

**Radhakisson Gopikisson, a firm (now represented by Juthalal
Motilal, Receiver)** - - - - -

Appellants

v.

Balmukund Ramchandra, a firm - - - - -

Respondents

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER, 1932.

Present at the Hearing :

LORD THANKERTON.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD THANKERTON.]

The suit in which the present appeal arises was instituted by the appellants on the 21st November, 1928, in the High Court of Judicature (Original Jurisdiction) at Bombay against the respondents for recovery of the balance due in respect of a series of transactions in cotton carried out by the appellants as commission agents on behalf of the respondents.

Various grounds of defence were put forward by the respondents, but only two of these are involved in the present appeal viz:—(1) that the suit was not maintainable under the provisions of the Bombay Cotton Contracts Act No. 14 of 1922 and Article 96 of the Articles of Association of the East India Cotton Association, Ltd., which were applicable to these transactions and under which arbitration was a condition precedent to any suit in Court and (2) that the transactions did not comply with the statutory by-laws of the Association and were therefore rendered void by the provisions of the Act.

The Trial Judge (Kemp J.) on the 5th November, 1929, dismissed the suit, holding that, while there was sufficient compliance with the by-laws, a submission to arbitration was a condition precedent and the suit was not maintainable. On appeal, the learned Judges of the Court of Appeal on the 12th August, 1930, held that arbitration was not a condition precedent, but that the by-laws had not been complied with ; they therefore confirmed the decree of the Lower Court, though on a different ground. The present appeal is taken from that judgment.

The appellants carry on business as commission agents at Cawnpore and Bombay ; the respondents are merchants at Cawnpore. The balance sued for arises on eight transactions, which began in each case with an order by the respondents on a printed form supplied by the appellants for purchase or sale in Bombay of a number of bales of cotton for forward delivery. On receipt of the order the appellants instructed their brokers in Bombay, Messrs. Chimanram Motilal, who executed the order and reported it to the appellants. Subsequently each transaction was closed by a sale or purchase, with a profit or loss arising to the respondents, as the case might be. The initial order in each case stated that the order was to be "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. It may be taken that the ungrammatical words "is applicable" mean "so far as applicable." In fact the appellants, who are now Associate Members of the Association, were not so at the time of the initial orders in the case of the three earliest transactions, but their Lordships are not in a position to separate the stages of these transactions, and they will deal with the important questions which arise on the footing that the appellants were at all material times members of the Association. It may be noted that Associate Members must employ a broker to carry out dealings on the Bombay Cotton Exchange and that such broker must be a member of the Association.

The Bombay Cotton Contracts Act of 1922 recites that it is expedient to provide for the regulation and control of transactions in cotton in Bombay and provides so far as is material, as follows :—

" 2. In this Act, unless there is anything repugnant in the subject or context

- (a) "Contract" means a transaction in cotton to be carried out in whole or in part in Bombay ;
- (c) The 'Association' means the East India Cotton Association Limited ; and
- (d) The 'Board' means 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.

" 3. The Board may, subject to the sanction of the Governor in Council make by-laws for the regulation and control of transactions in cotton :—

- (f) prescribing the terms, conditions and incidents of contracts and the forms of such contracts as are in writing ;

- (g) regulating the making, performance and cancellation of contracts including contracts between a commission agent and his constituent, or between a broker and his constituent, or between a jethawala or mucedum and his constituent, or between a member and a non-member of the Association and providing for the consequences of insolvency on the part of a seller or buyer or intermediary, the consequences of a breach or omission by a seller or buyer, and the responsibility of commission agents, mucedums and brokers not parties to such contracts ;
- (m) regulating the course of business between parties to contracts in any capacity whether they be members of the Association or not.

“ 4. The constitution and administrative machinery set out in the Articles of Association of the Association are declared to be lawful. The said Articles shall not, except with the sanction of the Governor in Council, be altered in respect of

the number or constitution of Panels, or the representation upon (a) Panels, (b) the Panels Representative Committees, (c) the Representative Committee of the Association or (d) the Board.

“ 5. 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.”

The first question at issue depends on Section 4 of the Act and on Article 96 of the Articles of Association which provides as follows :—

“ Article 96. 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 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 of any such arbitration.”

The respondents maintain that the effect of Section 4 is to make Article 96 binding on non-members as well as members, and that accordingly the present suit is not maintainable, arbitration being a condition precedent to the commencement of proceedings. Their Lordships are unable to construe Section 4 in that sense. In their opinion Section 4 does no more than to declare that the constitution and administrative machinery set out in the Articles are not unlawful, and does not alter the character of the Articles as a domestic contract among the members of the Association. The respondents maintained alternatively that the Articles of

Association were included among the " Rules and Regulations " to which the present contracts were expressly made subject by the passage quoted above from the initial orders, but their Lordships read these words as referring to the published by-laws made for the regulation and control of cotton transactions, which the Act makes binding on non-members, and are of opinion that they cannot be taken to refer also to the Articles of Association. Their Lordships agree with the conclusion of the learned Judges of the Court of Appeal on this point.

