

made before hand. Such offerings were strictly personal, and were not paid into the *pedhi*.

[299] Their Lordships are unable to hold that either the payment of the offerings in the *pedhi*, or the receipt of them by the defendant personally, constitutes "carrying on business" within the meaning of the Letters Patent. Devotion to the shrine was the reason for the offerings in each case.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment of the appellate Court should be affirmed, and this appeal dismissed. The appellant will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Hore and Pattisson*.

Solicitor for the respondent:—Mr. *Edward F. Turner*.

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Before Mr. Justice Farran.

CURSETJI JEHANGIR KHAMBATTA AND ANOTHER (*Plaintiffs*) v.
W. CROWDER AND ANOTHER (*Defendants*),*
[11th, 15th, 16th and 18th January, 1894.]

Arbitration—Award—Setting aside award—Arbitrator receiving evidence from one side in absence of other side—Misconduct—Civil Procedure Code (XIV of 1882), s. 521—Contract—Contract to sell from 2,500 to 3,500 tons of coal—Breach of contract—Non-delivery of coal—Damages—Number of tons on which damages to be calculated.

An arbitrator ought not to hear or receive evidence from one side in the absence of the other side, without (if he does) giving the other side affected by such evidence the opportunity of meeting and answering it. This proposition is, however, subject to the qualification that the parties may agree that a reference may be conducted in any particular way, and such an agreement may be either express or implied from their conduct during the arbitration, and they may also expressly or by their conduct waive their objection to an irregular course of conduct on the part of the arbitrator.

Where an arbitrator received certain papers and documents from the defendants in a suit referred to his arbitration, together with a letter from the defendants containing certain comments on the documents sent to him and made his award without giving the plaintiffs an opportunity of seeing the said papers and documents, and of meeting the inferences deducible from them.

Held, that there was such a breach of duty on the part of the arbitrator as entitled the plaintiffs to have the award set aside.

On the 18th May, 1893, the defendants sold to the plaintiffs "the entire cargo of coal per steam-ship ———— May shipment, *via* canal, amounting to 2,500 to 3,500 tons or thereabouts." The defendants intended a certain steamship called the "*Ethelaida*," [300] which carried a cargo of 3,395 tons of coal to satisfy this contract. This ship, however, did not load in May, and consequently her cargo did not fulfil the conditions of the contract. From the day of making the contract the plaintiffs had been urging the defendants to declare the name of the vessel in which the coal contracted for was to be shipped. On the 14th June the defendants by letter informed the plaintiff that the "vessel chartered for their May shipment" had not loaded in May, and they offered to cancel the contract. On the same day, however, and about an hour after the plaintiffs had received this letter, and before they had replied to it, the defendants sent them another letter as follows:—"We have now been informed that the boat, our coals have been loaded

* Suit No. 415 of 1893.

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in, is the 'Ethelaida,' and we now beg to declare it." Correspondence subsequently passed between the parties. On the 15th June the plaintiffs wrote to the defendants as follows:—"Please inform us finally what you intend. In case the 'Ethelaida' is declared as bringing coals sold to us under contract of 18th May, please let us know the date of her sailing, landing and the particular date of her arrival in Bombay, and also how much coal she has on board." On the following day the defendants replied: "The 'Ethelaida' is the boat chartered for the cargo we sold you..... We do not positively know whether she commenced to load in May or June. She was expected to load about 3,000 tons." On the 20th June the defendants wrote definitely stating that the "'Ethelaida' did not load in May." The plaintiffs refused her cargo, and sent in a statement of their alleged loss calculated upon 3,300 tons, the amount stated to be the cargo of the "Ethelaida" in the defendant's letter of the 14th June.

Held, that the damages must be calculated upon a cargo of 2,500 tons only. The "Ethelaida" was never incorporated into the contract. The defendants declared her against the contract; but, after they had informed the plaintiffs that she had not loaded in May, the plaintiffs refused her cargo. The contract which the defendants failed to fulfil was a contract to deliver 2,500-3,500 tons and not a contract to deliver the "Ethelaida" cargo, which they were always ready and willing to deliver. The option rested with the defendants whether they would deliver 2,500 or 3,500 tons, or any intermediate quantity, and upon no principle could the Court exercise that option for them and declare that they were liable to deliver more than a cargo of 2,500 tons.

