1955 *Present :* **Basnayake, A.C.J., and Pulle, J.**

MARCHANT HEYWORTH & SWIFT, LTD., Appellant, *and* A. E. M. USOOF, Respondent

S. C. 167—D. C. (Inty.) Colombo, 28,778

Contract—Sale of goods—Arbitration clause—Arbitration on reference by one party alone—Validity of award—Reciprocal Enforcement of Judgments Ordinance, s. 3.

In a written contract entered into between a buyer in England and a seller in Ceylon for the sale of 50 tons of rubber, the seller failed to perform his part of the contract. Thereupon the buyer referred the matter to the Rubber Trade Association of London for arbitration in terms of the contract which provided that it was governed by the Rules, Regulations and Bye-laws of the Rubber Trade Association of London. The arbitrators awarded that the seller should pay to the buyer a sum of £15,000. As the seller failed to satisfy the award, the buyer obtained an originating summons from the High Court of Justice under section 26 of the Arbitration Act of 1950 and duly served it on the seller in Ceylon.

The seller, having objected to the arbitration, took no part in the arbitration proceedings and did not appear in the High Court of Justice in England.

When the buyer applied under section 3 of the Reciprocal Enforcement of Judgments Ordinance to have the judgment of the English Court registered in the District Court of Colombo, the District Judge refused the application on the basis of the objection taken by the seller that the High Court in England had no jurisdiction over the seller as the seller had not submitted himself to its jurisdiction.

Held, that, under a marginal clause in the contract, disputes between the parties were to be settled by arbitration. According to the law of England which regulated the transaction in question there was nothing which required that the reference to arbitration should be a formal document signed by both parties. In the circumstances the judgment of the English Court was registrable in the District Court of Colombo under section 3 of the Reciprocal Enforcement of Judgments Ordinance.

APPEAL from an order of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *E. R. S. R. Coomaraswamy*, for the Petitioner-Appellant.

R. M. Markhani, for the Respondent-Respondent.

July 19, 1955. BASNAYAKE, A.C.J.—

The appellant, Marchant Heyworth & Swift, Limited, a limited liability company incorporated in the United Kingdom (hereinafter referred to

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as the appellant), applied under section 3 of the Reciprocal Enforcement of Judgments Ordinance to have a judgment given in its favour by the Queen's Bench Division of the High Court of Justice in England registered in the District Court of Colombo.

The material portion of that judgment reads—

"PURSUANT to the Arbitrators' Award herein dated the 26th day of October 1950 WHEREBY IT WAS AWARDED that Sellers have defaulted and shall pay to the Buyers the sum of Fifteen Thousand Pounds (£15,000/-) and Association Fee Ten Shillings (10/-) and Arbitration Fee Three Guineas (£3—3—0*d*) to be paid by Sellers. And the said Applicants Marchant Heyworth & Swift Limited having by the Order of Master Diamond dated the 3rd day of October 1952 obtained leave to enforce the said Award in the same manner as a Judgment or Order to the same effect.

"IT IS THEREFORE ADJUDGED that the Applicants Marchant Heyworth & Swift Limited recover against the Respondents, Ceylon Trading Corporation, £15,003—13—0*d*."

The appellant's application was opposed by the respondent Ahamed Ebrahim Mohamed Usoof, the judgment debtor (hereinafter referred to as the respondent), the sole proprietor of the Ceylon Trading Corporation, on the ground that—

(*a*) he did not submit to the jurisdiction of the High Court of Justice in England ;

(*b*) the High Court of Justice in England acted without jurisdiction ;

(*c*) he was not duly served with the process of the original Court ; and

(*d*) the judgment was not registrable under section 3 (2) of the Ordinance.

The learned District Judge after trial held that the respondent had been duly served with the process of the High Court of Justice in England but that that Court had no jurisdiction over the respondent as he had not submitted himself to its jurisdiction, and refused the appellant's application to have the Judgment in its favour registered.

Dissatisfied with that decision, the appellant has appealed to this Court. It will be convenient to refer shortly to the material facts. They are as follows :—

By a contract dated 22nd June, 1950, the appellant contracted to buy from the respondent a consignment of 50 tons of rubber. The instrument of contract was in the following form :

CONTRACT.

MARCHANT, HEYWORTH & SWIFT, LIMITED

Ref. No. 664.

London House,
3, New London
Street,
LONDON, 22nd June, 1950.

Messrs. Ceylon Trading Corporation, 360, Union Place, Colombo.

