ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Hayward.

GOPALJI KUVERJI (APPELLANT) *v.* MORARJI JERAM NARANJI AND ANOTHER (RESPONDENTS.)* 1919. January 16.

Indian Arbitration Act (IX of 1899), sections 8 (1) (a), (b), (c), (d) and (2), 9 —English Arbitration Act of 1889 (52 & 53 Vic. c. 49)—General Clauses Act (X of 1897), section 13—Reference and submission to three named arbitrators who, acting for some time, decline to proceed further—Application to Court to appoint fresh arbitrators—Jurisdiction.

In a case of submission to three named arbitrators all of whom after acting have declined to proceed any further, the Court has no jurisdiction to appoint fresh arbitrators in their place under the Indian Arbitration Act.

Per SCOTT, C. J.:—Section 8 (1) (*b*) of the Indian Arbitration Act does not apply to the case of independent appointments of two arbitrators. In such a case when a vacancy occurs it would ordinarily be filled by the original appointor as contemplated in section 9. Section 8 (1) (*b*) only applies in terms to a single vacancy to be supplied by the *parties*. Section 8 nowhere seems to contemplate the case of two original arbitrators appointed jointly by the parties plus a third of the same class appointed by the two already jointly appointed or by the parties. In short, section 8 only applies to certain cases of failure to appoint jointly. Where choosers should but do not concur, the Court is enabled to assist them by the selection and appointment of an individual falling in one of the following categories—an (i.e., one) arbitrator; an umpire; a third arbitrator in the special sense in which that term is used.

Per HAYWARD, J. :—It is not in my opinion open to us to extend this special jurisdiction to special contracts not clearly contemplated and expressly mentioned by the Act.

In re Smith & Service and Nelson & Sons (1) and *Manchester Ship Canal Company* v. *S. Pearson & Son, Limited* (2), referred to.

PETITION under the Indian Arbitration Act.

The parties to the petition were piece-goods merchants who had entered into different contracts for sales and purchases of cloth ready, in process of manufacture and

* Appeal No. 24 of 1918.

(1) (1890) 25 Q. B. D. 545. (2) [1900] 2 Q. B. 606.

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forward. Disputes having arisen in respect of the said contracts, the three parties, viz., the petitioner, the first respondent and the second respondent agreed on the 21st March 1918 to refer their several differences to the arbitration of Lalji Govindji, Morarji Mathuradas Kamdar (who was acting as solicitor for the first respondent) and Mansukhlal Oghadlal. The submission paper provided that the three arbitrators named were to publish their award within two months with power to extend the period by one or two months. The arbitrators proceeding with the reference held various meetings. On the 12th April 1918, however, they signified by their letter to the parties, that they declined to continue further in the arbitration. Subsequently correspondence took place between the petitioner and the first and second respondents with a view to new arbitrators being appointed. The petitioner and the second respondent agreed between them that two of the original arbitrators, viz., Lalji Govindji and Mansukhlal Oghadlal should act again, but the first respondent by his attorneys' letter, dated 25th April 1918, informed the petitioner that as all the three arbitrators had refused to act the petitioner was not entitled to make any fresh appointment nor to call upon him to concur in any such appointment.

The petitioner thereupon applied to the Court praying (1) that the Court might confirm the appointment of Lalji Govindji and Mansukhlal Oghadlal as arbitrators and appoint a third arbitrator, directing such three arbitrators or only the two above-named to proceed with the reference from the stage where the originally appointed arbitrators left it; or (2) in the alternative, the Court might appoint any three arbitrators to proceed with the reference. The first respondent in his affidavit averred that inasmuch as the arbitrators named had refused to act on the 12th April 1918

and the parties had accepted their resignation, the reference came to an end on the 12th April 1918 and that in the circumstances of the case the Court had no jurisdiction under the Indian Arbitration Act to make the order prayed for by the petitioner.

The petition came on before Marten, J., in chambers, when it was adjourned into Court. The learned Judge held that section 8 (1) (*b*) and (2) of the Indian Arbitration Act did give him jurisdiction to appoint arbitrators in place of the three originally appointed arbitrators, and acting upon the subsequent consent of the parties without prejudice to any contention which respondent No. 1 might raise in the appellate Court challenging the decision on the question of jurisdiction he appointed a single and entirely new arbitrator to dispose of the reference. His Lordship's judgment ran as follows :—

MARTEN, J. :—This is a petition under the Indian Arbitration Act which I adjourned into Court and which raises points of novelty and some difficulty. Shortly stated, the questions are, whether, in a case of a submission to three named arbitrators all of whom after acting have declined to proceed any further, (1) the Court has jurisdiction to appoint any arbitrators in their place under section 8 (1) (*b*) and (2) of the Arbitration Act, (2) if so, whether the Court has a discretion under the same section as to whether on the facts of any particular case it will make any appointment ; and (3) if it has such a discretion, then whether, on the facts of the present case, such discretion ought to be exercised against making any such appointment.