[R., 6 Ind. Cas. 963=73 P.W.R. 1910.]

SUIT to recover Rs. 5,803-14-0 as damages for breach of contract and for a declaration that a certain award was not binding.

On the 18th May, 1893, the defendants by a contract of that date sold to the plaintiffs "the entire cargo of coal per steam-ship———May shipment *via* canal amounting to 2,500 to 3,500 tons or thereabouts. The coal to be of the description known as Davison's West Hartley, and to be delivered into purchaser's boat alongside at Rs 15-4-0 per ton. Delivery to be taken at a rate not less than 500 tons per diem." The other terms of the contract are not material to this report.

Between the date of the contract and the 14th June the plaintiffs wrote several letters to the defendants to declare the [301] name of the vessel in which the coal was to be shipped, but the defendants replied that they were as yet unable to supply the information. On the 14th June, the defendants wrote to the plaintiffs stating that the vessel chartered for their May shipment did not take in her cargo during May, and they offered either to cancel their contract with the plaintiffs or to supply them with other coal. On the same day, and about an hour after the plaintiffs had received this letter, and before they had replied to it, the defendants sent them another letter as follows:—

"14th June, 1893.

"Dear Sirs,—We have now been informed that the boat, our coals have been loaded in, is the 'Ethelaida' and we now beg to declare it.

"Yours faithfully,

"(Signed) W. CROWDER & Co."

On the next day, the plaintiffs wrote to the defendants acknowledging the receipt of both the above letters. They declined the offer of other coal, and referring to the latter, declaring the "Ethelaida," they said:—

"Please inform us finally what you intend. In case the 'Ethelaida' is declared as bringing coals sold to us under contract of 18th May, please let us know the date of her sailing, loading, and the probable date of the arrival in Bombay, and also how much coal she has on board."

On the 16th June the defendants replied by the following letter :—

“16th June, 1893.

“Dear Sirs,—In reply to yours of yesterday's, we beg to say that the ‘Ethelaida’ is the boat chartered for the cargo of Davisons we sold you. We have had no advice, so far, of her sailing, and up to the present we do not positively know whether she commenced to load in May or June, but expect to get a cable shortly. She was expected, according to 6/P, to load about 3,300 tons.

“Yours faithfully,

“(Signed) W. CROWDER & CO.”

On the 28th June the defendants wrote a letter to the plaintiffs, of which the following is the material part :—

“For reasons that we have already explained to you both by letter and verbally at our interview yesterday, the ‘Ethelaida’ did not load in May. You promised us yesterday that you would write us a letter declining to accept the ‘Ethelaida’s’ cargo, and which you might have done a fortnight ago on 14th June. We wish you to clearly understand that whatever claim you may ultimately prefer against us, we [302] have a right at once to know whether you intend to accept this cargo or not ; otherwise we shall hold you responsible for any losses that may take place on a resale in a falling market.

“We have asked you and we now again ask for a statement of what you consider to be your losses, and would like to have this in writing as soon as possible without prejudice to our case.”

To this letter the plaintiffs replied as follows :—

“Bombay, 28th June, 1893.

“Messrs. W. CROWDER & CO.,

“Bombay.

“Dear Sirs,—We think you made a mistake when you wrote that we might have declined the ‘Ethelaida’s’ cargo a fortnight ago, seeing that it was only by your letter dated the 22nd instant that you informed us of the date of sailing. We had many times asked you for the date before.

“On the 23rd we wrote to you and said we should be glad to hear from you in reply, because we intended to ask our solicitors to reply to your letter of the 22nd. This must have been understood by you to mean that we did not intend to accept the ‘Ethelaida’s’ cargo, and that we should instruct our solicitors to write a letter claiming damages for your breach of contract. If you had replied at once, you would have received this letter. As you now request us to send in our claim, we do so by enclosing our bill No. 976 for Rs. 5,803-14-0.

“Yours faithfully,

“(Signed) C. J. KHAMBATTA & CO.”

The defendants objected to the amount of the plaintiffs' claim, and on the 5th July both the parties agreed to refer their dispute to the sole arbitration of Mr. F.L. McAfee, who on the same day undertook to arbitrate between them.

Both the plaintiffs and the defendants subsequently sent to the arbitrator written statements of their respective cases. The plaintiffs also sent him certain other papers connected with his case.

