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ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1908.
December 7.

In re THE INDIAN ARBITRATION ACT, 1899, AND *In re* ARBITRATION BETWEEN THE ATLAS ASSURANCE COMPANY, LIMITED, AND OTHERS AND AHMEDBHOY HABIBBHOY. THE ATLAS ASSURANCE COMPANY, LIMITED, AND OTHERS, PETITIONERS, *v.* AHMEDBHOY HABIBBHOY, CLAIMANT AND RESPONDENT.*

Letters Patent, 1865, clause 15—Order of Judge refusing to decide whether arbitrators are going beyond scope of their authority—Judgment—Appeal—Construction of submission to arbitration—Insurance against fire—Liability of Company for further loss.

An order of a Judge dismissing a petition to revoke a submission to arbitration on the ground that the arbitrators are going beyond the scope of the reference is a judgment within the meaning of clause 15 of the Letters Patent and as such is appealable. Such an order compels a party to submit to the jurisdiction of arbitrators though he complains that no such jurisdiction exists. It decides a question of right, namely, whether or not he is by the terms of reference to arbitration deprived of his right at common law to have the dispute decided in the ordinary way in a Court of law. It goes to jurisdiction and is not passed as an exercise of discretion.

Per CHANDAVARKAR, J.:—When a submission to arbitration is being construed, a cardinal principle to be applied is that by a submission to arbitration a party deprives himself of the right at common law to have the dispute to which the submission relates decided by a Court of law. It must therefore appear clearly from the terms of the submission that with reference to any point the party has so deprived himself.

* Appeal No. 8 of 1908.

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The loss or damage by fire which is insured against in a policy of insurance cannot include loss caused by deterioration of the property insured consequent on neglect (if any) of the Insurance Companies to take care of it if they have taken possession. A loss so caused is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire (in fire insurance cases) and from perils of the sea (in marine insurance cases) and the natural and almost inevitable consequence of that mischief is to create further mischievous results that underwriters become responsible for the further mischief so incurred.

Montoya v. *London Assurance Company*(1) referred to.

The fact that a petition by nineteen different Companies was not signed by all the nineteen Companies, and that the appeal from the order of the Judge dismissing the petition was by but one of the nineteen Companies, and the other Companies were not parties to it, would have required serious consideration if the Court had to revoke the submission to arbitration but when the order which the Court passes is only an intimation to the arbitrators of its opinion on the question of their jurisdiction it is immaterial whether all or some of the Companies are formally parties to the proceedings in appeal.

As to the objection that, even so far as the petition is by one Company, it is signed by one of its officers without any authorisation as required by law, the defect is a mere irregularity which can be cured, if necessary, by the Company putting in a power of attorney showing the authority given to a signatory.

Per BATCHELOR, J.:—The loss insured against is limited to the loss by fire (which includes the loss by water in extinguishing the fire) and cannot conveniently embrace all possible damages, however remote, which could by ingenuity be traced up to some connection with the fire as the ultimate *causa sine qua non*. It is impossible to hold that damages arising from the alleged negligence of Insurance Companies while in possession are properly claimable in pursuance of the contract of insurance, for whereas this contract refers only to loss by fire, those damages would arise from an origin totally different and wholly distinct and separable from the fire, namely, a neglect of some duty imposed on the companies after the loss by fire or water had become an accomplished fact.

APPEAL from an order of Davar, J., dated the 23rd January 1908.