As regards the facts of the case, one peculiarity is that there are three parties involved. The first respondent was a vendor of certain piece-goods to the petitioner who was the purchaser. The petitioner in

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his turn resold the goods to a sub-purchaser, respondent No. 2. Apart from these transactions, it appears that the vendor himself bought certain goods from the purchaser; and that there were other and separate transactions between the purchaser and the sub-purchaser. Disputes appear to have arisen with respect to the first lot of goods I have mentioned and also I gather as to the other goods. Accordingly, on the 21st March 1918, the three parties, viz., the petitioner, the first respondent and the second respondent, agreed to refer their several differences and disputes to the arbitration of the three persons named in the submission which was in writing. The arbitrators proceeded with the reference and held or fixed various meetings. Finally by their letter, dated 12th April 1918, they declined to continue further in the arbitration. Subsequently, correspondence took place between the parties with a view to new arbitrators being appointed. The petitioner and the second respondent suggested between them that two of the original arbitrators should act again, but the first respondent in effect declined to proceed further and consequently the present petition was launched. It is based solely on the Indian Arbitration Act as it is common ground that having regard to sections 2 and 3 of that Act, sections 17 and 19 of Schedule 2 of the Civil Procedure Code cannot apply.

At the hearing I gave liberty to amend the petition by asking in the alternative for the appointment of three fit and proper persons to be arbitrators. The materiality of that amendment will appear later.

Now taking the question of jurisdiction first, Mr. Setalvad for respondent No. 1 contends in effect that as regards the appointment of new arbitrators the Act does not apply to the case of three arbitrators. He says the Act only applies to the case of a single

arbitrator or a single umpire or a third arbitrator, and he relies strongly on an English case of *In re Smith & Service and Nelson & sons* [1], in support of this contention.

Now turning first to the Act itself, it is quite clear that section 9 does not apply, for that section only applies to the case of two arbitrators, one to be appointed by each party. And on looking at the rest of the Act, it is apparent that the only jurisdiction (if any) given by the Act in such a case as the present is under section 8. Looking at sub-section (1) (*b*) of section 8, I find it runs: "If an appointed arbitrator neglects or refuses to act..." Now *prima facie* I should have thought that each one of the three arbitrators in the present case was "an appointed arbitrator" who neglected or refused to act. This is quite irrespective of the general provisions in the General Clauses Act providing for the singular including the plural and one would be confirmed in this *prima facie* view of the Act by noticing that in the preceding sub-section (*a*) the words "single arbitrator" are used, thus giving rise to the inference that "an appointed arbitrator" in sub-section (*b*) is different from "a single arbitrator" under sub-section (*a*). Further, section 8 begins "In any of the following cases," thus showing that the section is contemplating separate and distinct cases. Again, if we turn to sub-section (*c*) we find the draftsman contemplating the case of there being two arbitrators and an umpire or a third arbitrator. This is in keeping with paragraph 2 of the first schedule to the Act which speaks of a "reference to two arbitrators." If, therefore, as Mr. Setalvad contends an "appointed arbitrator" in section 8 (*b*) means an appointed sole arbitrator, then in a case of two arbitrators appointed by the parties

[1] (1890) 25 Q. B. D. 545.

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jointly there would be power under section 8 (*d*) to supply a vacancy caused by (say) the death of the umpire or third arbitrator, but there would be no power to supply a vacancy caused by the death of one of the two original arbitrators. This would, I think, be a curious result and can hardly have been intended. Mr. Setalvad says at any rate there would be no such power of supplying a vacancy if one of the parties had refused to make the original appointment, for then there would be no "appointed arbitrator" under section 8 (*b*), while section 9 could not apply, because *ex hypothesi* the appointment was to be by the parties jointly. This would seem to be so, but even if the Act does contain one or two flaws, I do not think it follows that there is another flaw.

Then if we look at section 7 we find that "the parties to a submission may agree that the reference shall be to an arbitrator or arbitrators to be appointed by a person designated therein." It is, therefore, I think, clear that the Legislature had in mind cases of two arbitrators other than those referred to in section 9, which section is confined to cases where one arbitrator is appointed by each party. If then sub-section (*b*) applies to one of two appointed arbitrators, I do not see why it should not also apply to one of three appointed arbitrators and if that be so and if there are in fact three vacancies I do not see why each of the three vacancies should not be filled up.

Mr. Setalvad urged that an appointed arbitrator in section 8 (*b*) means an appointed single arbitrator. But if the word "single" is thus to be inserted, why does that Act itself insert the word "single" in sub-section (*a*) and omit it in sub-section (*b*).

So far I have dealt with the case on the assumption that the submission of 21st March 1918 was to three

named arbitrators appointed by the parties jointly and not separately by each of the parties. Looking at the submission alone, this is, I think, the only view of the instrument that can fairly be taken. It is true that the submission states that one of the arbitrators, namely, Mr. Kamdar, "has acted as solicitor for the respondent No. 1 in this matter." But it would be a natural precaution to state this and thus avoid any risk of the submission being upset on the ground that one of the arbitrators was an undisclosed agent of one of the parties. Further, having regard to the definition of "submission" in section 4 of the Act, the submission referred to in section 8 must be this very agreement of 21st March 1918 and nothing else. I doubt, therefore, whether I am at liberty to look at other circumstances or to see whether in fact the arbitrators were nominated or appointed by separate parties. If in fact they were so separately appointed, this might well have been so stated in the submission. In a more precise document it would, I think, have been so stated. Compare for instance Key and Elphinstone's Precedents in Conveyancing, 8th Edition, Volume I, Form 1, p. 167, where the agreement provides that the disputes are referred to the arbitration of an arbitrator nominated by A, and an arbitrator nominated by B.

But even if, contrary to the view I hold, it should be considered that the submission is one to three arbitrators appointed by the parties separately, I still think that section 8 would apply. The only difficulty then would be that having regard to the use of the word "concur" at the end of section 8 (1) all the parties would have to agree in filling up any particular vacancy and not leave that vacancy to be supplied by the person who had appointed that particular arbitrator originally. That may not be altogether a

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satisfactory result, but I think it is a far more satisfactory result than to say that the section does not apply at all.

