

8. If I am right in the above view then the only provision for arbitration which is incorporated into this contract by reference to the rules and regulations of the Association is by-law 38 ; and, as I have already said, I do not think that by-law makes reference to arbitration a condition precedent to the bringing of an action. Therefore, in my judgment, the learned Judge was wrong in holding that the action would not lie.

9. I should add that it has been argued that if the Bombay Cotton Contracts Act has made arbitration compulsory under either Article 96 or by-law 38 so as to oust the jurisdiction of the Court, it was not competent for the legislature to pass such an enactment. In the view I take of the matter, it is not necessary to consider that question, because I think that Article 96 does not apply at all to this contract, and I think that by-law 38 is merely an ordinary provision for arbitration which does not in any way oust the jurisdiction of the Court.

10. The next point raised on the appeal, which is the subject, though I think not rightly the subject, of cross-objections by the defendants, is this, that the contract in

this case does not comply with Clause (81) of the by-laws. Clause (81) of the by-laws, which were in force at the date of this contract, provides that: -

Contracts between Agents and their constituents, e. g., between a member and a non-member or between a member acting as an agent and a member acting as his constituent shall be subject to the by-laws and shall be in writing in the form given in the Appendix (pages 67, 08, 69 and 70).

11. Then it goes on:-

A member whose constituent has agreed in writing to sign the prescribed form of contract and fails or refuses to do so after terms have been arranged shall be treated in all respects as if he had done so and both parties shall have the rights and remedies accorded by these by-laws.

The learned Judge in this case held that the documents, to which I shall refer in a moment, amounted to a substantial compliance with the terms of the by-law, that is to say, substantially they amounted to the same thing as the form of contract set out in the schedule to the by-laws, although they were not in fact in that form, but in a later case he seems to have receded from that position. I see no reason why Clause (81) of the by-laws should not mean what it says, i. e., that the contract between the agents and their constituents shall be in writing in the form given in the Appendix. It may be very convenient that contracts relating to cotton should all be in the same form. Obviously it will assist arbitrators very much if the contracts which they have to deal with are all in the same form; in course of time any difficulties which arise under them can be construed by the Court, and people will get to know exactly what the contract means. If every member of the cotton association or other person dealing in cotton is to have his own particular form these advantages will be lost. At any rate, whatever the reason for this by-law it says plainly that the contract shall be in the form given in the appendix. Looking at the documents in this case, it is perfectly plain that they are not in the form given in the appendix. Mr. Coltman says that he can bring the case within the second part of by-law 81, because he says that the defendants agreed in writing to sign the prescribed form of contract and there was failure by the defendants to sign it. Now I am quite unable to find any agreement by the defendants to sign the prescribed form of contract. The contract, as I have already said, starts with this provision, "We (i.e., the defendants) request you to execute the following order on our account subject to the Rules and Regulations of the East India Cotton Association Limited." Mr. Goltman says that "subject to the Rules and Regulations" involves signing the form of contract in the appendix. But it seems to me impossible to give that meaning to the phrase. The defendants are requesting the plaintiffs "to execute the following order on our account," and then follows an order not in the least in the form of the contract referred to in the by-laws. I see no reason to suppose that defendants intended to be bound by two contracts or were requesting the plaintiffs to procure two forms of contract for them to sign. Then that contract is followed by

a telegram from the plaintiffs to their brokers in Bombay requesting them to carry out the defendants' order. That is Exhibit N1, and Exhibit O1 is a telegram from the brokers stating that the order has been carried out. And then comes Exhibit A3, a confirmation notice which the plaintiffs sent to the defendants stating that they have received from their Bombay friends, i.e., the brokers, a telegram advising sale on defendants' account of such and such quantity of cotton "subject to usual terms of their contract of which please take note." "Their" contract must, I think, mean the contract which the brokers have entered into for the sale of the cotton. Then it goes on, "The confirmatory note and the contract will be sent to you as usual, as soon as we receive these from Bombay," and on that document, which is Exhibit A3, is endorsed by the defendants a receipt notice which is Exhibit A4, and the suggestion is that that endorsement by the defendants on Exhibit A3 in some way binds them to execute a contract in the form set out in the appendix to the by-laws. I am quite unable to see that it does anything of the sort. So far as the evidence goes, the parties never had any such form of contract as required by the by-laws; they never discussed it, and I see no ground on which it can be held that the defendants have either signed such a contract or agreed to sign such a contract, or that they ever heard of such a contract, and if that is so, they cannot have failed or refused to sign such a contract. In my judgment the contract was not a compliance with the statutory form as the learned Judge held and on that ground the action must fail.

12. The result is that the appeal fails, with costs, though our reasons are different from those of the learned Judge. I think this is a case where there ought to be two counsel allowed under Rule 533 (ii) (as). The cross-objections were unnecessary and their costs are not allowed.

Baker, J.

13. I am of the same opinion, and have very little to add to the exhaustive judgment delivered by my Lord the Chief Justice.

14. As to the first point which was raised that the constitution of the East India Cotton Association, which compels all disputes arising in the cotton trade, even amongst persons who are not members of that Association, to be referred to arbitration, has the force of law, I am of the same opinion as my Lord the Chief Justice. If it was intended by the legislature to compel everybody who dealt in cotton to be bound by the rules of the East India Cotton Association, I can only say that the legislature would presumably have dealt with the matter in a rather less casual manner than they have done in Section 4 of Bombay Act XIV of 1922. All that the section says is that the constitution and administrative machinery set out in the articles of association of the Association are declared to be lawful. If it had been intended to give them the force of law and to make them binding on persons whether or not members of that Association, I can see no reason why the legislature should not have said so. The question, therefore, of whether the local Legislative Council have the power to pass any Act of the kind is one which does not arise.

15. Then as regards the second point that supposing a reference to arbitration not to be made compulsory by law, still it is so made in this case by agreement between the parties, I am of the same opinion as my Lord the Chief Justice that the agreement to be bound by the rules and regulations of the East India Cotton Association does not necessarily import Article 96 of the articles of association into the contract between the parties. The next point is one to which it seems there is really no answer. By-law 81 is in mandatory terms, and provides that contracts must be in writing in the form given in the appendix, pp. 67, 68, 69 and 70. There is a great deal of difference between that form and the form employed by the parties when the defendants originally asked the plaintiffs to purchase and sell certain cotton on their behalf. The form which is given in the by-laws is shown in the printed book that we have been able to get. The original forms which have been provided by the Association are divided into several parts, and one noticeable thing about them is that they have the regulations regarding reference to arbitration printed on the reverse. Therefore, it is not open to anybody who enters into a contract of that nature and signs the prescribed form to raise any objection to the compulsory provisions regarding arbitrations. There is nothing of the kind in the form which was signed by the defendants in the present case, a form bearing the name of the plaintiffs' firm and apparently a private form printed by plaintiffs for their own private purposes, and although it contains a reference to the rules and regulations of the East India Cotton Association, it cannot by any stretch of language be regarded as the form given in the appendix to the by-laws of that Association.

16. Moreover, in the present case there is no agreement by the defendants to sign the prescribed form of contract, and there can be no failure or refusal to sign the form when no such form has been tendered to them for signature. As far as appears from the record in the present case, I should doubt very much whether either of the parties had the prescribed form when the transaction took place or had ever seen it. In these circumstances I do not see how any endorsements made on other documents which have no relation to these by-laws can amount to an agreement in writing to sign the specific form which is annexed to the bylaws of the East India Cotton Association.

17. In these circumstances, the appeal must fail, although our reasons are somewhat different from those of the learned Judge who tried the case, and I agree with the order proposed by the learned Chief Justice.