The respondent, Mr. Ahmedbhoy Habibbhoy, was the owner of certain premises situate at Fergusson Road, wherein previous to October 1906 there was a mill known as the Victory Mills; this property was insured with 19 Insurance Companies for various

(1) (1851) 6 Ex. 451 at p. 458.

amounts against loss or damage by fire. On the 14th of October 1906, there was a fire on the mill premises and loss and damage was caused to the property insured. The respondent made his claims against the Companies. By nineteen different agreements made by each of the Companies on the one part and Mr. Ahmedbhoy on the other part the matters were referred to the arbitration of Mr. Armstrong and Mr. Dwarkadas Dharamsey. The arbitration proceedings having reached a certain stage a difference of opinion arose as to the admissibility of certain evidence tendered by the respondent. After a very elaborate argument before them, the arbitrators decided to admit the evidence. Their decision ran as follows :—

"Without in any way deciding the question as to whether or not, any, and if so, what, consequential damage could be awarded to the claimant under the contract of assurance we hold that evidence of the nature offered to be produced on behalf of the claimant and objected to by Mr. Chamier on behalf of the Companies is allowable for the purposes of the subject matter of the reference. We think that it is open to the claimant to contend that under the Policy the Companies did take possession and they were bound to protect and clean the machinery."

On this decision being given the Companies presented the present petition wherein amongst other things they prayed that they might be allowed leave to revoke the submission to arbitration and in the alternative they prayed that :—

"In the event of Your Lordship being satisfied that the arbitrators will comply with Your Lordship's directions and ruling as to the proper course to be pursued, Your Lordship will rule that the arbitrators had acted wrongly in law and have intimated their intention to act in future and have erred in the manner complained of in paragraphs 21, 22, 23 hereof, that Your Lordship will rule and direct the arbitrators as to the course that it is their duty to take and pass no further order on this petition beyond intimating to the arbitrators that they should order the said Ahmedbhoy Habibbhoy to pay all costs of proceedings before them caused by and incidental to the attempt made on behalf of the said Ahmedbhoy Habibbhoy to adduce the said evidence and of the objection thereto and of this petition which was necessitated thereby."

Mr. Justice Davar dismissed the petition with costs.

Against this order one of the petitioners, the Bombay Fire and Marine Insurance Company, filed an appeal on the following grounds :—

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(1) That the learned Judge erred in not complying with one or other of the prayers of the petition. (2) That the learned Judge erred in declining to comply with the alternative prayer in the petition on the ground that he had no power to enforce his ruling or directions if the arbitrators should not choose to follow or obey them. (3) That the learned Judge erred in refraining from expressing any opinion on the merits of the question raised before him by the petitioners.

Strangman, Advocate-General, with him *Chamier*, for the appellant.

Inverarity (with him *Lowndes*) for the respondent raised a preliminary objection that no appeal lay. The arbitrators have up to this moment decided nothing, they only say we are entitled to contend what we do. We say they are liable not only for damage at the actual moment the fire occurred but also for their not taking care of the machinery after the fire when and after they took possession. We want to show that the damage now is a good deal greater than it was when they first took possession. We say that as the arbitrators decided nothing and as the Court below was asked either to revoke the reference or to express an opinion and refused to do either, there is not a judgment; nor is there a decree and therefore no appeal lies. Our next objection is that only one of nineteen appellants have appealed. The other eighteen have not been joined as respondents. The appellant therefore cannot appeal on behalf of those eighteen.

Strangman:—This argument is based on a fallacy, namely, that the arbitrators decided nothing.

[CHANDAVARKAR, J.:—Mr. Inverarity says that the arbitration Act gives the judge a discretion, that he has exercised that, and that we cannot interfere.]

Strangman:—It is necessary to go into the facts before one can appreciate what our position is. The respondent insured with nineteen different Companies in respect of the Victory Mills. On the 14th October 1906 a fire took place. A claim was made and assessors were appointed, one by each of the parties. In February 1907 the assessors made a joint report, Ahmedbhoy was dissatisfied, there was an agreement to refer to arbitration on 28th May 1907. The proceedings commenced and before the arbitrators it was contended that the Companies entered into

possession and subsequent to possession there was great loss and damage, it was contended that the arbitrators were to decide not only the loss caused by the fire but all subsequent loss and damage including loss due to want of cleaning. This was strenuously argued and the arbitrators gave their decision. What does this decision mean? They say that they propose to find that if the Companies did take possession they would make the Companies liable for the damage caused by the neglect to clean. When we look at the reference we see that it does not contemplate anything of the sort.

