Privy Council Appeal No. 14 *of* 1943

Shree Meenakshi Mills Limited – – – – *Appellant*

v.

Patel Brothers – – – – – – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH MARCH, 1944

Present at the Hearing:
LORD MACMILLAN
LORD WRIGHT
LORD JUSTICE DU PARCQ
[*Delivered by* LORD JUSTICE DU PARCQ]

In September, 1940, a dispute arose between the parties to this appeal as a result of transactions in which they had been engaged in the cotton markets of Bombay, Liverpool and New York. An agreement between the parties provided for arbitration under the by-laws of the East India Cotton Association Ltd. Two arbitrators were appointed in accordance with those by-laws, and there is now no dispute about the validity of their appointment. On the 19th March, 1941, the arbitrators made an award whereby they awarded to the respondents the sum of Rs.34,508-6-5 with interest

The appellants were dissatisfied with this Award. The by-laws of the East India Cotton Association gave them a right of appeal to the Board of the Association " within 10 days from the date of publication of the award," and they gave a proper notice of appeal within the prescribed period. The by-laws define " the Board " as meaning " the Board of Directors " of the Association " acting through at least a quorum of their number at a meeting of that Board duly called and constituted." The articles of association provide that six shall form a quorum.

Nine members of the Board were convened to hear the appeal. During the argument of Counsel for the appellants one of the nine went away and did not return. His departure and his absence appear to have escaped the notice of Counsel. The appeal was fully heard by the remaining eight members, who, by a majority, decided that the sum awarded to the respondents should be reduced to Rs.12,508-6-5. This decision was published on the 21st June, 1941. It was signed by the chairman and secretary, who had been authorised to sign it on the Board's behalf. On the 11th July, 1941, the award of the 19th March, 1941, and the decision on appeal were filed in the office of the Prothonotary of the High Court, who gave notice of such filing to the appellants on the 18th July, 1941.

The appellants thereupon petitioned the High Court of Bombay, praying " that the alleged awards dated 19th March, 1941, and 21st June, 1941, be declared to be invalid and set aside and taken off the file of the records of this Honourable Court." The petition was heard by Chagla J. The learned Judge was of opinion that when once the Board had been constituted for the purpose of hearing the appeal, the nine members who had been convened were to be regarded as joint arbitrators. Taking that view, he held that the appellants were entitled to an adjudication by all

nine arbitrators acting together, and that the decision of the 21st June, 1941, which purported to be the decision of the Board, was invalid. The learned Judge expressed the opinion that all the members of the Board who adjudicated should have signed the award, but if it had been necessary to decide the point he would have considered that this was an irregularity which could be cured, and would have remitted the award to them for their signatures. The conclusion at which the Judge arrived was that " the award must be set aside." As he had made no finding adverse to the validity of the award of the arbitrators, dated the 19th March, 1941, this mode of expression might have left it uncertain whether he intended to do more than set aside the decision on appeal, but the formal order of the Court put the matter beyond doubt, stating as it did in terms that both the decision of the Board and the award of the arbitrators were to be set aside and taken off the file of the Court.

The respondents then in their turn appealed to the High Court in its Appellate Jurisdiction, contending that the decision of the Board was valid and regular, and that the order of Chagla J. was wrong. The appeal was heard by Sir John Beaumont C.J. and Somjee J. The Court affirmed the decision of Chagla J. on the main issue. They held that in the circumstances the decision of the Board was a nullity, and must be set aside. They further held, however, that there was no ground for setting aside the award of the arbitrators. The learned Chief Justice, in whose judgment Somjee J. concurred, expressed the opinion that " the so-called appeal " was " not really an appeal but . . . a continuation of the arbitration " so that one award had been made on two different dates, and in two different parts, by two different sets of arbitrators." The position thus was that one part of the award had been validly made, but the other part had so far not been made. " If that is so " said the learned Chief Justice, " I think we can remit that portion of the award " (vizt. the decision of the Board) " under sec. 16 of the Arbitration Act, and in my view that is really the only course which is open to this Court." The Court accordingly made a declaration that the appeal against the original award had never been heard by a properly constituted Board, and ordered that the order of the Board should be set aside, and that the notice of appeal should be " remitted back " to the Board " to be dealt with in accordance with law." Against this order the present appeal is brought. The appellants naturally do not question the correctness of so much of the decision of the High Court as declared that the proceedings before the Board of Directors were a nullity, and since there was no cross-appeal, their Lordships are not called upon to express any opinion upon that part of the decision, and must not be understood to express either approval or disapproval of it. Should the same question arise for decision hereafter it will be necessary to consider whether the well-established principle that, in the case of a reference to two or more named arbitrators, all the arbitrators must act together, can properly be applied when the reference is not to individuals but to a body, such as a Committee or a Board, whose corporate powers are regulated by its constitution. It is perhaps desirable to add that their Lordships must not be taken to assent to the opinion expressed *obiter* by Chagla J. that an award made by the Board ought to be signed by all the members of the Board who have adjudicated. Their Lordships do not desire to express any opinion on that point.