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On the 18th July, 1893, the defendants wrote to the arbitrator as follows:—

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"Dear Mr. McAfee.—Please do give your decision *re* May shipment, Davison's, without further delay, as it will decide us in what we have to do with the cargo—land or resale. The ship 'Ethelaida' is expected in at any moment now, and we will be awkwardly placed if the matter is not settled before she arrives.

"Yours truly,

"(Signed) W. CROWDER."

[303] On the same day the arbitrator addressed the following letter to both parties:—

"Bombay, 18th July, 1893.

"Messrs. C.J. KHAMBATTA & Co.

and

"Messrs. W. CROWDER & Co.

"Gentlemen,—To enable each of your good selves to discuss opposing points brought out in your respective statements, I would feel obliged by your arranging to call at my office from 3 to 5 this afternoon. I would suggest your bringing with you, in original, such letters as have been interchanged between you on the matter now in question.

"I am, &c., &c.,

"(Signed) F.L. MCAFEE."

On the same day (*viz.*, the 18th July) the arbitrator sent the following note to the plaintiffs:—

"Dear Sirs,—Messrs. W. Crowder & Co. say three o'clock this afternoon will suit them. Please say by bearer whether this hour will answer you. If it will not, appoint your time, please.

"I am, &c.,

"(Signed) F. L. MCAFEE."

In reply, the plaintiffs sent him the following memorandum:—

"All my papers are at Mr. Hemming's, and unless I get them, my presence will be useless. I am ready to be at your place at the appointed time, and will let you know as soon as they are received.

"I am just writing to Mr. Hemming.

"Yours faithfully,

"(Signed) C. J. KHAMBATTA."

At the trial the plaintiff stated in his evidence that immediately on receipt of the above letter from the arbitrator he sent to his solicitor (Mr. Hemming) for the documents which he desired to have at the meeting. He, however, only obtained some of them, as Mr. Hemming was not then in his office. With these, however, he attended the arbitration meeting. No other person was present before the arbitrator except the plaintiff and the defendant. The plaintiff stated in his evidence that the whole time of the meeting, which lasted about two hours, was occupied by the defendant Crowder in addressing the arbitrator, and that, except by way of occasional interruption and correction, he (the plaintiff) said nothing, and in spite of his remonstrances was not given any opportunity of stating his case. He further [304] stated that he was so dissatisfied

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with the way in which the meeting was conducted, and the refusal to allow him to speak, that he went immediately, at the close of the meeting, to his solicitor Mr. Hemming, complained that he could not get a hearing, and arranged that Mr. Hemming should represent him at the next meeting. Mr. Hemming gave evidence and corroborated the plaintiff on this point. The plaintiff swore that he had no idea that there was not to be another meeting.

On the other hand, the arbitrator and the defendant deposed that the plaintiff was fully heard, and that the points in dispute were taken up at the meeting and discussed *seriatim*, and that the business of the arbitration was then concluded. The arbitrator, however, in his evidence stated that no formal announcement to that effect was made.

On the following morning, *viz.*, the 19th July, the arbitrator sent the following note to the plaintiff and defendant:—

“ Messrs. W. CROWDER & CO.,
 and
 Messrs. C. J. KHAMBATTA & CO.

“ Gentlemen,—Will you do me the favour to let me have any contracts for sale or purchase of Davison’s West Hartley coal that you may have entered into for May shipment between the 20th May and the 15th June.

“ As also prices of same species of coal ruling in Bombay between the 1st and 7th July.

“ I am, &c., &c.,
 “ (Signed) F. L. MCAFEE ”.

The plaintiff’s reply was as follows:—

“ Bombay, 19th July 1893.

“ Dear Sir,—Referring to your enquiry in your memo, of to-day’s date, we beg to state that as there was no coal to be got at the time, no rate was fixed.

“ All that was going on, was the demand for May shipment by S. S. ‘Indrapoora’, which was offered at Rs. 17 (seventeen), but no sellers.

“ The ‘Indrapoora’ completed her discharge on 30th June.

“ Yours faithfully,
 “ (Signed) C. J. KHAMBATTA & Co.”

The defendant’s reply was the following:—

“ Bombay, 19th July, 1893.

“ Dear Sir,—In reply to yours of date, we beg to say that we have not sold any May shipment of Davison’s between the dates mentioned by you since the 28th [305] June. We have tried to get an offer for the ‘Ehe-laida’ cargo, and the best that we have had so far is Rs. 14.