We have this day Bought from you the following goods :—

About 50 (fifty) tons FAIR AVERAGE QUALITY RIBBED SMOKED SHEETS RUBBER, R. M. A. 3, packed in cases and/or bales and/or bareback bales, fit for export, at *1s/9d.* (one shilling and ninepence) per lb., nett, c. *i. f.* Liverpool :

For shipment from the East during June and/or July, 1950.

TERMS : Payment by Sight Draft on presentation in London with Shipping Documents attached.

Confirmed Credit to be opened immediately.

Yours respectfully,
For and on behalf of
MARCHANT, HEYWORTH & SWIFT,
LIMITED.

DIRECTOR.

Please Sign and Return the Receipt attached Hereunder.

Each delivery to stand as a separate contract. This contract is made subject to the Rules, Regulations and Bye-Laws of the Rubber Trade Association of London and any dispute arising thereon or in relation thereto is to be settled by Arbitration here in accordance with such Rules, Regulations and Bye-Laws. The said Rules, Regulations and Bye-Laws of the Rubber Trade Association of London are made, so far as not expressly varied by the special conditions of this contract, part of this contract as if same were set forth herein in full.

Below the words "Please Sign and Return the Receipt attached Hereunder" was a detachable receipt which the respondent duly perfected and sent to the appellant. That receipt and the letter which accompanied it are set out below :

To : MARCHANT, HEYWORTH & SWIFT, LIMITED

Ref. No. 664.

London House, 3, New London Street, London, E. C. 3.

We hereby confirm having sold to you about 50 (fifty) tons FAIR AVERAGE QUALITY RIBBED SMOKED SHEETS RUBBER R. M. A. 3, packed in cases and/or bales and/or bareback bales, fit for export, at 1*s*/9*d*. (one shilling and ninepence) per lb., nett, c.i.f. Liverpool :

Delivery. For shipment from the East during June and/or July, 1950.

Terms As per your Contract Ref. No. 664 dated 22nd June, 1950

Date.....

CEYLON TRADING CORPORATION.

Sgd.

Manager.

CEYLON TRADING CORPORATION

COLOMBO, 28th June, 1950.

Dear Sirs,

We thank you for your letter of the 22nd instant enclosing your contract No. 664 covering your purchase of the 50 Tons RSS3.

We confirm cables mutually exchanged as per copy attached and in confirmation of our cable we now have pleasure in enclosing our formal contract No. 008/50 in respect of 50 Tons RMA 3—RSS rubber sold to your goodselves at 1*s*. 9*d*. per lb. CIF Liverpool shipment June/July.

Now we have received your Letter of Credit, we shall make arrangements to have this rubber shipped as early as possible.

We thank you for your valued order and co-operation and assure you of our best and careful attention.

Yours faithfully,
CEYLON TRADING CORPORATION

Sgd.

Manager.

The respondent failed to perform his part of the contract. His excuse was that the export duty on rubber had been increased by the Ceylon Government by 2¾ pence. Over this failure the parties exchanged a

series of communications both by post and telegraph. The respondent at first asked for time to perform his contract till the end of August and also for an increase in the credit value. Then he asked for time till the end of September and finally till the 15th of December, 1950, and even suggested 31st March, 1951. The appellant was willing to give the respondent time till even 15th December, 1950, but asked him to give proof of his *bona fides* by shipping at least part of the amount contracted for and specifying the name and date of sailing of the steamer. The respondent failed to give such proof but kept on asking for time and repeating his difficulties and claiming that his default was caused by *force majeure*.

After giving repeated extensions and finding that the respondent was not going to honour his obligations, on 10th October, 1950, the appellant cabled—

"FINAL WARNING INTEND REQUESTING RUBBER TRADE ASSOCIATION LONDON NOON TOMORROW TO APPOINT ARBITRATORS DEAL WITH YOUR DEFAULT".

As this cable evoked no response the appellant proceeded with the reference to arbitration, and on 19th October, 1950, cabled—

"ARBITRATION RE DEFAULT MONDAY NEXT THREE P. M. TELEGRAPH WHETHER YOU WILL BE REPRESENTED AND IF SO BY WHOM".

The respondent objected to the arbitration by the following cable—

"YOUR 19TH CANNOT AGREE ARBITRATION DELAY DUE *FORCE MAJEURE*".

On 23rd October, 1950, the appellant cabled—

"UNLESS WE HEAR BY WEDNESDAY NOON THAT YOU WILL BE REPRESENTED AT THE POSTPONED ARBITRATION AT THREE P. M. THAT DAY ARBITRATORS WILL PROCEED WITH THE CASE".