Nor is it, I think, the true view that this submission was to three named persons and those persons only and that it negatived the possibility of any vacancies being filled up. The forms in the Second Schedule to the Indian Arbitration Act itself show that in a submission to a single named arbitrator, it is unnecessary to provide for a vacancy. If that is the case with one named arbitrator, I think it would be equally the case with three named arbitrators. It is true that these forms contain a reference to the Act, and that the submission in question does not. But I do not expect a vernacular semi-commercial document to be drawn up with the precision one would get from English conveyancing counsel.

Accordingly looking at the construction of this Act alone and apart from any authority, I should be of opinion that the present case falls within section 8 (1) (*b*) and (2), and that I had the requisite jurisdiction to make the appointment.

Now, is there any authority which prevents my so holding? Mr. Setalvad laid great stress on the case I have mentioned of *In re Smith & Service and Nelson & sons*[1]. He said that that case established that the English Arbitration Act does not apply to the case of three arbitrators; and that, as the Indian Arbitration Act is almost a verbatim copy of the English Act as regards the clauses in question, I ought to follow that decision. As to this, I may say that sections 1, 4, 5 and 6 of the English Act correspond to sections 5, 19, 8 and 9 of the Indian Act, but there is no section in the English Act, corresponding to section 7

[1] (1890) 25 Q. B. D. 545.

of the Indian Act, nor is the word "concur" in section 8 of the Indian Act found in section 5 of the English Act. The above case was a decision of the Court of Appeal and the head-note is as follows :—

"Where an agreement to refer disputes to arbitration provides for a reference to three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed, and one of the parties refuses to appoint an arbitrator, the Court has no power, either under or apart from the Arbitration Act, 1889, to order him to do so."

As the Advocate-General for the petitioner pointed out, that head-note shows at once that there is a material difference between the facts of that case and the facts of the one I have to deal with. In the English case the arbitrators had not been appointed because one of the parties refused to appoint an arbitrator. In the case I have to deal with, the parties have appointed arbitrators but the arbitrators so appointed have eventually declined to act. Having regard to this difference of fact it will be seen that section 8 (*b*) could not apply in the English case because there was no "appointed" arbitrator. Nor, if one looks at the rest of that Act, is there any other section which could possibly apply. Consequently it is not surprising to find Lord Esher saying at page 548 :

"As this was to be a reference to three arbitrators, it is obvious that the case does not come within sections 4, 5, or 6, and that point is given up."

Mr. Setalvad, however, relied upon this statement of Lord Esher as showing that the decision applied to the case of three arbitrators generally. He laid even more stress on what Lord Lindley said at page 552, viz. :—

"The other sections, viz., sections 4, 5, and 6, do not touch this point. It certainly looks like a blot in the Act, that by reason of there being no provision as to three arbitrators, as distinguished from two arbitrators and an umpire, sections 4, 5, and 6 do not apply ; but we cannot help that."

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Every judgment must, however, be read in the light of the facts of the particular case, and in my opinion there is nothing whatever to show that their Lordships had present to their minds a case like that which I have to deal with. On the contrary, counsel had really given up the point as unarguable and we find Lord Justice Bowen saying at page 554 :—

"On these grounds it seems to me impossible to hold that section 1 of the Arbitration Act, 1889, applies ; and it is admitted that if section 1 does not apply there is no remedy for the respondents in any of the other sections."

It is true that that case was cited again in the Court of Appeal in *Manchester Ship Canal Company* v. *S. Pearson & Son, Limited* (1). There the facts were similar in all essentials to those in *In re Smith & Service and Nelson & Sons* (2), except that legal proceedings had been started. The Court, while agreeing that it could not appoint an arbitrator, affirmed the decision of Mr. Justice Bigham staying the action under section 4 of the Arbitration Act. In the course of his judgment Lord Justice A. L. Smith said :—

"The case did not come within the power given by the statute to the Court to appoint an arbitrator, because that is confined to the cases where the arbitrator is single or there are but two arbitrators. Lindley L. J. said very truly that this was a blot in the Act, and now we are asked to make what in my opinion would be another blot. This is not an application to order the appointment of an arbitrator, but to stay the action...There was, therefore, jurisdiction to make the order appealed from, and the appeal must be dismissed."

Lord Justice Vaughan Williams said :—

"It is plain from this that when the learned Lords Justices said that section 4 did not apply, it was not meant that this was because it was a case of reference to three arbitrators, but only because no legal proceedings had been commenced. On that ground no application could be made to stay the action ; but in the present case it is abundantly plain that section 4 does apply... "

(1) [1900] 2 Q. B. 606, (2) (1890) 25 Q. B. D. 545.

There again I do not think the learned Lords Justices had in view a case like that now before me. Similar observations apply to the decision of Bacon, V. C., in *Gumm* v. *Hallett*[1] under the Common Law Procedure Act, 1854. In these circumstances, I do not think that there is anything in the above three English cases which would cause me to alter the view of the Indian Arbitration Act which I should take apart from authority. No Indian case on the point has been cited to me, and I accordingly answer the first question I have formulated by holding that I have jurisdiction under section 8 (1) (*b*) and (2) of the Act to appoint arbitrators in the place of the three who have refused or declined to act.

That brings me to the question of discretion.

