LETTERS PATENT APPEAL.

Before Weston, C. J. and Harnam Singh, J.

THE GREAT AMERICAN INSURANCE CO., LTD.,—
Appellant,

versus

SHRI BODH RAJ SHAH,—*Respondent.*

Letters Patent Appeal No. 1 of 1951.

1952

September 8th

The Arbitration Act (X of 1940)—Section 20—Policy of insurance—Arbitration clause in—"Difference as to the amount of any loss or damage to be referred to arbitrator"—Whether applies to a case where claim rejected in toto by the company.

The arbitration Clause in the policy of insurance provided: 'If any difference arises as to the amount of any loss or damage such difference shall, independently of all other questions, be referred to the decision of an arbitrator to be appointed in writing by the parties in difference..... and it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage, if disputed, shall be first obtained." In answer to the claim by the assured the Insurance company rejected the claim in toto on the plea that surveyors appointed to assess the amount of the loss had not by then reported on the loss and that in the circumstances the company was not in a position to admit or deny the loss.

Held, that where the company pleads that it is not in a position to admit or deny the loss because the surveyors have not so far reported on the loss, the dispute between the parties is as to the amount of the loss or damage within the arbitration clause.

Jureidine v. *National British and Irish Millers Insurance Company, Limited* (1), and *Eagle Star and British Dominions Insurance Company* v. *Dinanath and another* (2), distinguished and not followed.

Letters Patent Appeal under Clause 10 of the Letters Patent from the judgment of Honourable Mr. Justice Kapur, passed in First Appeal from Order No. 56 of 1949 on 22nd November 1950, affirming that of Shri Gulal Chand Jain, Sub-Judge, 1st Class, Delhi, dated the 14th June 1949, ordering the agreement to be filed in Court.

BISHAN NARAIN and M. L. PURI, for Appellant.

HANS RAJ SAWHNEY, for Respondent.

(1) 1915 A.C. 499.
(2) A.I.R. 1923 Bom. 249.

JUDGMENT.

HARNAM SINGH, J. This is an appeal under Clause 10 of the Letters Patent from the judgment given by Kapur, J., in F.A.O. No. 56 of 1949. Harnam Singh J.

On the 11th of June 1947, Bodh Raj Shah, hereinafter referred to as the applicant, took out an insurance policy including riot risk, the amount of insurance being rupees 50,000 on the house and rupees 40,000 on the furniture and household goods.

On the 21st of August 1948, the applicant initiated proceedings under section 20 of the Indian Arbitration Act, 1940, hereinafter referred to as the Act. In that application the applicant maintained that in the last week of August 1947, the furniture and household goods covered by the policy were looted in the riots that followed the partition of the country, that he had intimated to the Great American Insurance Company, Limited, hereinafter referred to as the Company, that the furniture and household goods had been looted and had claimed rupees 38,000 from the company on the basis of the insurance policy.

In the written statement the company pleaded *inter alia* that the arbitration clause only applied to a difference as to the amount of loss or damage and not to a claim which the company rejected altogether, whatever the loss might be. The arbitration clause in the policy provides:—

> "If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in

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writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator; and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the arbitrator, arbitrators or umpire respectively: and in the event of the death of an arbitrator or umpire, another shall in each case be appointed in his stead by the party or arbitrators (as the case may be) by whom the arbitrator or umpire so dying was appointed. The costs of the reference and of the award shall be in the discretion of the arbitrator, arbitrators or umpire making the award. And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators, or umpire of the amount of the loss or damage if disputed shall be first obtained."

On the pleadings of the parties the Court of first instance fixed the following issue:—

"Whether suit can be referred to arbitrators under the terms of the policy?"

In deciding the issue the Court found for the applicant and ordered the arbitration agreement to be filed in Court.

From the order passed by the Court on the 14th of June 1949, the Company appealed under section 39 of the Act.

In deciding the appeal Kapur, J., thought that when the company was not in a position to admit or deny the loss the dispute fell within the arbitration clause of the policy.

Mr. Bishan Narain appearing for the Company basing himself upon *Jureidine* v. *National British and Irish Millers Insurance Company, Limited* (1), and *Eagle Star and British Dominions Insurance Company* v. *Dinanath and another* (2), urges that the arbitration clause only applies to a difference as to the amount of loss or damage.

In *Heyman and another* v. *Darwins, Limited* (3), Viscount Simon L.C. examined the decision given in *Jureidine* v. *National British and Irish Millers Insurance Company, Limited* (1). In *Heyman and another* v. *Darwins, Limited* (3), with reference to the decision in *Jureidine* v. *National British and Irish Millers Insurance Company, Limited* (1), Viscount Simon L. C., said :—

> "Here, again, the decision was not reserved, and here, again, the speeches do not all give the same ground for allowing the appeal."

In *Jureidine* v. *National British and Irish Millers Insurance Company, Limited* (1) Lord Dunedin pointed out that the arbitration clause only applied to a difference as to amount of loss, and therefore, not to a claim which the respondents rejected altogether, whatever the loss might be. Lord Atkinson rested his judgment on the last point alone. Lord Parker concurred without distinguishing reasons. Lord Parmoor said expressly that no difference had arisen as regards matters which could come for decision under the arbitration clause and that consequently the clause had no application.