[CHANDAVARKAR, J.:—Your argument comes to this that the moment the arbitrators say that it is open to contend they admit that the point is within the reference.]

Strangman:—Exactly that: see clauses 10, 11, 17 of the Policy of the General Accident Insurance Company and see the reference, damage under the policy is damage due to the fire, *i.e.*, at the time the fire occurred and was extinguished. An attempt was made to extend the scope of the reference. There is a good deal of correspondence which shows what our attitude has been. We do not say that Ahmedbhoy has not got a right of action against the Company, but that this reference has nothing to do with it. Loss and damage intended to be referred to was simply loss and damage caused by fire and nothing more. Ahmedbhoy tried to widen the scope of the reference and that is what we objected to.

[BATCHELOR, J.:—There might be a doubt in the minds of the arbitrators as to whether there was not a difference between "consequential loss" and damage due to neglect in cleaning.]

Strangman:—I take my stand on the last sentence of the arbitrators' decision. There is no damage contemplated under clause 11 of the policy. Supposing a mill insured for one lac and worth eight lacs. Fire causes loss of one lac and over. The Company goes into possession and is guilty of gross neglect so as to cause loss of two or three lacs. The reference could not go beyond one lac because that is all that is covered by the policy. See Indian Arbitration Act, section 5.

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[CHANDAVARKAR, J.:—Davar, J., says that the only thing before his mind was the complaint that there was an improper reception of evidence.]

Strangman:—We say the learned Judge did not grasp the point. He says the arbitrators decided nothing. That is the fallacy.

[BATCHELOR, J.:—What is the right that is denied to you?]

Strangman:—The right to revoke the submission. See *Hart* v. *Duke*(1). Our case is much stronger than this. *East and West India Dock Company* v. *Kirk*(2), *Robinson* v. *Davies*(3). *Scott* v. *Van Sandau*(4) is an entirely different case to the present one. It only dealt with the improper reception of evidence. Here the arbitrators want to go outside their reference.

[BATCHELOR, J.:—What is there to prevent you from coming before the Court after the award is made to have it set aside on the ground that the arbitrators have exceeded their jurisdiction?]

Strangman:—We could not do so, because supposing they awarded to Ahmedbhoy fifteen lacs on his claim of twenty lacs how could we come before the Court and satisfy it that such and such amounts were allocated to items beyond the jurisdiction of the arbitrators. It would be impossible so we must come in now. The learned Judge should have adjourned the matter and seen whether the arbitrators would follow his ruling. The learned Judge has gone wrong in holding that the arbitrators decided nothing because they did decide that they had jurisdiction. We ask the Court to give directions to the arbitrators and tell them that all they can decide is the loss occasioned by the fire and by the water thrown on to extinguish the fire.

Inverarity:—Our first point is that the Court has no jurisdiction to entertain this petition on the ground that it does not comply with the requirements of the Arbitration Act and Rules of the High Court. There are nineteen policies and agreements and one award could not be made because the conditions are not the same. The conditions on the back of the policies must also be

(1) (1862) 32 L. J. Q. B. 55.
(2) (1887) 12 App. Cas. 738.
(3) (1879) 5 Q. B. D. 26.
(4) (1841) 1 Q. B. 102.

deemed to form part of the contract. That being so can nineteen Companies present one petition? It is not in accordance with the Rules of this High Court. The verification of the petition is wrong. The petition ought never to have been received. High Court Rule 863; section 51, Civil Procedure Code. This petition is not signed by any of the petitioners, it is not even signed by a person who holds a power of attorney. If we are right the Court has no jurisdiction to entertain the petition. This is all the more remarkable because other so called petitioners have dropped out. The appeal is brought by the Company with whom Mr. Croft, who signs and verifies the petition, has nothing whatever to do.