On this point, the positions are somewhat reversed, as Mr. Kanga, who was with the Advocate General, for the petitioner, relies on the English case of *In re Eyre and Corporation of Leicester*[2] as showing that I have no discretion under section 8 of the Act and must make the appointment, while, on the other hand, Mr. Setalvad distinguishes that case and says that I am not bound by it and have a discretion as to whether I should make any appointment. Mr. Desai for respondent No. 2, did not seriously contend that I had no discretion, and indeed I understood him eventually to admit that the Court had a discretion. His main contention was that I ought to exercise it in favour of making the appointment. However, again I prefer to look at the Act first apart from authority. Looking then at the Act I find that the word used in section 8 (2) is "may" and not "must" or "shall". *Prima facie*, therefore, I should have thought the Court would have had a discretion, though no doubt in an ordinary case and as a general rule it would make the appointment and fill up a vacancy as a matter of course.

(1) (1872) L. R. 14 Eq. 555.

(2) [1892] 1 Q. B. 136.

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This view is, I think, borne out by looking at sections 5 and 19. Section 5 provides in effect that a submission may be revoked by leave of the Court. The Court, therefore, has a discretion in certain cases whether it will revoke a submission. So, too, in section 19 it clearly has a discretion as to whether it will stay an action where there is an existing contract for arbitration between the parties. If, therefore, it has a discretion in these two latter cases, I do not see why it should not also have a discretion when the question is one of making a new appointment where the arbitrators have declined to act. Authorities on other Acts were cited to me to show that sometimes in an Act the context may show that "may" is really imperative. In *Delhi and London Bank* v. *Orchard*[1], Sir Barnes Peacock said :—

"There is no doubt that in some cases the word 'must,' or the word 'shall,' may be substituted for the word 'may' ; but that can be done only for the purpose of giving effect to the intention of the Legislature ; but, in the absence of proof of such intention, the word 'may' must be taken to be used in its natural, and, therefore in a permissive, and not in an obligatory sense."

So, too, *In re Baker* : *Nichols* v. *Baker*[2] Cotton L. J. says :—

"I think that great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean 'must,' so long as the English language retains its meaning ; but it gives a power, and then it may be a question in what cases, where a Judge has a power given him by the word 'may', it becomes his duty to exercise it."

Rex v. *Mitchell*[3] is a recent instance where the Court agreed that the above was the right principle to adopt, but differed in their application of it, the majority holding that in that particular case, "may" was imperative : see also *Reg.* v. *Judge Turner*[4]. Applying the above principle to the case I have to deal with, I do

(1) (1877) L. R. 4 I. A. 127 at p. 135.
(2) (1890) 44 Ch. D. 262 at p. 270.
(3) [1913] 1 K. B. 561.
(4) [1897] 1 Q. B. 445 at p. 448.

not see that the Legislature intended to make an appointment imperative. For instance suppose an application by one party for leave under section 5 to revoke a submission came on with another application by his opponent under section 8 to supply a vacancy, it surely could not be contended then that the Court had no discretion. Or similarly, if one of the applications was under section 19 for a stay, the Court would then have to decide whether the action or the arbitration should proceed. Accordingly I think it more consistent with the scheme of the Act, that section 8 should be discretionary rather than imperative. Therefore, on the Act alone and apart from authority on the Act, I should have thought I had a discretion under section 8.

Turning next to authority on the Act the case of *In re Eyre and Corporation of Leicester*[1] was a case where, so far as I can see, there was no possible ground for contending that the Court ought to exercise its discretion by refusing to appoint an arbitrator. The case, therefore, differs from the present one where there are grounds for contending that no such appointment should be made. I entirely follow and respectfully agree with what Lord Justice Kay said in that case at p. 143, viz.:—

"I desire, however, not to bind myself with regard to the question whether the word 'may' in the section may not in certain cases give a discretion to the Court. I conceive that cases might arise where it would be necessary to exercise some discretion. I understand that in this case it is admitted that some of the matters in dispute were clearly such as came within and ought to be referred under the submission. In such a case, I do not think that the Court would have a discretion to say that it would not entertain the application, assuming, of course, that all the necessary preliminary steps had been taken—that is to say, that there had been a sufficient notice within the section, and no appointment had been made within the seven days. In such a case I do not think the Court ought to exercise any discretion, if it has any ; its duty under such circumstances really becomes only ministerial. I, therefore, agree that for

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the purposes of this case the word 'may' must be treated as equivalent to 'must'. But I do not wish to hold that in every case 'may' in this section is equivalent to 'must'."

Then if one turns to the other judgments, I think that all that Lord Esher and Lord Justice Lopes say is that in the case they had to deal with "may" must be treated as equivalent to "must" though not in every case. This is certainly a possible view of their language, and I think it is the right one. This is borne out by the head-note which says :—

"*As a general rule*, where the conditions exist under which the section is applicable, the Court or Judge has no discretion to refuse to appoint an arbitrator."

There Lord Esher in fact said :—

"What under these circumstances does the section provide that the Court is to do? It says that the Court 'may' appoint an arbitrator. It is argued that under this provision the Court may say in this case, where it is admitted and the Court has decided that there is a dispute within the submission, that it will not force the corporation to go to arbitration, but will leave the contractor to bring an action—that is, that the Court has a discretion to say in such a case that, though one side has contracted to refer the matter to arbitration, they need not act according to their contract, and that the Court will relieve them from it, and the other side must bring their action. I do not think that that is so. I think that in *such a case as this* 'may' means 'must,' and that the Court is bound to appoint an arbitrator. I cannot accede to the argument that the Court has a discretion in *such a case as this*, because there is a discretion under section 4 in cases where the parties have proceeded quite differently, and, one party having brought his action, the other party applies to the Court to stay it. That is the converse of this case."