The validity of the contracts between the appellants and the respondents is challenged by the latter on the ground that they contravene by-law 81 of the statutory by-laws, which is in the following terms :—

" 81.—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, 68, 69 and 70), provided that to such Contracts By-laws 130 to 163 inclusive shall not apply.

" 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 form in the appendix which is referred to is headed " Official Client's Contract Form " and, in addition to the details of the transaction, contains various terms and conditions as to payment, provision of margins, arbitration etc.

The appellants maintain, in the first place, that this by-law, so far as it purports to apply to a contract between a commission agent and his constituent, is *ultra vires* of the Association in respect that sub-head (f) of section 3 of the Act which authorises regulation of the Forms of Contracts, only relates to a contract to which a broker is a party, and does not relate to a contract of agency between a commission agent and his constituent. This argument is based on a narrow view of the definition of " contract " in section 2 and a comparison of sub-heads (f) and (g) of section 3. It is argued that the transaction in cotton to be carried out in Bombay relates only to the contract with the broker who deals on the exchange, while the commission agent is employed by his constituent to procure the contract with the broker, the relations between the commission agent and his constituent being merely one of agency and not forming part of the transaction in cotton within the meaning of section 2 (a). It is further argued that, while the definition of contract in section 2 applies to sub-head (f) of section 3, it is expressly extended in sub-head (g) so as to include *inter alia* contracts between a commission agent and his constituent and that by-law 81 and its relative form are alone warranted by sub-head (f) of section 3.

Their Lordships are unable to accept this construction; in their view the transaction in cotton referred to in the definition of contract covers the whole transaction in cotton, including the part which an intermediary takes in it, and this view is supported by sub-head (*m*) of section 3, which shows that the whole course of business "between parties to contracts in any capacity whether they be members or not" is to be subject to regulation by by-laws. They are therefore of opinion that by-law 81 and its relative form are *intra vires*.

In the next place, the appellants maintained that by-law 81 and its relative form do not apply to a contract between a commission agent and his constituent. While admitting that the by-law would *prima facie* apply to such a case, they contended that the terms of the form prescribed were quite inapplicable to such a case and could only apply to a contract between a broker and his constituent. It is to be noted that neither this contention nor the preceding contention as to the validity of the by-law appears to have been maintained in either of the Courts below, the only question having been whether the contracts in the present case sufficiently complied with the prescribed form. The Trial Judge held that there was substantial compliance with the form, which was all that was required by the by-law, but a contrary view was taken in the Court of Appeal, where it was held that there must be literal compliance with the form, and that admittedly such compliance was absent in the present contracts. Before their Lordships it was not argued by the appellants that there was even substantial compliance with the form.

Their Lordships are of opinion that the form prescribed is, in its terms, applicable to contracts between a commission agent and his constituent and that the parties in the present case were bound to comply with the by-law and its form. They are unable, however, to agree with the view that the form is a stereotyped one and that literal compliance with it is essential; in their opinion, the contract must contain all the terms and conditions set out in the form in order to comply with it. For instance, in the prescribed form the main terms and conditions are contained in the memorandum of contract (on page 68 of the by-laws) sent by the agent to his constituent, in which the former reports the fulfilling of the order by a purchase or a sale, as the case may be, in Bombay. If identical terms and conditions, instead of being in the memorandum sent by the agent, were contained in the initial order by the constituent, their Lordships are of opinion that there would be *pro tanto* sufficient compliance with the by-law. But that is clearly not found in the present case, for the initial orders are inconsistent with the terms and conditions set out in the prescribed form in at least two respects, viz.: (1) as regards the absence of any provision for arbitration and the substitution of provision for the particular Courts in which suits are to be instituted, and (2) a provision that, in the event of a

loss on the transaction, the agents' account is to be accepted as correct and to be binding on the constituent in any legal proceeding. It follows that the contracts having failed to comply with the by-laws they are rendered void under the provisions of section 5 of the Act, and the appellants' cause of action fails.

Their Lordships accordingly will humbly advise His Majesty that the decree of the High Court of Judicature at Bombay dated the 12th August 1930 should be affirmed, and the appeal should be dismissed with costs.

1875

In the Privy Council.

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BALMUKUND RAMCHANDRA,
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DELIVERED BY LORD THANKERTON.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1933.