Privy Council Appeal No. 122 of 1924.

Yamike Kweku - - - - - - - *Appellant*

v.

Annor Adjaye (substituted for Ackah Ayimah) - - - *Respondent*

FROM

THE SUPREME COURT OF THE GOLD COAST COLONY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JUNE, 1926.

Present at the Hearing:

VISCOUNT HALDANE.
LORD ATKINSON.
LORD DARLING.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a judgment dated the 20th March, 1923, of the Full Court of the Supreme Court of the Gold Coast Colony, dismissing an appeal from an award (dated the 21st June, 1919, and filed in the Supreme Court on the 24th April, 1922) of Mr. John Maxwell, arbitrator.

The appellant is the Chief of Sinibu in Western Appolonia and the respondent is the Omanhin or King of Beyin, who is the paramount Chief in Western Appolonia. On the 19th August, 1912, the appellant issued a writ of summons against the predecessor of the respondent, in the Supreme Court of the Gold Coast Colony (as subsequently amended by order of Court, dated the 2nd December, 1916), by which he claimed to "establish his title to the Kobina-Sua and Akah lands situate in Appolonia, bounded with the defendant by the Ailaim stream with Kofie Enima by Bissaw stream, and for perpetual injunction restraining the defendant, his agents, nominees, assignees, and people from interfering with the plaintiff as to receipts of rents of concessions

granted by the plaintiff within the aforesaid area or otherwise interfering with the plaintiff in his enjoyment of the said lands."

On the 9th August, 1916, Judge Watson, sitting in the Divisional Court, made the following order in this cause :—

> " Under Order 52, Rule 1, of the Supreme Court Ordinance I make this Order of Reference and by consent of parties I hereby appoint Mr. John Maxwell, Provincial Commissioner, Western Province, to be arbitrator in this case, and I give parties leave to submit in writing any matters or former judgments or orders which parties desire to bring to the notice of the arbitrator.
>
> Parties agree to sign the following document agreed upon by counsel on their behalf :—
>
> We, the undersigned parties in this action, on behalf of ourselves, our elders and subjects, hereby agree that the matter in dispute between us in this case (Writ of Summons No. 91/1912) be submitted to the arbitration of John Maxwell, Esqr., Provincial Commissioner, Western Province.
>
> We further agree that the decision of the said arbitrator shall be final and conclusive as between us subject to the provisions of Order 52 of the Supreme Court Ordinance No. 4 of 1876, and that the arbitrator shall have full powers to invite the co-operation of any natives of the Colony as assessors or otherwise as he may deem fit, and that the question of the costs of this arbitration shall follow the event.
>
> We further agree to abide by any orders or direction made by the arbitrator consequent upon this arbitration.
>
> (Sgd.) E. C. WATSON,
> Judge."

Subsequently, certain amendments (immaterial for the purpose of this appeal) were by the order of the Court made in the writ of summons.

It is to be observed that though this order provides that the decision of the arbitrator shall be subject to the provisions of Order 52 of the Supreme Court Ordinance No. 4 of 1876, it does not, as is required by Section 3 of that Order, fix the time for the delivery by the arbitrator of his award. That section runs thus :—

> " The Court shall, by an order under its seal, refer to the Arbitrators the matters in difference in the suit which they may be required to determine and shall fix such time as it may think reasonable for the delivery of the award, and the time so fixed shall be specified in the Order."

If one turns to the award, one finds that it begins with a recital of the order of reference setting out that that order was made under Section 52 of the Supreme Court Ordinance No. 4 of 1876, and then proceeds to recite the fact that the parties have agreed that the decision of the arbitrator shall be final and conclusive as between them (*i.e.*, the parties themselves) subject to the provisions of Order 52 of the Supreme Court Ordinance No. 4, of 1876. This obviously means subject to all the provisions of Order 52 applicable to the case, amongst which sub-section or paragraph 3 must be included, because the fixing of the time for the delivery of the award is not a mere trivial provision regulating procedure, it is a matter of vital importance designed to prevent

the decision of the matters in controversy between the parties being indefinitely postponed.

The effect of the omission of any specification of the time for the making of the award under a legislative provision somewhat similar to sub-section 3 of Section 52 has been considered and decided in the case of *Nusserwanjee Pestonjee v. Meer Mynoodeen* (VI Moo. I.A. 134).

There the applicable legislative provision was the Bombay Regulation VII of 1827. By clause 1 of its third section it was enacted, amongst other things, that the deed of reference " must contain the time within which the award is to be given," and it was held that as the deed of submission contained no provision as to when the award was to be made by the arbitrators, it was bad and unenforceable.

It appears to their Lordships that the omission from an award made under Order 52 of the above-mentioned Ordinance of any indication of the time when it is to be made is such a defect, apparent upon the face of the award, as would *primâ facie* make it bad and liable upon proper proceedings being taken to be set aside. But sub-section 12 (*c*) of this same Order 52 protects the award from being so dealt with. It provides that if an objection to the legality of the award is apparent upon its face the Court can remit it for reconsideration by the arbitrator or umpire upon such terms as it may think proper, and then by sub-section 13 enacts, as complementary to the preceding sub-section, that an award shall not be liable to be set aside except on the ground of perverseness or misconduct of the arbitrators. The effect of these two sub-sections necessarily is, in their Lordships' view, that an award cannot be set aside merely for an illegality appearing on the face of it, where that illegality does not amount to perverseness or to misconduct of the arbitrator. The 14th sub-section then provides that if no application shall have been made to set aside the award or to remit it or any of the matters referred for reconsidera tion, or if the Court shall have refused any such application, either party may file the award in Court, and the award shall thereupon have the same force and effect as a judgment. Those provisions obviously mean that the award cannot be filed unless no application to remit it or to set it aside shall have been made, or if made shall have failed. If its legality has not been attacked, or if that attack has been made and failed, the award ceases to be assailable, and may by either party be filed and enforced. The contention put forward by Mr. Narasimham on behalf of the appellant is wholly in conflict with such a construction of Order 52. According to him, though the award has successfully run the gauntlet of the provision of the order, the filing of it is a new point of departure, the objections to its validity already dealt with may be renewed, because it is provided that when filed it shall have the same force and effect for all purposes as a judgment, and a judgment can always be appealed from. Well, in their

Lordships' view the contention of Mr. Narasimham on behalf of the appellant is unsound, just because sub-section 14 does not enact that the award is or becomes a judgment. The nature of the award is not changed. It is still an award, but after running the gauntlet it is, if filed, given the force and effect for all purposes of a judgment.

The learned Counsel frankly admitted that if the arguments submitted by him were held to be unsound his appeal must fail. It appears to their Lordships that this frank admission is perfectly accurate. The judgment appealed from is that of the 20th March, 1923, of the Supreme Court of the Gold Coast Colony, and it is quite clear from that judgment that the appeal to that Court was based on the contention that the use of the word "judgment" in sub-section 14 necessarily gave to a party to the submission or award the right of appeal. The learned judge who delivered the judgment of the Court, in the penultimate passage of his judgment, said :—

> "Were it otherwise, it would be possible for a party to move to set aside an award, and to continue appealing through the various Courts, and then, if still unsuccessful, as soon as the other side had filed the award to start the same process all over again on the same subject-matter.

In their Lordships' opinion the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

YAMIKE KWEKU

v.

ANNOR ADJAYE (SUBSTITUTED FOR ACKAH AYIMAH).

DELIVERED BY LORD ATKINSON.

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