Then Lord Justice Lopes said :—

"With regard to the language of the section, I think that in a *case like the present*, where there is a dispute clearly within the submission and a failure to concur in the appointment of an arbitrator, and the proper notice has been given, the word 'may' is equivalent to 'must'."

I think the important words in both those two judgments are "such a case" and "a case like the present," and that the judgments of those learned Lords Justices

ought to be limited to the case they were dealing with or cases similar to that and were not necessarily of universal application to all arbitrations. Therefore in the view which I take I am not precluded by any English authority from giving effect to the construction of the Act which I should adopt apart from authority; and no Indian case on section 8 of the Act was cited to me. Accordingly, on the second question, I hold that I have a discretion under section 8. But I also hold that a very strong case must be made out for the exercise of that discretion against filling up a vacancy. I will not attempt to lay down any exhaustive test for the exercise of that discretion, but I think one test would be whether further arbitration proceedings would be unworkable or would produce very great hardship. I think in this way one will best carry out the scheme of the Act and give effect to the spirit shown in the preamble which runs:

"Whereas it is expedient to amend the law relating to arbitration by agreement without the intervention of a Court of Justice".

The intervention of a Court may in certain cases be necessary, but its object should be to assist the parties to carry out their agreement and not to thwart them and still less should it show any petty jealousy of arbitrations.

Now that brings me to the third question, namely, whether in the present case I ought to exercise my discretion in favour of Mr. Setalvad's client and refuse to make the proposed appointment. Mr. Setalvad's main grounds are: (1) that the arbitration is really impracticable or unworkable as it involves a series of different disputes all of which are not common to all three parties to the submission, (2) that the arbitration would be ineffectual, because the statement in the submission that respondent No. 1 is a proprietor of his three businesses therein named is untrue, inasmuch as he has no interest in one of the businesses and has partners

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in the other two businesses who do not concur in the arbitration, and (3) that one of the arbitrations has already proved abortive.

Dealing with the first point, it is quite true that the arbitration involves separate disputes, that is to say, that there are disputes between the petitioner and respondent No. 1 in which respondent No. 2 is not concerned, and that there are other disputes between the petitioner and respondent No. 2 in which respondent No. 1 is not concerned. But the parties knew that before they entered into their submission. Therefore it hardly lies in the mouth of one of them, viz., respondent No. 1, to object to those disputes being decided by the forum they have mutually agreed on. On this I may refer to what Lord Selborne said in *Willesford* v. *Watson*[1] (which was a case of a mining lease with an arbitration clause and arose under the Common Law Procedure Act, 1854), viz.:—

"Then we are told that this is an arbitrary tribunal, final and without appeal, and so forth, and that these are not fit questions to go before the arbitrator. But I think that the Legislature and the Act of Parliament under which the Court is now asked to act have given the answer to that argument. If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament was passed a *prima facie* duty is cast upon the Courts to act upon such an agreement. The parties here have made that agreement. They probably knew what were the reasons in favour of determining these questions by arbitration, and what were the reasons against it, and they made it part of their mutual contract that these questions should be so determined. The plaintiffs cannot, therefore, be now heard to complain if that part of their contract is carried into effect."

Further, in the present case I do not think it can be said that these several disputes would make the arbitration unworkable or produce great hardship on any of the parties. If the arbitrators so desire, they can hear

[1] (1873) 8 Ch. App. 473 at pp. 479, 480.

the several disputes separately and I do not see on that score why there should be any great difficulty in arriving at an award.

The second objection seems at first sight a serious one. But in the first place, it must be noted that the submission itself which was prepared by respondent No. 1's own solicitor gives the lie to his allegations. This submission which is dated 21st March 1918 states quite clearly that respondent No. 1 "is doing business in the names of Gopalji Kunvarji, Valji Durlabhji and Ramdas Pranjivandas." These are the three businesses in question. It further states that he, respondent No. 1, has entered into different contracts "in his different names mentioned above," with the petitioner. These are contracts disputes in respect of which are referred to arbitration. His opponents, the petitioner and the respondent No. 2, say that these statements in the submission are correct. They deny absolutely the truth of the allegations by respondent No. 1 that he in fact is not the owner of these businesses; and they are prepared to take the risk, so far as there is any risk, of respondent No. 1 being able to show that any other person besides himself has an interest in these businesses and is not bound by the submission.

They also refer to the correspondence and in particular to a letter, dated the 8th December 1917, from the solicitors for respondent No. 1 to Messrs. Shroff & Dinsha, the solicitors for the petitioner. That letter is headed "Re Ramdas Pranjiwandas and Morarji Jairam Naranji." Ramdas Pranjivandas is the name of the business firm which the respondent No. 1 now alleges he has no interest whatever in. This letter from respondent No. 1's solicitors is with reference to a contract between that business firm and the petitioner and it speaks of "Our client Mr. Gopalji" who of course is respondent No. 1. In fact no other person is named as their client,

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although I notice in some places the expression "our clients" is used. Be that as it may, this letter like the submission gives the lie to the allegation that respondent No. 1 is not interested in the business.

Further, it is noteworthy that the allegations of respondent No. 1 rest on his own word alone. If it be the fact that he has partners who have not assented or authorized him to enter into this submission, why have they not come forward and made an affidavit to that effect. Again, as was pointed out by Mr. Desai, for respondent No. 2, if this sort of unsupported allegation is to be accepted by the Court, nothing would be easier in any case than for a man to get out of a submission by falsely alleging that he had partners. Under the above circumstances, I think, I ought not to accept respondent No. 1's unsupported allegations about the existence of partners and his want of authority and so on, and accordingly I reject those allegations.