For the purposes of this appeal their Lordships must assume, without deciding, that the proceedings before the Board of Directors were a nullity. On that view there can be no doubt, and it was not disputed, that the declaration to that effect was properly made. The objection taken by the appellants to the order of the High Court was two-fold.

In the first place, it was said that the power of the Court to remit an award depended on statute, and that sec. 16 of the Arbitration Act 1940, under which the Court purported to act, gave no power to remit the award, or the notice of appeal, in the circumstances of this case. Secondly, the appellants submitted that the original award of the arbitrators and the decision of the Board on appeal must be regarded as together constituting one indivisible award, and that it was impossible to set aside a part of that indivisible entity without setting aside the whole.

It is convenient to deal first with the second of these submissions. No authority could be cited to support it, and in their Lordships' view it is not sound in principle. When the rules governing an arbitration provide for an appeal from the first award, the result of declaring the proceedings by way of an appeal to be a nullity must be to leave the parties in the position which they occupied immediately before those abortive proceedings were begun. The notice of appeal is still effective and the original award stands until such time as it may be replaced by an effective decision of the appellate body. It was suggested on behalf of the appellants that the original award was " merged " in the decision of the Board on appeal. This figure of speech may be justified when the Board has come to a valid and effective decision. Such a decision is substituted for the original award. The original award then ceases to have any further force or effect, and may be said without impropriety to be " merged " in the final decision. But when once it is established that the proceedings before the Board are to be regarded as a nullity, there can be no question of any such merger. Their Lordships are therefore clearly of opinion that the appellants were at no time entitled to have the original award set aside.

With regard to the appellants' first submission, their Lordships are of opinion that, although the order under appeal was in substance correct, it could not properly be founded on sec. 16 of the Arbitration Act 1940. It appears to their Lordships, with great respect to the learned Chief Justice, that this section has no relevance to the peculiar circumstances of the present case. The section specifies three sorts of defect which may necessitate reconsideration of an award, and empowers the Court to remit the defective award in the cases specified (and in no others) to the arbitrator or umpire, and to fix the time within which the arbitrator or umpire is to submit his decision to the Court. When what purports to be the decision of arbitrators is a nullity, there is no power to remit it. Nor is there need for any such power, since there is nothing to remit, and since it necessarily follows from the fact that the decision is annulled that the parties are entitled to a new and effecive hearing and determination.

It is apparent therefore that no injustice has been done to the appellants and that the order appealed from is in substance perfectly correct. The order which was drawn up made no express reference to sec. 16 of the Arbitration Act, and can hardly be said to be erroneous even in form. It speaks of " remitting back " the notice of appeal to the Board of Directors " to be dealt with according to law." This amounts to no more than a direction to the Board that the parties are entitled to have the appeal heard. It was suggested by Counsel for the appellants that the order was mandatory in form and might be read as compelling the parties to proceed with the appeal even though neither of them were willing to do so. In their Lordships' opinion the inclusion in the order of the words " to be dealt with in accordance with law " precludes such a construction of the order. The law gives the parties a right to an adjudication by the Board of Directors. If neither of them wishes to exercise the right the law will not compel them to exercise it.

It follows that no complaint of substance can be made against the order appealed from. Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the appellants should be ordered to pay to the respondents their costs of the appeal.

(33679) Wt. 8060—28 160 4/44 D.L. G. 338

In the Privy Council

SHREE MEENAKSHI MILLS LIMITED

v.

PATEL BROTHERS

[DELIVERED BY LORD JUSTICE DU PARCQ]

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