“ We send you copies of *Times of India*, *Gazette* and Messrs. Brooks & Co.’s Coal Circular for the 30th June, 7th and 14th July, from which you will see that the price quoted for ready Davison’s is about Rs. 14, and this being so, Messrs. C. J. Khambatta are Rs. 1½ to the good not having to take delivery of the cargo.

“ Yours faithfully,
 “ (Signed) W. CROWDER & Co.”

On the afternoon of that day (the 19th July) the arbitrator published his award, finding that the plaintiffs had sustained no loss by the

1894 defendants' failure to fulfil the contract of the 18th May, 1893, and that
 JAN. 18. no compensation was due to the plaintiffs.

ORIGINAL The plaintiff alleged that he was wholly taken by surprise in receiving
 CIVIL. the award; that he was altogether unaware that the enquiry before the
 18 B. 299. arbitrator was concluded; and that he had fully expected that another
 meeting would be held, at which he could place his case before the
 arbitrator.

Immediately on receiving the award he wrote the following letter to
 the arbitrator:—

"19th July, 1893.

"To F. A. McAFEE, ESQ.

"Dear Sir,—I am surprised to receive your letter with what you call
 your award. As you know quite well, I have not yet had the opportunity
 of putting my case before you, and no evidence whatever has been given.
 I shall take steps in the matter, and will, if I can, upset such conduct.
 It was distinctly understood last evening that there was to be another
 meeting, and I object to be imposed upon in this manner. It is ridiculous
 for you to state that the ruling rate was between 14 and 14½, and it shows
 that you know nothing about it. I have overwhelming evidence to show
 that the rate was much higher. I do not trouble to state anything further,
 but will ask you to return what papers you have of mine at once, and
 please to keep a list of them, as I shall show that you have not yet given
 me opportunity of putting all my papers before you, and I regret that you
 ever had anything to do with it."

"Yours faithfully,

"(Signed) C. J. KHAMBATTA."

Further correspondence took place between the plaintiffs and the
 arbitrator which is not material to this report, and on the 24th August,
 1893, the plaintiffs filed this suit, praying for a declaration that proceedings
 with regard to the arbitration and award were invalid and not binding,
 and for Rs. 5,803-14-0 as damages for the defendants' breach of contract.

[306] The defendants pleaded the award, and denied the damages
 alleged by the plaintiffs.

Krikpatrick and Russell, for plaintiffs:—The award should be set
 aside—*Haigh v. Haigh* (1); *Russell on Arbitration* (7th ed.), p. 185 *et*
seq.; *Hurpurshad v. Sheo Dyal* (2); *Harvey v. Shelton* (3); *Brook v.*
Delcomyn (4); *Doddington v. Hudson* (5); *Civil Procedure Code* (XIV
 of 1882), s. 521; *Ganga Sahai v. Lekhraj Singh* (6). As to damages,
Benjamin on Sale (4th ed.), pp. 916—923; *Hammond v. Bussey* (7); *Hinde*
v. Liddell (8).

Jardine (with *Lang*, Advocate General), for defendant:—No case has
 been made out to set aside the award made by the arbitrator. The award
 is binding, unless misconduct is shown; *Civil Procedure Code* (XIV of
 1882), s. 521. The evidence shows that the proceedings were properly
 conducted, and the award duly made. If, however, the award is set aside,
 the question will be what damages should be given. *Mayne on Damages*
 (4th ed.), p. 30; *Contract Act* (IX of 1872), s. 73, ill. (1), and *Cunning-*
ham's Contract Act, note to s. 39; *Benjamin on Sales* (4th ed.), p. 755
 —906-7; *Phillipotts v. Evans* (9).

(1) 3 DeG. F. & J. 157 (166).

(4) 16 C. B. (N. S.) 403.

(7) 20 Q. B. D. 79.

(2) 3 L. A. 259.

(5) 1 Bing. 394.

(8) L.R. 10 Q. B. 265.

(3) 7 Bea. 455 (462-464).

(6) 9 A. 253.

(9) 5 M. & W. 475.

JUDGMENT.