As regards the third point as to one arbitration having proved abortive, that certainly is the case, but I do not think it follows that I ought to refuse to give the parties another chance of settling their disputes in the way they have agreed upon.

In the result, therefore, and after a careful consideration of all the facts of the case, I am of opinion that no case is made out for my refusing to make the proposed appointment. I think, therefore, and I so hold, that I ought to make the appointment.

That brings me to the prayer of the petition. The petition was apparently launched on the theory that the petitioner and respondent No. 2 were each entitled to appoint a new arbitrator and that they had done so and that the Court ought to confirm such appointment and appoint an additional third arbitrator, or alternatively, allow the first two to act alone, and take up the

matter where they left it on 12th April 1918. In my view that is not a correct interpretation of the Act. I do not think that under section 8 the petitioner or respondent No. 2 had power to appoint an arbitrator. It was necessary, I think, for all three parties to concur in the appointment of each of the three arbitrators. That being so, I will not grant the prayer of the petition as originally framed but will only grant the alternative amended prayer, namely, for the appointment of three fit and proper persons to be arbitrators. But the time for making the award must be duly extended under section 12 of the Act. The exact period I will fix after hearing the parties.

As regards the persons actually to be appointed the petition will be remitted to Chambers for that purpose. But I may say that I do not intend to re-appoint any of the three original arbitrators, nor shall I appoint any solicitor of any of the parties. I wish three independent arbitrators to be appointed, but I see no objection to an independent solicitor being one of such three arbitrators. It will of course save expense if the parties agree that the reference should be to a single arbitrator. Should the parties fall in with that suggestion, the appointment can be made, so far as my order goes, without prejudice to any contention which respondent No. 1 may raise in an appellate Court challenging my decision on the question of jurisdiction and discretion.

As regards the costs, I think on the whole it is fair that they should follow the event and that accordingly respondent No. 1 should pay the costs of the petitioner and respondent No. 2 of and incidental to this petition up to date.

I will only add in conclusion that I hope counsel and solicitors will show more discretion as to the cases which they ask to be heard in Chambers. Although

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this case has taken over a day to argue, it was originally brought on in Chambers. In my opinion it should have been adjourned into Court from the outset and never been in my Chamber List at all. The course actually taken has caused extra expense and some delay, and the omission to have an official translation of the submission, the precise terms of which were material, necessitated another adjournment. But having regard to the past practice and to the apparent delay in the Translator's office I do not think I ought in the present case to visit the petitioner with the costs of these adjournments. But I give a warning that in the future I may take a different course.

Respondent No. 1 appealed.

Taraporevalla, for appellant (original respondent No. 1).

Kanga, with him *Strangman* (Advocate-General), for respondent No. 1 (original petitioner).

Kanga, with *Desai*, for respondent No. 2 (original respondent No. 2).

SCOTT, C. J. :—The petitioner Morarji Jairam Naranji petitions under the Indian Arbitration Act as follows :—

"1. That by a writing in the Gujarati language and character made in Bombay on the 21st day of March 1918 between the 1st respondent of the 1st part, the petitioner of the second part, and the second respondent Pitamber Vithalji of the third part, certain disputes between the said parties in respect of contracts for sales and purchases of piece goods of ready and forward delivery were referred to the joint arbitration of Messrs. Lalji Govindji, Morarji Mathurdas Kamdar (a solicitor of this Hon'ble Court and solicitor for the 1st respondent) and Mansukhlal Oghadlal upon and subject to the terms and conditions mentioned in the said writing. By the said writing it was provided that the said arbitrators should publish their award within two months, and power was given to the said arbitrators to further extend the said time by one or two months. A copy of the said writing is hereto annexed and marked A.

"2. The said arbitrators entered upon the said references and, after partly proceeding with the reference, they, by their letter of the 12th April 1918, addressed to the aforesaid parties to the said reference, informed them that they declined to continue to act further as arbitrators. A copy of the said letter is hereto annexed and marked B.

"3. Thereupon the petitioner by his attorneys' letter, dated the 24th April 1918, addressed to the respondents informed them that under the events that had happened the petitioner was entitled to have three arbitrators appointed in place of the said three originally appointed arbitrators under the provisions of section 8 of the above Act and suggested the name of the said Mr. Mansuklal Oghadlal (whom he had induced to act again as arbitrator) as one of the said newly to be appointed arbitrators and called upon them to concur in his appointment and to suggest the names of two other persons as arbitrators within seven clear days after the service of the said letter. A copy of the said letter is hereto annexed and marked C and the office translation of the consent in writing of the said Mr. Mansukhlal Oghadlal to again act as arbitrator, dated the 15th day of May 1918, is hereto annexed and marked D.

"4. In reply to the said letter the second respondent Pitamber Vithalji by his attorneys' letter, dated the 14th day of May 1918, addressed to the petitioner's attorneys, informed them that their client had again appointed the said Mr. Lalji Govindji as one of the arbitrators and that the said arbitrator Mr. Lalji Govindji had no objection to continue as arbitrator. Copy of correspondence between the petitioner's attorneys and the attorneys of the said Pitamber Vithalji is hereto annexed and marked E.

"5. The first respondent has in his attorney's letter, dated 25th April 1918, addressed to the attorneys of the petitioner, stated that all the three arbitrators having refused to act the petitioner was not entitled to make any fresh appointment and to call upon the first respondent to concur in such appointment and to suggest the names of two other arbitrators and the first respondent declined to do so. A copy of the said letter is hereto annexed and marked F."