[CHANDAVARKAR, J.:—Is this not a mere irregularity?]

Inverarity:—I submit not. As regards the second point, nineteen petitioners could not join in one petition there being nineteen different submissions. The body speaks of one submission and so does the prayer, which submission is the Court asked to revoke? It is said that clause 2 cures that defect, but it is not signed by all the Companies and again it is qualified. Take again the amounts of the policies, some are larger and some are smaller. Then we come to the merits of the case. What we meant by saying that the arbitrators decided nothing was that no right of the parties was decided. A "judgment" does not include a mere decision to admit or reject evidence. Mr. Strangman says he had a *right* to the order he asks for; nothing of the kind, it is a pure act of discretion. See Russell on Arbitration, 9th edition, page 125; *James* v. *James*.[1] Davar, J., has not expressed any opinion on any of the questions in the case. They are now asking the Court to do what the arbitrators had to do. The deed of reference does not mention loss by fire but loss according to contract. Our point is that this loss is covered by the policy even though it was not the direct result of the fire. "Consequential loss" is a very ambiguous term. Some losses are admittedly recoverable under the policy though they occur after the fire, *e.g.*, damage done by water, debris falling on the machinery. You cannot limit the loss to the action of the fire itself or in point of

(1) (1889) 23 Q. B. D. 12.

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time to the moment the fire is extinguished. If that is correct a great deal of damage done to the machinery is the direct result of the fire. You cannot touch the machinery till it is surveyed by the surveyors and now they want to shut us out from giving any evidence to show what time elapsed and who is responsible.

It is impossible to fix a date after which our evidence should be limited. The Insurers have to pay us the damage done to the property, there is no intervening cause. We say they were in possession till August 1907 at least, the fire having taken place in October 1906. Any damage done to the machinery must be deemed to be the direct result of the fire. An omission to do a thing which they might do is not an intervening cause. Supposing that there was a neglect of duty on the part of the Companies, how did that duty arise? Clearly under the contract of assurance, see clause 11 of the policy. Therefore it is within the terms of the policy. How can this Court decide now that all our contentions are incorrect? The arbitrators have made no mistake of law. We submit the case is on all fours with *Scott* v. *Van Sandau*(1). It being a matter of discretion is the Court going to interfere? The arbitrators should be asked to state what sums they would allow on different heads and then it is easy to set them right if they go beyond the scope of the reference. This application is practically to decide that for which the arbitrators have been appointed and therefore is unprecedented: see *In re Lord Gerard and London and North Western Railway Co.*(2), *The Irish Society* v. *Bishop of Derry*(3), *The Carron Iron Co.* v. *Maclaren*(4).

Strangman:—As to the verification of the petition I ask leave to have it done now. As to discretion see section 14 of the Arbitration Act: *Toolsee Money Dassee* v. *Sudevi Dassee*.(5)

CHANDAVARKAR, J.:—Both the preliminary point and the point on the merits raised in this appeal turn upon the question whether the arbitrators have decided that the submission to them included the matter now in dispute between the parties. In other words, the question is—Have the arbitrators decided

(1) (1841) 1 Q. B. 102.
(2) [1894] 2 Q. B. 915.
(3) (1846) 12 Cl. & Fin. 611.
(4) (1855) 5 H. L. C., p. 457.
(5) (1899) 26 Cal. 361.

that they have jurisdiction to decide the matter as part of the terms of the reference to arbitration? Davar, J., has indeed held that they have decided nothing; but that is clearly wrong. The contention raised before the arbitrators by the respondent Ahmedbhoy Habibbhoy's solicitor, Mr. Hormusjee, was that the respondent was entitled to claim damages from the Insurance Companies for the loss suffered by him owing to deterioration of the machinery consequent upon the neglect of the Companies to take proper care of it after they had taken possession of it, and that this claim was part of the submission. The Insurance Companies denied that the claim in question formed part of the reference. The meaning of the decision of the arbitrators upon that preliminary question is, to my mind, plain. They substantially held that, whatever conclusion they might ultimately arrive at after hearing evidence on the claim, they had jurisdiction to take evidence and decide whether Ahmedbhoy was entitled to any, and if so what, damages for the specific loss alleged.