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FARRAN, J.—On the 18th May, 1893, the defendants contracted to sell an entire cargo of Davison's West Hartley coal, May shipment, of 2,500—3,500 tons, to the plaintiff at Rs. 15-4-0 per ton. This contract the defendants were unable, or failed, to carry out; and the plaintiff now sues for damages for its breach. On the 5th July, the parties, being unable to arrive at a settlement, referred the matter to the sole arbitration of Mr. F. L. McAfee, and agreed to abide by his decision; and on the same day, Mr. McAfee undertook the arbitration. On the 19th July, the arbitrator published his award, and found that the plaintiff had sustained no loss by the defendants' failure to perform the contract, and that, therefore, no compensation was due to him.

Three questions arise upon the pleadings, and are embodied in the issues: (1) Whether the award is binding upon the plaintiff? [307] (2) Whether the plaintiff suffered damages by reason of the defendants' breach of contract? (3) What is the amount of such damage, if any? The plaintiff impeaches the award on various grounds. His charges of collusion and moral misconduct against the arbitrator were, for the most part, tacitly abandoned by his counsel; and as I consider that they were without foundation, I shall make no further allusion to them. Counsel, in reply, rested his case mainly upon the grounds (1) that the plaintiff had not a proper opportunity afforded to him of stating his own and meeting his opponents' case, and was taken by surprise by the award being made with too great precipitation, and (2) that the arbitrator had before him, and took into consideration, (a) papers and documents furnished to him by the defendants which the plaintiff had no opportunity of seeing, or discussing, or meeting by argument or counter-proof, and (b) evidence afforded by his own book which he did not inform the parties that he intended to use.

The following facts are not greatly in dispute. I shall indicate those upon which the parties are at variance. After the 5th July, the plaintiffs and the defendants sent in written statements of their respective cases to the arbitrator and some papers, but no meeting was held until after the 17th July, the arbitrator being anxious to arrange about his fees. These the defendants guaranteed to him by their letter of that date, asking him at the same time for a prompt decision. The defendants were evidently under the impression that the arbitrator might give his decision without holding a meeting. Their written statement, dated July 6th, ends with the following passage after offering to explain any points which might not be clear to the arbitrator:—"We would also suggest that, after you have gone into the case and before you finally decide, both sides be given the opportunity of meeting with you to discuss away any points that you may desire cleared. Perhaps Saturday afternoon, the 8th, may be convenient to you." The plaintiff does not appear to have read, or made himself acquainted with, the contents of the defendants' written statement. He expected the matter to be orally discussed, but whether in the presence of both parties, is not so clear. His case, with certain extracts referred to in it in the [308] form of rough notes, was received by the arbitrator before the 12th July. On the 18th July the defendant Crowder wrote a private and very urgent letter to the arbitrator to give his decision without delay, as the defendants' hands, he wrote, with reference to the "Eshelaida's" cargo, were tied until they knew it. On this the arbitrator wrote, appointing a meeting from

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3 to 5 that afternoon, to enable each of the parties to discuss the opposing points brought out in their respective statements. The plaintiff wrote that his papers were with his solicitor, and that he was writing for them, and would let the arbitrator know as soon as he received them. His solicitor sent him some papers, and he and the defendant Crowder attended the meeting, which lasted about two hours. Unfortunately, the arbitrator took a wretchedly meagre and most unsatisfactory note. It conveys no idea, to the mind, of what really took place. From the oral evidence, however, of the witnesses and what subsequently occurred, I think that it may safely be concluded that the salient points of the case underwent discussion, such as the meaning of the contract, whether the defendants had any valid excuse for their non-performance of it, and the date at which the coals ought to have been delivered; and that a more or less definite conclusion was arrived at as to these points, the parties being at one as to or not strongly contesting them; but as to what should be deemed to be the proper price of coal at the date of the performance, though that also was discussed, the parties took up very different positions, and, I think, the arbitrator had not and did not consider that he had materials before him to enable him to determine it. When the meeting broke up, nothing was said, I think, as to another meeting being held, nor, on the other hand, was it stated that the proceedings had terminated, and that the matter was ripe for an award; nor do I think that anything took place which would lead either of the parties necessarily to that conclusion. The defendant Crowder says that, at the end of the meeting, he wanted to raise the question of a sort of counter-claim which he contended for, and that the plaintiff objected, saying "I object to any more papers or documents going in; the case is finished;" but he is not borne out by the arbitrator as to this latter part of the plaintiff's statement.