(1) 1915 A.C. 499
(2) A.I.R. 1923 Bom. 249
(3) 1942 A.C. 356

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In *Jureidine* v. *National British and Irish Millers Insurance Company, Limited* (1), the arbitration clause was identical with the arbitration clause in the present case. If so, the decision given in *Jureidine* v. *National British and Irish Millers Insurance Company, Limited* (1), seems to restrict the application of the arbitration clause to a difference as to the amount of loss. In *Jureidine* v. *National British and Irish Millers Insurance Company, Limited* (1), the main ground for decision was that the repudiation of the claim on a ground going to the root of the contract precluded the company from pleading the arbitration clause as a bar to an action to enforce the claim. If so, the point that arose for decision in *Jureidine* v. *National British and Irish Millers Insurance Company, Limited* (1), was different from the point that arises in the present case. Clearly *Jureidine* v. *National British and Irish Millers Insurance Company Limited* (1), cannot be regarded to be a direct decision on the point arising in the present case.

In *Eagle Star and British Dominions Insurance Company* v. *Dinanath and another* (2), the points that arose for decision were:—

(i) whether the company by their solicitors' letter of January 12, 1922, had rejected the plaintiff's claim under the policy ; and

(ii) whether in the events that had happened the plaintiffs were entitled to file the suit without obtaining an award as to the amount of loss or damage sustained by them."

In deciding the case the Court of first instance found that the company had rejected the claim of the plaintiffs by their letter of January 12, 1922, and that the suit was maintainable.

(1) 1915 A.C. 499
(2) A.I.R. 1923 Bom. 249

In deciding point No. 1 Macleod, C. J. (Crump, J., concurring), said:—

> "And in my opinion, the defendants by that letter of January 12, 1922, rejected the plaintiff's claim."

On the second point Macleod, C. J. (Crump, J., concurring), said:—

> "Therefore when the defendants had rejected the claim, the plaintiffs had a right of action in order that it might be decided by the Court whether such rejection was right or wrong, and it was only in the event of that question being decided in favour of the plaintiffs that it would become necessary that the amount of loss or damage should be ascertained."

Clearly, the points decided in *Eagle Star and British Dominions Insurance Company*, v. *Dinanath and another* (1), do not arise in the present case.

In the concluding sentence of the arbitration clause it is stated that it shall be a condition precedent to any right of action or suit upon the policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained. In plain English the concluding sentence of the arbitration clause provides that no suit upon the policy shall be instituted unless the arbitrator has ascertained the amount of the loss or damage, if disputed. In case it is found that the arbitration clause only applies to a difference as to amount of loss or damage, and, therefore, not to a claim which the company rejected altogether, whatever the loss might be, the condition stated in the concluding sentence of the arbitration clause will not be satisfied when the company decides to deny its liability under the policy. Clearly, this was not the result contemplated by the arbitration clause.

(1) A.I.R. 1923 Bom. 249

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In the present case the company maintains that they have appointed surveyors who *have so far not reported on the loss and that in the circumstances the company is not in a position to admit or deny the loss.* If so, the dispute between the parties is *as to the amount of loss or damage* within the arbitration clause.

For the reasons given above I dismiss with costs L. P. A. No. 1 of 1951.

Weston C. J.

WESTON, C. J.—I agree.

APPELLATE CIVIL.

Before Weston, C. J. and Harnam Singh, J.

THE TRADERS BANK, LTD.,—*Defendant-Appellant*

versus

S. KALYAN SINGH,—*Plaintiff-Respondent.*

Regular First Appeal No. 297 of 1951.

1952

9th September

Banker and Customer—Relation between—Bank draft—Purchaser of, whether ordinary creditor—Refusal by the bank to pay on presentation unjustified—Whether creates trust in respect of the amount of the draft.

Held, that ordinarily the position of the Bank *vis-a-vis* a person dealing with the Bank is that of debtor and creditor. It is of course perfectly open to such person to show that in a particular transaction the Bank has received money in trust.

Held, that because a draft is negotiable, there can be no agreement that the money represented by the draft would be paid to a specified person. The holder of the draft is a creditor and his remedy is on the draft and his rights are defined by the Negotiable Instruments Act. The holder of the draft cannot claim the rights of the holder of a bill of exchange and the additional right to get the amount of the draft in preference to the general body of creditors.

Held further, that refusal of payment by the Bank on presentation of the draft, however wrongful such refusal may have been, cannot change the jural relation of the parties and create a trust in respect of the money due to the purchaser of the draft. The position of the plaintiff in the present suit is the position of an ordinary creditor, and he cannot on grounds of sympathy be given a position higher than that of any other creditor.

In re Noakhali Union Bank, Ltd. (1), and *The Official Assignee of Madras* v. *Krishna Bhatta* (2), relied on. *In the matter of the New Bank of India, Ltd* (3) and *Sugan Chand and Co.* v. *Brahmayya and Co.* (4), not followed.

(1) 54 C.W.N. 744
(2) 6 I.C. 213
(3) A.I.R. 1929 East Punjab 373
(4) A.I.R. 1951 Mad. 910