What the arbitrators have, then, finally decided is, that they have jurisdiction over the matter now in dispute; that it is competent for them to enter into the merits of the dispute after taking evidence and to adjudicate upon it.

Davar J.'s order virtually compels the Insurance Companies to submit to the jurisdiction of the arbitrators, whereas those Companies complain that, having regard to the terms of the reference, no such jurisdiction exists. The order decides a question of their right. They say that they have a common law right to have the dispute decided in the ordinary way—in a Court of law. Davar, J., decides that they have not, but that the arbitrators have jurisdiction to decide it. The order is, therefore, a judgment within the meaning of clause 15 of the Letters Patent.

Passing to the merits, Davar, J., seems to me to have failed to perceive the real question at issue. He thought what he had to deal with was a case in which the complaint was merely that the arbitrators were committing an error of law by admitting irrelevant evidence. But in reality the admission of evidence by the arbitrators was complained of by the Insurance Companies not as an independent ground for grievance but as the result of

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an unwarranted jurisdiction assumed by the arbitrators. It was not the admission of inadmissible evidence that was the grievance: but the taking cognizance of a dispute not within the terms of the reference was complained of. The question, therefore, was—were the arbitrators exceeding or have they exceeded their jurisdiction? The answer to that depends upon a proper construction of the terms of the reference.

In construing the agreement to refer to arbitration we ought to bear in mind one cardinal principle—*viz.*, that by a submission to arbitration a party deprives himself of the right accorded to him by common law to have the dispute to which the submission relates decided by a Court of Law. Therefore, it must clearly appear from the terms of the submission that with reference to any point arising the party has so deprived himself. Here the dispute referred related to damages or loss from *fire*, whereas the claim on which the arbitrators were asked to adjudicate and which they have held they have jurisdiction to decide, in addition to the loss or damage from fire, is the loss or damage consequent on the tortious conduct of the Insurance Companies after the fire had been extinguished. Mr. Inverarity has before us attempted to show that what his client wants to do before the arbitrators is to prove that this latter loss is in substance loss from fire. But that was not the case made before the arbitrators, and I do not think that the loss alleged can be included in loss from fire on any reasonable view of the case, because the deterioration of machinery from neglect on the part of the Insurance Companies to take care of it is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire in fire insurance cases and from perils of the sea in maritime insurance, and the natural and almost inevitable consequence of that mischief is to create further mischievous results, that underwriters become responsible for the further mischief so incurred. See Pollock B. in *Montoya* v. *London Assurance Company*[1].

The question, whether before the arbitrators or before Davar, J., was by no means one of discretion. It was, in my opinion, one of excess of jurisdiction in the arbitrators.

(1) (1851) 6 Ex. 451 at p. 458.

Mr. Inverarity has raised the point that the petition before Davar, J., ought to have been dismissed because it was not signed by all the nineteen petitioners, that this appeal is by but one of the Insurance Companies, and that the other Companies are not parties to it. This ground would have required serious consideration if we had to revoke the submission to arbitration; but as the order we have decided to pass is at present no more than an intimation to the arbitrators of our opinion on the question of their jurisdiction, it is immaterial whether all or some of the Insurance Companies are *formally* parties to the proceedings in this Court. As to the other objection that, even so far as the petition is by one Company, it is signed by one of its officers without any authorisation as required by law, the defect is a mere irregularity which can be cured, if necessary, by the Company putting in a power of attorney showing the authority given to the signatory. And this irregularity does not affect the merits of the case.

