[SUPREME COURT]

Freetown
March 27
1961

IBRAHIM JALLOH . . . . . *Applicant*

Luke Ag.J.

v.

WHITE CROSS INSURANCE COMPANY LTD. . . . *Respondent*

[C.C. 444/60]

Arbitration—Motion to set aside or remit arbitration award—Power of court to set aside arbitrator's decision.

On June 5, 1959, a lorry belonging to the applicant left Freetown bound for Kailahun. It had a consignment of cargo which included 30 drums of kerosene. While the lorry was crossing a river on a ferry, the ferry sank. Applicant's claim against the respondent insurance company was referred to an arbitrator, to whom were submitted four questions: (1) whether or not the insured vehicle was overloaded at the time of the accident; (2) whether or not the insured had fulfilled all conditions of the policy and in particular condition 5; (3) whether or not the exclusion under paragraph 2, section 1 of the policy was applicable; and (4) whether or not the company was liable. The arbitrator found that the lorry was overloaded at the time of the accident and that applicant's driver was negligent in driving the lorry onto the ferry. He then made an award in favour of respondent. Applicant moved the court to set aside or remit the award on the ground that the arbitrator had decided a question which was not specifically referred to him and had decided it wrongly.

Held, for the respondent, where a matter is referred to an arbitrator chosen by the parties, they are bound by his award, both as to fact and law, provided there has been no corruption on his part and there is no error of law appearing on the face of the award.

Cases referred to: *Hodgkinson* v. *Fernie and anor.* (1857) 27 L.J.C.P. 66; *British Westinghouse Electric and Manufacturing Company Ltd.* v. *Underground Electric Railways Company of London, Ltd.* [1912] A.C. 673; *F. R. Absalom, Ltd.* v. *Great Western (London) Garden Village Society Ltd.* [1933] A.C. 592.

Cyrus Rogers-Wright for the applicant.

Arthur E. Dobbs for the respondent.

LUKE AG.J. This is a motion to set aside or remit an award on arbitration made by J. E. Mackay, Barrister at Law, in the matter of an arbitration between the applicant and respondent dated May 4, 1960.

Applicant gave six grounds on which he relied to upset the award. But in order to appreciate the award of the arbitration it will be necessary to look into the submission placed before him by the parties. They are four, viz.:

(1) To determine whether or not the insured vehicle was overloaded at the time of the accident.

(2) To determine whether or not the insured had fulfilled all conditions of the policy and in particular condition 5.

(3) To determine whether or not the exclusion under paragraph 2, section 1, of the policy is applicable.

(4) To determine whether or not the company is liable.

The facts briefly are that applicant is owner of lorry E 409 which he insured under comprehensive policy No. MB 477345 with respondent company on March 31, 1959. Applicant carries on business at Kailahun and the lorry plies between Kailahun and Freetown. On June 5, 1959, it left Freetown proceeding to Kailahun, having a consignment of cargo, amongst which was 30 drums of kerosene, which the lorry was carrying to Kailahun for Messrs. C. F. A. O. The lorry had to cross two ferries to get to Kailahun. Arriving at the Male ferry, the lorry boarded it and shortly after the ferry started to move and in the course of the journey when they got to the middle of the river water got into it through a hole or holes and it sank.

The arbitrator, in order to ascertain the first submission, referred to the Ferries Ordinance which is found in Cap. 79, s. 4 (1) as amended by the Ferries (Amendment) Rules, which reads:

> " No motor vehicle the laden weight of which exceeds 5½ tons shall be permitted to make use of any ferry pontoon. Provided that the D.P.W. or any officer authorised by him in that behalf may by his consent in writing, etc., etc."

To ascertain the weight of the lorry at the time it was boarding the ferry evidence was given by a Mr. M. Renardias that on June 5, 1959, Messrs. C.F.A.O. loaded 30 drums of kerosene which weighed five tons or over. The arbitrator said there was no objection to this nor was there any evidence in rebuttal. A similar lorry was also weighed which gave the weight of 3½ tons which added to the former weight of the 30 drums of kerosene showed that at the time the lorry entered the ferry pontoon it weighed 8½ tons.

Dealing with the second submission which relates to condition 5 in the insurance policy the arbitrator stated that applicant's driver was negligent when he drove his lorry into the pontoon ferry carrying a laden weight over and above the 5½ tons required by the Ferries Ordinance.

Counsel for applicant in objecting to the whole award gave as his reasons the following: First, where an arbitrator purports to determine a question which is not specifically referred to him his award will be set aside. Secondly—even if what was not referred to him is an essential part of his decision and he decides it wrongly his award is bad and can be set aside.

Learned counsel seems to have overlooked the submission which was to determine whether or not the insured vehicle was overloaded at the time of the accident and not what he has put down in his argument, i.e., " The question before him was not whether there was a breach of the ferries rules but whether or not the vehicle by itself was overloaded without reference to any circumstance."

It seems strange that if a lorry sinks when travelling in a ferry evidence of its weight will not be considered relevant. Continuing his argument he stated in support that the arbitrator completely misconstrued the words laden weight. He submitted that those words meant " weight loaded on " and is not equal to gross weight. He, however, agreed that laden is the past participle of the verb " to load." According to the Concise Oxford Dictionary the meaning of load is, " put load on or aboard (person, vehicle, ship, etc.) . . . place (load, cargo) aboard ship, on vehicle, etc.; add weight to, be burden upon."

