

28th, October, 1952.

Judge :

The Hon. Mr. Justice A. Magri, B.Litt., LL.D.
Edward Rizzo pr. et ne. versus Major Arthur D. Abbott pr. et ne.

Arbitration — Jurisdiction — Renunciation.

An arbitration agreement entails want of jurisdiction in the Court. But if the arbitration clause affects only the private interests and rights of the parties, each of them may renounce that clause either expressly or tacitly.

In the present case, it was held by the Court that, in the way the case was contested by defendant, he could no longer, at the last stage of the proceedings, raise the plea of want of jurisdiction of the Court, and so disturb the terms of litigation at that stage.

The parties, binding themselves to abide by the decision of an arbitrator, remain always entitled to dispute his decision, when this is against the fundamental principles of justice, as in the case of fraud, or obvious and substantial error, or on any ground on which a contract may be rescinded or annulled according to law.

The Court, — Upon seeing the writ-of-summons where-in plaintiff, after premising that the contending parties entered into an agreement, whereunder the plaintiff undertook to effect the transport of a quantity of scrap iron from the Corradino Scrap Ground at the Dockyard to "P" Point, Mar-

sa, or elsewhere, for loading on to S.S. Eskdalegate; and that the transport service in question was to be performed by the plaintiff at the rate of 8s. per ton deadweight as advised by the Master of the S.S. Eskdalegate after taking the ship's markings; and that between the 13th. August and the 16th. September, 1947, plaintiff loaded and carried from the Dockyard to the above destination at the Marsa, against issue vouchers made out by the authorities of the Dockyard, a quantity of scrap iron, the exact tonnage of which could not be ascertained in accordance with the clause "ship's markings", seeing that the S.S. Eskdalegate loaded other goods besides; and that defendant, without advancing any good and sufficient reasons, and without rendering to plaintiff any statement of accounts, and basing his calculations on criteria that, as shall be established during the hearing of the case, are unfair to plaintiff, in that they lessen the amount of the payments assessable to him, claimed that plaintiff carried only 3725 tons, and paid unto said plaintiff in respect thereof the sum of £1490, which sum plaintiff accepted without prejudice; and that plaintiff actually carried a quantity of scrap iron that considerably exceeds the quantity of 3725 tons alleged by defendant, as shall be established during the hearing of the case; asked (1) that, in view of the inadequacy, in the special circumstances of the case, of the clause "ship's markings" agreed upon; and of the basis for computation adopted by defendant, an assessment be made by this Court, if necessary through experts appointed for the purpose, of the quantities of scrap metal which plaintiff carried from the Corradino Scrap Ground to the Marsa, or elsewhere, and loaded on the Eskdalegate, between the 13th. August and the 16th. September, 1947, inclusive; and (2) that defendant be condemned to pay unto plaintiff the sum which shall be established by this Court, and which, in accordance with the preceding demand, shall be assessed as due to plaintiff at the rate of 8s. per ton, for the transport on behalf of defendant, and during the period and in the areas afore stated, of that quantity of scrap iron over and above the quantity of 3725 tons already paid for by defendant. With costs;

Omissis;

Having examined the record of proceedings and heard Counsel, the Court considers as follows;

As regards defendant's plea at para. 4 of his note of submissions at page 223, whereby he contends that the referee is not entitled to dispute the Master's certificate, since the Master, in substance, was appointed arbitrator or judge of the weight, and that consequently his decision is to be accepted unless there is evidence of fraud, or of an obvious error, plaintiff objects to such a plea at the stage of the proceedings it was set up, as it should have been put forward "in limine litis"; and further, that the Master of the ship was never selected as an arbitrator or judge, as the legal necessary formalities were not gone through; and finally, that the ship's markings were chosen only as a practical reference to establish the weight; and these were good grounds for disputing the Master's certificate:

The Court, having duly considered the importance of the aforesaid plea, is of opinion that defendant is no more entitled to raise such a plea; for the following reasons:—