The result is that the order of Davar, J., must be discharged with costs, in both his Court and this, on the respondent; and that the arbitrators should be informed that, in the opinion of this Court, their jurisdiction extends only to the dispute relating to loss or damage from fire under the terms of the policy in each case, and not to the question of any loss or damage alleged to have arisen from the neglect of the Insurance Companies to take care of the machinery after the fire had been extinguished and the Companies had entered upon possession under clause XI of the Policy.

BATCHELOR, J.:—I concur: but as I am differing from my brother Davar I should like briefly to explain the reasons for my opinion.

The only question, it appears to me, is what have the arbitrators decided, if they have decided anything?

The learned Judge below was of opinion that they have decided nothing, and, therefore, he declined to interfere with their order. Now, their order is one of which it is not easy to be quite confident as to the meaning, but upon the best consideration that I can give to it, it seems to me to decide that the

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reference to the arbitration does include the question whether the plaintiff is entitled to damages on the ground that the Companies having gone into possession were guilty of negligence in not cleaning and not protecting the machinery. If that is the meaning of the order, then I think the appellants must succeed, for, as to the preliminary point that no appeal lies, that order on my interpretation is a judgment since it goes to jurisdiction by enlarging the scope of the arbitration submission and by depriving the appellants of their rights to have these matters decided by a suit: see *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub*.[1] And if the appeal is competent, then, I think, it ought to be successful; for the policy, the agreement to refer and the terms of the reference all satisfy me that no claims on account of negligence by the companies after they had, as alleged, gone into possession, were included in the submission. That I think was limited to the loss by fire (including of course the loss by water in extinguishing the fire) and it is plain that a claim on this footing must be limited somewhere and that it cannot conveniently embrace all possible damages, however remote, which could by ingenuity be traced up to some connection with the fire as the ultimate *causa sine qua non*.

Now here the plaintiff's case is that the Companies were in possession from October 1906 to August 1907 at least, and it seems to me impossible to hold the damages arising by reason of their negligence throughout this prolonged period are such damages as are properly claimable in pursuance of the contract of insurance, for whereas this contract refers only to loss by fire, those damages would arise from a totally different origin, an origin which, it seems to me, is wholly distinct and separable from the fire, namely a neglect by the Companies of some duty imposed on them after the loss by fire or water had become an accomplished fact.

As to the technical objections which have been urged by Mr. Inverarity I am of opinion that they are all of a merely formal nature; that there is no substance in them; and that they ought not to be allowed to stand between us and the decision of this appeal on its merits.

(1) (1874) 13 Ben. L. R. 91.

For these reasons, I concur with my learned colleague as we are assured that the arbitrators will gladly give effect to any expression of opinion from us.

The appellants must have their costs.

Order reversed.

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

MULJI TEJSING *v.* RANSI DEVRAJ.*

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January 25.

Jurisdiction—Practice—Presidency Small Cause Courts Act (XV of 1882), section 22—Suit cognizable by Small Causes Court brought in High Court—Non-joinder—Contract of sale made subject to rules of Rice Merchants Association—Rule ousting jurisdiction of Court of law—Rule providing for fixing vaida rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rules—Principal and agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), section 93—Sale—Tender.

The Bombay United Rice Merchants Association was a commercial body of which most of the principal rice merchants in Bombay were members. Its rules were printed and circulated and they prescribed a certain form of contract which was very generally used in Bombay. By these rules a Sub-Committee was nominated "to decide all disputes which may arise as to contracts and do all other business relating to contracts." It was also provided that the "exclusive authority" to decide all such disputes should be the said Sub-Committee and the Association and that no party should be at liberty to go to Court with respect to any matter connected with such contracts except to enforce the decision of the Sub-Committee and the Association. It was further provided that the Sub-Committee should keep a record of the daily rates and on the last day of the *vaida* should fix the *vaida* rate (*i. e.* the market rate of the day) on the basis of which differences should be calculated which became payable in cases in which contracts were not carried out. The plaintiffs who were rice merchants in Rangoon were not members of the Association, but they employed agents in

* Suit No. 172 of 1907.