In the course of his argument he stated that if the court should hold that the question which was referred to the arbitrator was a matter which was specifically left to him, then the case falls within the principle of *Hodgkinson* v. *Fernie & anor.* (1857) 27 L.J.(N.S.)C.P. 66. In that case, which was an action to recover damages for collision at sea between two vessels, the case was tried and judgment given in favour of the plaintiff and the question of what damages plaintiff was entitled to was referred to an arbitrator. The arbitrator in assessing the damages of £713 8s. 2d. included an amount of £495 6s. 8d. freight amount which had been deducted by the Commissioner of the Admiralty from the terms of the charter-party under which the plaintiff's vessel had been chartered by the Admiralty. The defendant sought for a rule calling on plaintiff to show cause why the award or certificate on the assessment of damages should not be set aside or referred back to the arbitrator; or why the damages should not be reduced by the sum of £495 6s. 8d., on the ground that that sum was not recoverable as legal damage, and had been improperly awarded.

The rule was discharged, and Williams J. said at pp. 68–69,

> "For many years the law has been settled, that where a question is referred to an arbitrator he is constituted the sole and final judge of law and fact, and the parties are bound to abide by his decision, he being the judge whom they themselves have chosen. One exception to the general rule that the courts will not interfere with the decision of the judge chosen by the parties themselves is where his conduct is corrupt; and another is, where it appears upon the face of the award, or on a paper forming part of the award (though this may be somewhat doubtful), that the arbitrator has mistaken the law. Neither of these exceptions apply here, and whether the question was well or ill decided in this case, I think we cannot interfere."

The case of *British Westinghouse Electric and Manufacturing Co., Ltd.* v. *Underground Electric Railways Company of London Ltd.* [1912] A.C. 673, dealt with turbines supplied under a contract to a railway company which were deficient in power and in economy of working and were not in accordance with the contract. Disputes arose between the two companies and the matter was submitted to an arbitrator. In the course of the arbitration the arbitrator stated a case for the opinion of the court whether in the circumstances the cost of the substituted turbines was recoverable by the railway company as part of their damages. The court answered this question in the affirmative, and the arbitrator made an award expressed to be made on the footing of this answer.

The award was ultimately submitted by the House of Lords to the arbitrator with directions that he should take into consideration in assessing the damages the primary advantage which the railway company derived from the superiority of the substituted turbines.

In this case before me the submissions which were referred to the arbitrator were left specifically to him, and it is, therefore, governed by the case of *Hodgkinson* v. *Fernie*. There was nothing which could be regarded as an error of law appearing on the face of the award as illustrated by the case of *F. R. Absalom, Ltd.* v. *Gt. Western (London) Garden Village Society Ltd.* [1933] A.C. 592, which was a building contract having several clauses to be construed by the arbitrator and in one of them he erred in his construction and so his award was set aside. There was no construction to be done by the arbitrator and his tasks were to decide whether the lorry was overloaded at the time of

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the accident; whether or not the insured had fulfilled all conditions of the policy and in particular 5. Applicant abandoned his other grounds.

The arbitrator having heard evidence as to how the lorry was loaded before entering the ferry pontoon held that the lorry was overloaded when in the ferry pontoon and that the insured's driver was negligent when he drove an overladen lorry into the ferry pontoon.

Under the circumstances this motion to either set aside or remit the award is dismissed with costs.

Freetown
March 27,
1961

Cole J.

[SUPREME COURT]

JERIMIAH TUGBEH . . . . . *Plaintiff*

v.

KALIL A. AKAR AND STAVELEY & COMPANY LIMITED . *Defendants*

Tort—Negligence—Submission of no case—Res ipsa loquitur—Whether affidavit filed before issue joined could be received in evidence—English Rules of Supreme Court, Ord. 37, *r.* 24.

On August 29, 1956, plaintiff was knocked down and injured by an automobile owned by Kalil Akar (defendant) and operated by one Davies. Plaintiff brought suit against defendant for negligence. Defendant's defence stated that on the day in question he had sent the car in the morning to Staveley & Co. Ltd. Plaintiff thereupon requested that Staveley & Co. Ltd. be joined as co-defendant. Plaintiff also filed an affidavit in support of this application, to which was attached a copy of a letter from co-defendant to plaintiff's solicitor. This request was granted, but neither the writ of summons nor the statement of claim were amended so as to include a claim against co-defendant.

At the trial, plaintiff testified as to the accident and his injuries. He said that he never saw the car that hit him nor its driver. At the close of plaintiff's case, defendant and co-defendant submitted that there was no case for them to answer. Plaintiff's counsel argued that the doctrine of res ipsa loquitur applied, and also that the court should treat as evidence the affidavit and letter which plaintiff had filed in support of his application for leave to add the co-defendant as a party.

Held, for the defendants, (1) plaintiff failed to make out a case for defendant to answer.

(2) The doctrine of res ipsa loquitur was not applicable, as there was no evidence to show that the car was at the material time under the management of the servant or agent of the defendant or co-defendant.

(3) The affidavit and letter which plaintiff had filed in support of his application for leave to add co-defendant as a party could not be received in evidence, because the requirements of rule 24, order 37, of the English Rules of the Supreme Court had not been complied with.

Case referred to: *Scott* v. *The London and St. Katherine Docks Company* (1865) 3 H. & C. 596; 159 E.R. 665.

Rowland E. A. Harding for the plaintiff.
Gershon B. O. Collier for the defendant.
Claudius D. Hotobah-During for the co-defendant.