[309] The plaintiff did object to the defendant's entering upon his counter-claim, but the statement that he considered the case finished, is quite irreconcilable with his conduct immediately afterwards. What was to happen after the meeting was left, I find, quite vague and undetermined. That the defendant Crowder considered the proceedings terminated, is probable. Having made the suggestion as to the arbitrator's proper course which I have already read from his written statement, and knowing how urgently he had pressed the arbitrator for a special decision, it probably did not occur to him that a second meeting could be contemplated. The plaintiff's broad views on the subject of time and his ignorance of the defendant's letter urging the arbitrator to haste, would naturally lead him to a different conclusion. At the close of the meeting he saw his solicitor and discussed with him the desirability of his attending the next meeting.

The plaintiff complains that at this meeting he was not accorded a proper hearing and had no opportunity of explaining his case fully to the arbitrator, and says he remonstrated at the time in strong language, and, in support of this, he called his solicitor to give evidence as to the complaints he made to him after the meeting. The arbitrator and the defendant both deny that he made these remonstrances, and say that he had ample opportunity allowed to him for speaking. The plaintiff, I think, has over-coloured this part of his case, and has attributed to some possible petulant observations a weight which they did not convey to the mind of the hearers. His complaint to his solicitor cannot have been more than such as was suggested by the feeling that his arguments had not impressed the arbitrator as strongly as he desired. If his present account

is accurate, it is impossible to believe that he would not have written, or caused a letter of remonstrance to be written, to the arbitrator, or withdrawn from the arbitration. I am of opinion that nothing occurred at the meeting which would justify the Court in setting aside the award.

The next day (19th July) the arbitrator, at about 2 P.M., sent a duplicate letter to the plaintiff and to the defendants, running thus:—"Messrs. W. Crowder and Co. and C. J. Khambatta and Co. Gentlemen,—Will you do me the favour to let me have any contracts for sale or purchase of Davison's West [310] Hartley coal that you may have entered into for May shipment between the 20th May and 15th June, as also prices for same species of coal ruling in Bombay between 1st and 7th July." The plaintiff replied on the same day that, as there was no coal to be got at the time, no rate was fixed. All that was going on was the demand for May shipment by S. S. "Indrapoora," which was offered at Rs. 17, but no sellers. The "Indrapoora," he added, completed her discharge on 30th June. The defendants replied as follows:—"Dear Sir,—In reply to yours of date, we beg to say that we have not sold any May shipment of Davison's between the dates mentioned by you. Since the 20th June, we have tried to get an offer for the 'Ethelaida' cargo, and the best that we have had so far is Rs. 14. We send you copies of *Times of India*, *Gazette*, and Messrs. Brooks and Co.'s coal circular for the 30th June, 7th and 14th July, from which you will see that the price quoted for ready Davison's is about Rs. 14; and this being so, Messrs. C. J. Khambatta are Re. 1-4 to the good, not having to take delivery of the cargo." No further communication took place between the arbitrator and the plaintiff, and the plaintiff was unaware that the defendants had sent the above papers to the arbitrator. The arbitrator stated at the hearing that he had before him, as evidence, his own book and the result of his private enquiry as to rates; but that he did not inform the parties of this. The arbitrator after receipt of the defendants' letter and documents, and the plaintiff's letter, at once made his award and published it by sending it the same day to the parties at about 5 P.M. He awarded nothing to the plaintiff. The plaintiff immediately wrote a strongly-worded letter to the arbitrator, protesting against his conduct and the award, and stating that he had no further evidence to adduce, and asking him for a return of his papers. The arbitrator replied by simply sending the plaintiff his application for arbitration, and undertaking to return the plaintiff's papers on receipt of the amount. The plaintiff next day (21st July) sent a solicitor's letter to the arbitrator setting out his grievances in great detail. On the 28th August, the present suit was filed.