This cable was followed by another dated 26th October, 1950:

"ARBITRATORS AWARDED US FIFTEEN THOUSAND POUNDS STERLING DAMAGES FOR DEFAULT IF YOU WISH APPEAL YOU MUST DO SO WITHIN FIVE DAYS AND REMIT FIFTEEN GUINEAS FEES".

The respondent cabled back on 27th October, 1950—

"YOUR 26TH CANNOT ACCEPT ANY AWARDS WILL SHIP GOODS IF SUFFICIENT TIME GIVEN DELAY DUE *FORCE MAJEURE*".

The appellant replied

"YOUR CABLE 27TH ARE POSTING ALL DOCUMENTS RELATIVE TO CLAIM TO OUR LAWYERS IN COLOMBO ON THURSDAY EVENING NEXT WITH INSTRUCTIONS TAKE APPROPRIATE LEGAL ACTION".

On 9th November, 1950, the appellant's lawyers in Ceylon sent to the respondent a copy of the arbitrator's award together with the following letter :

9th November, 50,
EL/PRS/NG.

Messrs. Ceylon Trading Corporation,
360, Union Place,
Colombo.

Dear Sirs,

Claim of Marchant, Heyworth & Swift, Ltd.

Our clients Marchant Heyworth & Swift, Ltd., London, have sent us the correspondence and documents in respect of the 50 tons Fair Average Quality Ribbed Smoked Sheets Rubber R. M. A. 3, which you had contracted to supply them by shipment during June/July 1950, together with the award of the Rubber Trade Association of London, and we are instructed to demand payment from you and in default of payment to take legal proceedings against you to enforce recovery of £15,003—13—0*d.* representing the amount due to our clients.

You have failed to fulfil your part of the contract with our clients although at your request and for the purpose of assisting you our clients amended the relative credit without prejudice to their rights under the contract to permit shipment to be effected by the end of September last. You have sought to give the impression to our clients that the delay in shipment of the rubber was due to the uncertainty caused by the increase in the Export Duty on rubber and to "*force majeure*". But the reasons given by you for your failure to ship have no substance and cannot be entertained. You are aware that the Government of Ceylon has taken steps to assist shippers of rubber by reimbursing their losses consequent on the increase of the Export Duty.

It is clear that your failure to ship the rubber even at the end of September cannot be excused by the increase in Export Duty on rubber and the rise in the price of rubber and our clients consider that you were hoping for a fall in price to fulfil your contract with financial advantage to you.

In the circumstances our clients were obliged to refer the matter to the Rubber Trade Association of London for Arbitration in terms of the contract entered into with you which provided that it was governed by the Rules, Regulations and Bye-Laws of the Rubber

Trade Association of London which fact was acknowledged by you in signing the contract receipt. You were given ample notice of the reference to Arbitration and ample opportunity was given to you to be represented at the Arbitration proceedings but you failed to make any response. The Arbitrators have awarded that you defaulted and that you as sellers should pay to our clients the buyers the sum of £15,000 and costs. We enclose the original Arbitration Award No. 5689 * of the Rubber Trade Association of London together with our clients' account showing a sum of £15,003—13—0*d.* due to them and we have to request you to make immediate payment of Rs. 200,645·70 representing the approximate equivalent in Ceylon currency of £15,003—13—0*d.*

In default of payment forthwith we shall take appropriate legal proceedings against you to enforce recovery ".

Yours faithfully,
Sgd. F. J. & G. de Saram.

* " We the undersigned having been appointed by the committee to settle a dispute arising out of a contract dated 22nd June 1950 made between Messrs. Marchant Heyworth & Swift Ltd. and the Ceylon Trading Corporation, Colombo, for Fair Average Quality R. S. S. R. M. A. 3, C. I. F. Liverpool, have carefully considered the same and award as follows, viz. about 50 tons Fair Average Quality Ribbed Smoked Sheets Rubber R. M. A. 3.

That sellers have defaulted and shall pay to the buyers the sum of Fifteen Thousand Pounds (£15,000) ".

As the respondent failed to satisfy the award, the appellant obtained an originating summons from the High Court of Justice under section 26 of the Arbitration Act of 1950. The originating summons was served on the respondent by Mr. V. Murugesu, Proctor, of Messrs. F. J. & G. de Saram and an affidavit to that effect was filed in the High Court. The respondent did not appear in the High Court and took no part in the proceedings.

Learned Counsel for the respondent contended that a party to a contract is not bound to submit to arbitration any dispute thereunder unless he has formally agreed to be so bound. He invited our attention to the case of *Caerleon Tinplate Co. Ltd. v. Hughes and another* [1], and to the case of *T. W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd.* [2]. Neither of these cases has any application to the case under consideration.

