**YAMIKE KWEKU**

**v.**

**ANNOR ADJAYE**

PRIVY COUNCIL

1926 JUNE 21

**LEX (1926) – PC 06/21**

OTHER CITATION

3PLR/1925/2 (PC)

**BEFORE THEIR LORDSHIPS:**

VISCOUNT HALDANE, LORD ATKINSON, and LORD DARLING.

**BETWEEN**

YAMIKE KWEKU – Appellant

AND

ANNOR ADJAYE – Respondent

Solicitor for appellant: *A. L. BRYDEN.*

Solicitors for respondent: *ASHURST, MORRIS, CRISP & CO.*

**ORIGINATING COURT(S)**

1. APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY.

2. DIVISIONAL COURT IN THE GOLD COAST COLONY

3. ARBITRATION PANEL

**ISSUES FROM THE CAUSE(S) OF ACTION**

ALTERNATIVE DISPUTE RESOLUTION: Gold Coast - Arbitration – Court’s power to facilitate or interfere with same - Order failing to fix Time for making Award - Power to set aside Award - Filing Award in Court - Award to have effect of Judgment - Absence of Right of Appeal – How treated

**PRACTICE AND PROCEDURE ISSUES**

COURT:**-** Role of court in arbitration proceedings - Supreme Court Ordinance (No. 4 of 1876, Gold Coast), Order LII., rr. 3, 12 (c), 13, 14.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

APPEAL (No. 122 of 1924) from a judgment of the Full Court of the Supreme Court of the Gold Coast Colony (March 20, 1923) dismissing an appeal from an award of an arbitrator.

By an order of a Divisional Court in the Gold Coast Colony the matters in dispute in a suit were referred under Order LII. of the Supreme Court Ordinance to an agreed arbitrator, but the time for the delivery of the award was not fixed by the order.

DECISION APPEALED AGAINST

The arbitrator delivered his award on June 21, 1919; the award recited the order under which it was made. On September 29, 1919, a motion to modify, correct, or set aside the award was dismissed by a Divisional Court; an appeal from the order was dismissed by the Full Court. On April 24, 1922, the present respondent (who had been substituted for the original party, Kwesie Horbah) filed the award in Court. Subsequently the appellant appealed to the Full Court against the award, but the appeal was dismissed upon the ground that the Court had no jurisdiction, as there was no appealable judgment.

ISSUE(S) FOR DETERMINATION

1. Whether there is a defect, apparent upon the face of the award, as would prima facie make it bad and liable upon proper proceedings being taken to be set aside.

2. Whether 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.

DECISION OF THE PRIVY COUNCIL

1. The Supreme Court Ordinance, 1876, of the Gold Coast, provides by Order LII., r. 3, that a reference by the Court to arbitrators shall fix the time for delivery of the award; by r. 12 (*c*), that if an objection to the legality of an award is apparent on its face, the Court may remit it for reconsideration; by r. 13, that an award shall not be liable to be set aside except on the ground of perverseness or misconduct of the arbitrators; by r. 14, that if no application shall have been made to set aside or remit an award, or if the Court has refused an application for that purpose, either party may file the award in Court, and that it shall thereupon have the same force and effect as a judgment:-

2. Following *Nusserwanjee Pestonjee v. Meer Mynoodeen* (1855) 6 Moo. I. A. 134, that an award which recited an order of reference not fixing a time for delivery of the award was prima facie liable to be set aside, but that rr. 12 (*c*) and 13 of the Ordinance prevented the omission from having that effect; further, that where, an application to set aside having been made and dismissed, an award had been filed in Court, r. 14 did not make it a judgment so as to give a right of appeal.

Judgment of the Supreme Court of the Gold Coast affirmed.

**MAIN JUDGMENT**

June 21. The judgment of their Lordships was delivered by

LORD ATKINSON.

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

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 August 19, 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 December 2, 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 August 9, 1916, Watson J., sitting in the Divisional Court, made the following order in this cause:

"Under Order LII., r. 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, Esq., 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 LII., 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."

Subsequently, certain amendments (immaterial for the purpose of this appeal) made were by the order of the Court 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 to Order LII. of the Supreme Court Ordinance No. 4 of 1876, it does not, as is required by r. 3 of that order, fix the time for the delivery by the arbitrator of his award. That rule 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 Order LII. 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 LII. of the Supreme Court Ordinance No. 4 of 1876. This obviously means subject to all the provisions of Order LII. applicable to the case, amongst which r. 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 r. 3 of Order LII. has been considered and decided in the case of *Nusserwanjee Pestonjee v. Meer Mynoodeen.* (1)

1. 6 Moo. I. A. 134.

There the applicable legislative provision was the Bombay Reg. VII. of 1827. By cl. 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 the recited order made under Order LII. 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 prima facie make it bad and liable upon proper proceedings being taken to be set aside. But r. 12 (*c*) of this same Order LII. 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 r. 13 enacts, as complementary to the preceding rule, 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 rules 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.

Rule 14 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 reconsideration, 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 LII. 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. In their Lordships' view that contention on behalf of the appellant is unsound, because r. 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 March 20, 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 r. 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.