Such being the facts as I find them, the question arises whether the award is, at law, binding on the plaintiff? It follows, from [311] what I have said, that the plaintiff did not know that the defendant had sent to the arbitrator the particular accounts I have referred to, and that he did not see them or offer any comment upon them, and that no opportunity was afforded him of doing so, except that arising from his receiving the duplicate letters asking the defendant, as well as himself, to send contracts and rates to the arbitrator. Now it is a well-established principle of law that an arbitrator ought not to hear or receive evidence from one side in the absence of the other side, without, if he does, giving the side affected by such evidence the opportunity of meeting and answering it. In *Russell on Awards* (7th ed., p. 191), the proposition is put thus:—"Neither side can be allowed to use any means of influencing his (the arbitrator's) mind, which are not known to, and capable of being

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met and resisted by, the other. As much as possible the arbitrator should decline to receive private communications from either litigant respecting the subject-matter of the reference. It is a prudent course to make a rule of handing over to the opponent all written statements sent to him by a party, and to take care that no kind of communication concerning the points under discussion be made to him without giving information of it to the other side." And, again, (p. 194): "This course of conduct, of examining one party, or the witnesses of one party, or receiving evidence from one party in the absence of the other, is often adopted by mercantile arbitrators. But the Courts in the above instance and in many others, have strongly repudiated the idea that a different course is allowable in this respect in the case of mercantile referees; and although the lawful usage of merchants may be imported into the contract of reference, they have said that the practice of receiving evidence which the party affected has no opportunity of meeting, is not a lawful one." "In every case in which matters are litigated, you must attend to the representations made on both sides, and you must not, in the administration of justice in whatever form, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge, which means are not known to the other side." Per Lord Langdale, *M. R. in Harvey v. Shelton* (1).

[312] In laying down the above proposition, it must be understood that it is subject to this qualification that the parties may agree that a reference may be conducted in any particular way, and such an agreement may be either express or implied from their conduct during the arbitration; and they may also, expressly or by their conduct, waive their objection to an irregular course of conduct on the part of the arbitrator. In the present case, there is no evidence of any agreement, expressed or implied, that the arbitration was not to be conducted on the ordinary lines; and applying the above principles to what, in fact, occurred, I think that the receipt, by the arbitrator, of the papers and documents sent to him by the defendants, with the comments contained in the defendant's letter of the 19th July, without giving the plaintiff the opportunity of seeing them or meeting the inferences deducible from them, would amount to such a breach of duty on the part of the arbitrator as would entitle the plaintiff to have the award set aside. The difficulty in the case arises from the circumstance that the plaintiff must have known, from the arbitrator's joint letter, that the defendants were asked to send the arbitrator particulars of the ruling rates of coal, and that the defendants would adopt means to furnish the arbitrator with information on that subject, and yet did not remonstrate against this course, or ask to see the defendants' proofs, but contented himself by replying that there was no rate fixed by reason of the absence of sales. It may be said that this is an acquiescence, on the plaintiff's part, in the course adopted by the arbitrator. I do not think that this is so. If I am correct in my view of the facts, the plaintiff expected another meeting, and the arbitrator calling for fresh evidence was eminently calculated to impress him in that expectation. So expecting, he would understand that he would have the opportunity to see and answer the defendants' rates and proofs. There was, in this view, nothing in the arbitrator's conduct in asking for fresh evidence which called for remonstrance. When the arbitrator made his award without any meeting and

(1) 7 Beav. 455 (462).

without giving him an opportunity of seeing the defendants' proofs of rates, he was, in my judgment, completely taken by surprise, which he expressed in very strong and uncourteous language; which a man is apt to use when he considers that he has been [313] unfairly dealt with. Under these circumstances, the award cannot, I am of opinion, be held binding on the plaintiff. I need not, therefore, consider the further objections made to it that the arbitrator ruled upon evidence in the shape of his own contract, but which neither party knew that he proposed to use. In my own mind, I am not satisfied that he did use it as evidence. It was not among the documents which were shown to and initialled by the plaintiff's solicitor, but as I have held against the award on another ground. It is unnecessary to pursue the question further. His reference to the book further confirms me in my view, that the arbitrator was, on the 18th July, without materials to guide him in fixing the price of coal, and must then have himself contemplated further evidence being necessary. I find the first issue in favour of the plaintiff.