The prayer is to the Court (1) to confirm the appointment of Mansukhlal Oghadlal and Lalji Govindji as arbitrators and appoint a third arbitrator and to make an order directing such three arbitrators or only the two above named to proceed with the reference from the stage where the originally appointed arbitrators left it; or (2) alternatively to appoint three arbitrators to proceed with the reference.

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It was objected by Gopalji Kuverji that the Indian Arbitration Act did not confer upon the Court jurisdiction to make any such order in the circumstances of the case.

Mr. Justice Marten, before whom the case came in Chambers, held that section 8 of the Act did give him jurisdiction and acting upon a subsequent consent of the parties he appointed a single and entirely new arbitrator to dispose of the reference.

The reasoning by which the learned Judge arrived at his decision was as follows :—

Section 8 (*c*) contemplates the case of two arbitrators plus an umpire or third arbitrator. As power is given to supply a vacancy caused by the death of the third arbitrator one would expect a provision to supply a vacancy or vacancies caused by the death of the two first arbitrators. Sub-section (*b*) if read liberally would furnish such provision and if so it would equally apply to the supply of vacancies caused by the death, refusal, &c., of three arbitrators.

But is it correct to hold that clause (*b*) is meant to cover the case of arbitrators 1 and 2 where the appointment of arbitrator 3 falls under clauses (*c*) and (*d*) ?

I think not ; because arbitrator 3 in the case supposed in (*c*) and (*d*) is in a special category like an umpire appointed jointly by the parties or by arbitrators 1 and 2, each of whom is appointed by one of the parties independently of the other. Section 8 (1) (*b*) does not apply to the case of independent appointments of two arbitrators. In such case when a vacancy occurs it would ordinarily be filled by the original appointor as contemplated in section 9. Section 8 (1) (*b*) only applies in terms to a single vacancy to be supplied by the *parties*. Section 8 nowhere seems to contemplate the case of two original arbitrators appointed jointly by the

parties plus a third of the same class appointed by the two already jointly appointed or by the parties. In short, section 8 only applies to certain cases of failure to appoint jointly. Where choosers should but do not concur, the Court is enabled to assist them by the selection and appointment of an individual falling in one of the following categories—an (i.e., one) arbitrator; an umpire; a third arbitrator in the special sense in which the term is used. It follows that in my opinion clause (*b*) must be read with clause (*a*) and clause (*d*) with clause (*c*) of section 8. The Court is not at liberty to take upon itself to select an individual where the selection is by the submission reserved for one of two disputing parties.

The Act does not attempt to provide for every case. It only gives assistance in the commoner cases where joint appointment cannot be arrived at.

It is said that the present case is one of joint appointment of three arbitrators. That is probably correct but it is not one of the common cases of joint appointment contemplated by the section. It is unusual, except perhaps in references in the course of a suit, to have a triangular submission and the joint appointment of three.

In Russell on Awards, Part II, Chapter III, section 3, in the Editions of 1870, 1882 and 1906 it is said:

"In case of death, refusal to act, or incapacity, of a *single* arbitrator... a Judge may appoint a new one if the parties do not; and...where one of two arbitrators fails for the like causes, unless the party appointing him appoints a fresh arbitrator, the remaining arbitrator may be appointed to act alone."

The authority given for this statement is until 1889 the Common Law Procedure Act, 1854, sections 12 and 13, and after that date the Arbitration Act, sections 5 and 6 (sections 8 and 9 of the Indian Act) which reproduced sections 12 and 13 of the Act of 1854. This, as the pronouncement of the standard text-book on

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Arbitration unaltered through a period of thirty-five years, is a good indication of the understanding of the profession as to the scope of these sections. The dicta of Lord Justice Lindley and Lord Justice A. L. Smith in *In re Smith & Service and Nelson & Sons*[1] and *Manchester Ship Canal Company* v. *S. Pearson & Son, Limited*[2], respectively, show that those learned Judges understood the provisions in question in the same sense.

In my opinion, therefore, the Court had no jurisdiction to make the order that it did, and the appeal must, therefore, succeed upon that ground. The appeal is allowed, and the decree is set aside and the petition dismissed with costs throughout upon the petitioner.

HAYWARD, J.:—The appeal involves a point of importance. The Indian Arbitration Act applies to the appointment of a single arbitrator and in certain cases to the appointment of two arbitrators. Does it apply in any case to the appointment of three arbitrators? It is important to remember in resolving this point that the Act is an Act to amend the law relating to arbitration. It does not deal with the whole law of arbitration and it must be construed strictly in that it confers special powers of interference not otherwise inherent in the Court.

It appears to me, with this in mind, that it applies primarily to the ordinary commercial contracts in which the reference is to a single arbitrator or else to two arbitrators, one appointed by each party, with power to call in a third arbitrator or leave the decision to an umpire. Such are the references treated in sections I and II and at p. 202 in section III of Chapter IV of Russell on Arbitration, 4th Edition, 1870. This application is indicated by section 6 of the Act which provides

(1) (1890) 25 Q. B. D. 545. (2) [1900] 2 Q. B. 606.

that a submission shall be deemed ordinarily to be to a single arbitrator and that if the reference is to two arbitrators, they shall have power to appoint an umpire; while section 8 (1) (*a*) and (*b*) proceed to provide for the failure of the parties to nominate the single arbitrator or the failure of the nominated arbitrator to proceed with the arbitration and section 9 for the failure of either of the parties to nominate either of the two arbitrators or the failure of either of the nominated arbitrators to proceed with the arbitration; while provision has already been made in section 8 (1) (*c*) and (*d*) for the failure of the parties or the two arbitrators to nominate the third arbitrator or the umpire. It has been provided that the arbitration shall in all these cases be made effective if necessary by the special interference of the Court. These provisions of the Indian Arbitration Act reproduce verbatim the English Statute, 1889.