The question in the former case was, whether or not there had been a submission to arbitration within the meaning of the Arbitration Act, 1889 (52 & 53 Vict. C. 49) section 27 of which provided that " in this Act, unless the contrary intention appears, ' submission ' means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not ".

[1] *60 Law Journal, Q. B. D. 640.* [2] *1912 A. C. page 1, at page 8.*

The action was for the price of goods sold, and it appeared that the defendants sent a bought-note, duly signed by them, to the plaintiffs' agents, containing the following provision :

> "Any dispute arising on this contract to be settled by arbitration in Liverpool".

On the same day the plaintiffs' agents signed a sold-note which contained no provision for arbitration whatever. It was held that section 27 required an agreement signed by both parties and that as there was no such agreement there was no valid reference to arbitration.

In the latter case, it was held that an arbitration clause found in the charter party was not applicable to the contract evidenced by the Bill of Lading, and to disputes arising between the shipowners and the holders of the Bill of Lading under that document the Bill of Lading being the primary document to be considered in that case.

It was sought to bring into the Bill of Lading the arbitration clause in the charter party by virtue of the following words in the Bill of Lading :

> "William Malcolm Mackay or to his assigns, he or they paying freight for the said goods, with other conditions as per charter party with average accustomed" and "Deck load at shippers' risk, and all other terms and conditions and exceptions of charter to be as per charter party, including negligence clause".

The House of Lords refused to permit such a construction of the Bill of Lading. The speech of Lord Atkinson at page 6 states the principle of construction thus—

> "I think it would be a sound rule of construction to adopt that when it is sought to introduce into a document like a Bill of Lading—a negotiable instrument—a clause such as this arbitration clause, not germane to the receipt, carriage or delivery of the cargo or the payment of freight,—the proper subject-matters with which the Bill of Lading is conversant,—this should be done by distinct and specific words, and not by such general words as those written in the margin of the Bill of Lading in this case".

Counsel for the respondent argued that the words "terms as per your contract Ref. No. 664 dated 22nd June 1950" in the respondent's cable did not include the arbitration clause and referred only to what was stated in the appellant's letter in regard to the Terms of Payment. We are unable to uphold his contention. This is not the respondent's first business transaction with the appellant. The respondent's plea that the arbitration clause was unknown to him cannot be accepted in view of the appellant's letter dated 4th April, 1949. It reads :

> "We duly received your of the 19th March enclosing Contracts 001/49 and 002/49, and would like to point out to you that these purchases from you have already been covered by our Contracts which

are made under the Rules of the Terms and conditions of the Rubber Trade Association of London. We naturally assume that these terms and conditions are well known to you and hope that you are agreeable to them. As you know they fully protect you in every respect ".

Even in the letter by which the instant contract was concluded pointed attention is drawn to the fact that disputes arising on the contract are to be settled by arbitration. The fact that that clause is printed in the margin of the document is no justification for treating it as if it did not exist.

According to the law of England which regulates the transaction in the instant case there is nothing which requires that the agreement to refer a dispute to arbitration should be a formal document signed by both parties. The requirements of that law are that there must be an agreement in the sense that the parties must be *ad idem* and that the agreement must be in writing. The view we have taken finds support in the case of *Frank Fehr & Co. v. Kassan Jivraj & Co. Ltd.* [1] which is quoted at p.25 of the 15th Edition of Russell on Arbitration. Such an agreement may even be extracted from the correspondence between the parties. It may even be incorporated by reference as in the appellant's letter of 4th April, 1949. In the instant case the respondent is not free to plead ignorance of the provision to refer disputes to arbitration as it is not only stated expressly in the formal letter of April, 1949, explaining the terms of business but it is also included in the letter by which the contract was concluded. The contention that there has been no valid agreement to refer is not entitled to succeed.

Even applying the test of our Law the respondent will not be heard to say in the instant case that there was no submission to arbitration. The only requirement of a voluntary submission is that the parties should consent to it either expressly or tacitly by conduct or action.

Once it is held that there was an agreement to refer all disputes to arbitration the only question that remains to be decided is whether the arbitration was properly held in England as provided in that clause. We think the arbitration was properly held in England, and that the petitioners correctly made an application to enforce it in the Queen's Bench Division of the High Court of England.

In our opinion the learned District Judge should not have set aside the order that the Judgment should be registered under section 3 of the Reciprocal Enforcement of Judgments Ordinance. We accordingly set aside the order of the learned District Judge and allow the appeal with costs in both Courts.

PULLE, J.—I agree.

Appeal allowed.

[1] *(1949) 82 Ll. L. Rep. 673.*