I now turn to the question of damages. The defendants had intended the "Ethelaida," which carried a cargo of 3,395 tons of Davison's West Hartley coal, to satisfy the plaintiff's contract. She did not load in May, and so her cargo did not fulfil the conditions of the contract. She left Port Said on the 21st June, and arrived in Bombay on the 22nd July. On the 14th June, it was known to the defendants that she had not loaded in May, and they informed the plaintiff of this, and offered to cancel the contract. They, however, later on the same day declared her against the contract. Time letters then passed, in which the parties fenced with each other, each knowing that though the "Ethelaida" had been declared against the contract, her cargo did not fulfil its requirements. It was not, however, till the 28th June that the defendant repeated the statement made in his earlier letter of the 14th June, and the plaintiff refused her cargo; and at the defendant's request sent in a statement of his alleged losses amounting to Rs. 5,800-14-0. On that day, or two or three days later, a May shipment of Davison's West Hartley coal might naturally be expected to arrive in Bombay. It is not important to fix the date with precision, even if it were possible to do so. There is no evidence of any alteration in the market price of Davison's West Hartley coal between the 28th June and the first few days of July. The defendants cannot, I think, object to the [314] 28th June being taken, as they asked for the plaintiff's bill of damages on that day. A question arises as to the number of tons upon which the damages should be calculated. The plaintiff has suggested 3,300 tons according to the charter-party of "Ethelaida," but the "Ethelaida" was never, so to say, incorporated into the contract. The defendants declared her against the contract, but after they had informed the plaintiff that she had not loaded in May, the plaintiff refused her cargo. The contract which the defendants have broken is a contract to deliver a cargo of 2,500—3,500 tons, and not a contract to deliver the "Ethelaida's" cargo, which they were always ready and willing to deliver. The option rested with the defendants whether they would deliver 2,500 or 3,500 tons or any intermediate quantity, and upon no principle can the Court exercise that option for them and declare that they were liable to deliver more than a cargo of 2,500 tons.

(His Lordship then discussed the evidence as to the damages and continued :—)

Taking all the circumstances into consideration, (including the price of June shipment of Davison's coal and coal of other classes), I have, as a

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juror, come to the conclusion that the plaintiff could have sold a cargo of Davison's coal arriving at the end of June at Rs. 15-12 per ton. I justify that finding, in point of law, by the consideration that this coal was selling at Rs. 17 per ton during the week ending 23rd June, and that the defendants have not established a greater fall than one rupee per ton the following week. I have taken off four annas per ton, feeling that there would probably have been a difficulty in selling the whole cargo at Rs. 16. This is almost the exact loss which the plaintiff sustained by not being able to satisfy his contracts for the 2,250 tons with the coal purchased from the defendants. I find the second issue for the plaintiff: and on the third, that the plaintiff be entitled to recover Rs. 1,250 from the defendants. I pass a decree for the amount, but make no order as to costs.

Attorneys for the plaintiffs: Messrs. *Turner and Hemming*.

Attorneys for the defendants: Messrs. *Roughton and Byrne*.

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[315] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

MANCHARAM PRANJIVAN (*Original Applicant*), *Appellant v. BAI MAHALI AND ANOTHER* (*Original Opponents*), *Respondents*.*

[11th April, 1893.]

Succession Certificate Act (VII of 1889), s. 4 (a)—Preamble—Representative of a deceased person—Person claiming to be entitled to the effects of the deceased—Purchaser at sale in execution of a decree against a deceased person.

A certain debt due to P. (deceased) was sold in execution of a decree against him and was purchased by M. In order to enable him to recover the said debt, M applied to the District Judge for a certificate under the Succession Certificate Act (VII of 1889). The Judge rejected the application on the ground that the applicant was not a representative of the deceased.

Held, reversing the decree, that the applicant having purchased at the auction sale the debt as part of the deceased's effects, which was sold as such by the Court, was entitled to a certificate under s. 4 (a) of the Succession Certificate Act (VII of 1889).

FIRST appeal from the decision of J. B. Alcock, District Judge of Surat.

A firm named Motiram Kevalbhai was indebted to the extent of Rs. 1,075 to one Punjia Jagjivan, deceased, against whom a money decree was obtained by one Nathu Kasan in the Court of the Small Causes at Surat. In execution of the said decree the debt due by the firm of Motiram to the deceased Punjia was sold by public auction and purchased by Mancharam Pranjivan, who presented an application to the District Judge for a succession certificate, under Act VII of 1889, in order to recover the debt due to the deceased. The District Judge rejected the application, holding that the applicant was not a representative of the deceased.

The applicant appealed.

Govardhanram M. Tripathi, for the appellant.—It is not necessary that the applicant for a certificate under the Succession Certificate Act (VII of 1889) should be the actual heir of the deceased. Section 4 (a) of the Act expressly contemplates applicants like the present, and in such

* First Appeal No. 1 of 1893.