1. If ever the clause contained in the Tender at page 12 — whereby the contractor bound himself "to accept the tonnage of scrap ferrous metal loaded arising from Corradino Scrap Ground as advised by the ship's Master as taken from the ship's markings for the basis of payment of this Tender" — were to be tantamount to an arbitration agreement ("*clausola compromissoria*"), this would entail want of jurisdiction in this Court; but unlike the case of absolute want of jurisdiction based on territorial reasons, which it would be the Court's duty to raise of its own motion, the said clause affects only the private interests and rights of the parties; to which each of them may renounce expressly or tacitly, on the strength of the aforism "*unicuique licet juri pro se introducto renuntiare*" (Law Reports, Vol. XXIV—1—1067); under the present circumstances, the Court finds ample proof of defendant's intention not to press the aforesaid plea:— (a) No mention whatsoever was made by defendant in his two statements of defence; (b) no objection was raised by defendant to the appointment of the referee, whose terms of reference were to enquire into and report on the

correctness or otherwise of plaintiff's submissions in accordance with the documents produced, amongst others, those respecting the number of trucks of scrap iron carried under the contract;

2. Even if the ship's Master were to be looked at as an arbitrator or judge of the weight, according to a well-established principle in local jurisprudence, the parties, binding themselves to abide by the decision of another person appointed by them, remain always entitled to dispute such decision when it is against the fundamental principles of justice, as in the case of fraud, obvious and substantial error, or on any ground on which a contract may be rescinded or annulled according to law (Law Reports, Vol. I, 294; IX, 380; XIII, 196; XXXI—1—55; and arg. art. 385 Code of Civil Procedure); for it is to be presumed that the parties had recourse to the said person as "bonus vir", and when his decision goes against the fundamental principles of justice, it becomes liable to dispute before the ordinary tribunal (Law Reports, Vol. XXIV—1—414; XXVIII—1—647);

3. Moreover, according to section 1036 of the Civil Code, contracts must be carried out in good faith, and shall be binding not only in regard to the matter therein expressed, but also in regard to any consequence which, by equity, custom or law, is incidental to the obligation according to its nature. Now, when the tender was accepted and became binding on the contractor, it was to be presumed that matters would remain the same ("rebus sic stantibus"), and that normal conditions would continue to prevail to allow the ship's marking to be a safe criterion for establishing the exact weight for the metal loaded by plaintiff. On the contrary, defendant allowed other cargo on the ship, and thus the method agreed to could not be resorted to with the same degree of safety and without any apprehension. As, through no fault of plaintiff, conditions changed, also in equity he is to be allowed to contest the ship's Master's weight certificate, and produce the relevant evidence therefor;

4. Finally, in the way the case was contested by defendant, plaintiff had also in his favour the principle that "in iudicio quasi contrahitur", and consequently defendant

could no longer, at the last stage of the proceedings, destroy or disturb the terms of litigation (Law Reports, Vol. XXVII—1—507; arg. sect. 193 (1) Code of Civil Procedure);

In view of the foregoing, defendant's plea fails;

Considering, further, that in terms of para. 15 of the "Schedule of Tender" (at page 13), "all questions relating to, or arising from, the performance of this contract, shall be finally settled by the Minister or his representative". This again would imply want of jurisdiction in this Court; but as no plea to this effect was ever brought forward by defendant, and as the whole issue, on its merits, was allowed to be thrashed out before this Court, defendant's intention not to press for the enforcement of such clause becomes evident; and this Court, for the reasons already set forth, abstains from going into it;

On the merits of the case, the Court considers that plaintiff succeeded in substantiating that the tonnage according to the ship's markings falls short of the quantity of scrap iron actually transported by him, and that there must have been an obvious error on the part of the ship's Master in reckoning such tonnage; as might well be argued from the following considerations:—

Omissis;

Plaintiff's contention, in the opinion of the Court, is also borne out indirectly by several other circumstances:—

Omissis;

Under the fore going circumstances, the Court is unable to give credit to defendant's contention; and consequently, whilst adopting the referee's conclusions;

Disallows defendant's plea raised in para. 4 of his note of submissions at page 223;

And allows plaintiff's claims, and condemns defendant nomine to pay unto him the sum of £207. 4. 0, with interest from this date;

All costs to be borne by defendant nomine.