It is not, in my opinion, open to us to extend this special jurisdiction to special contracts not clearly contemplated and expressly mentioned by the Act. Thus it is not open to us to interfere where the reference is to two arbitrators to be appointed not one by each party but the two jointly by the two parties. There is no provision in section 8 for interference on the failure of the parties jointly to nominate the two arbitrators. Nor do clauses (*a*) and (*b*) read together provide for interference on the failure of two arbitrators so nominated to proceed with the arbitration. These two clauses must, in my opinion, be read together and the words "the appointment of an arbitrator" at the end of clause (*a*) read as repeated in the words "if an appointed arbitrator" at the opening of clause (*b*); just as the two clauses (*c*) and (*d*) have also plainly to be read together. It would, in my opinion, be repugnant to the arrangement and plain meaning of section 8 of the Indian Arbitration Act to give effect to

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the general provisions of section 13 of the General Clauses Act.

It is similarly, in my opinion, not open to us to interfere where the reference is to more than two arbitrators and the parties fail to nominate the arbitrator or the arbitrators fail to proceed with the arbitration. There is no provision in section 8, clauses (*c*) and (*d*) providing for a difference of opinion between two arbitrators and settlement by a third arbitrator or by an umpire. Such references are thus treated at p. 203 of section III of Chapter IV of Russell on Arbitration, 4th Edition, 1870: "The arbitrators selected, one by each side, ought not to consider themselves the agents or advocates of the party who appoints them....In order to ensure a decision in case of difference of opinion, the submission frequently goes on to prescribe that the two arbitrators shall name a third and that an award made by any two, if they cannot all agree, shall be sufficient. If the two arbitrators do not appoint a third arbitrator or an umpire, when at liberty to do so, a Judge...may appoint...". Russell proceeds to distinguish the duty of a third arbitrator from that of an umpire: "The arbitrators named by the parties often seem to think that they are to represent their respective nominors and act rather as advocates than Judges, while the third arbitrator frequently supposes he is an umpire and that his active interference is not to commence until the others have differed finally..." And at p. 211 of Section IV: "Where two arbitrators are appointed, the submission often provides that in case of their not agreeing in an award, the matters shall be decided by a third person, who is styled an umpire". Clauses (*c*) and (*d*) of section 8 of the Act do not, in my opinion, provide for interference, where the reference is not to two arbitrators with power to settle differences of opinion by summoning a third arbitrator or referring the matters

to an umpire, but is, as here, directly to three arbitrators. Such references would appear not to have been included within the particular provisions of sections 8 and 9 though they might fall within the provisions of the other sections including section 19 of the Indian Arbitration Act. This would appear to have been the view held in *In re Smith & Service and Nelson & Sons*[1] and in *Manchester Ship Canal Company* v. *S. Pearson & Son, Limited*[2] under the English Statute relied on in paragraph 964 of Volume I of Halsbury's Laws of England.

The appeal should, therefore, in my opinion, be allowed as the appellant and two respondents referred their disputes direct to three arbitrators and Mr. Justice Marten had no jurisdiction on their refusal to proceed with the arbitration to appoint fresh arbitrators under the Indian Arbitration Act. It would not be necessary in this view of the matter to decide whether the special powers conferred by the Act were discretionary with the Court. It would appear to me, however, that Mr. Justice Marten placed the right interpretation upon the decision in *In re Eyre and Corporation of Leicester*[3] and that the word "may" never can mean "must" so long as the English language retains its meaning though the exercise of a discretionary power conferred by the word 'may' might in certain circumstances being established become imperative on the Judge, as observed by Cotton L. J. in *In re Baker*[4]. It would further appear to me that it would not have been proper for us to interfere with the exercise of the discretion vested in Mr. Justice Marten merely upon our own views of the desirability or otherwise of leaving the parties in this particular matter to their ordinary remedies in the Court.

(1) (1890) 25 Q. B. D. 545.
(2) [1900] 2 Q. B. 606.
(3) [1892] 1 Q. B. 136.
(4) (1890) 44 Ch. D. 262 at p. 270.

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Solicitors for appellant: Messrs. *Madhavji, Kamdar and Chhotubhai.*

Solicitors for respondent No. 1: Messrs. *Ardeshir, Hormusji, Dinsha & Co.*

Solicitors for respondent No. 2: Messrs. *Motichand & Devidas.*

Appeal allowed.

G. G. N.

CRIMINAL REVISION.

Before Mr. Justice Heaton and Mr. Justice Shah.

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April 2.

EMPEROR *v.* BYRAMJI PUDUMJI (No. 1).*

Cantonment Code, 1912, Rules 107A and 97†—Order to repair a building in a bad condition—Disobedience of the Order—Power to inflict daily fine for disobedience—Fine can be levied for disobedience in the past only.

The owner of a bungalow within Cantonment limits, having failed to carry out repairs to the bungalow, was, on the 27th October 1918, ordered by

* Criminal Application for Revision No. 39 of 1919.

†107 A. Whoever fails to comply with any notice issued under sub-section (3) of section 92 or under any other section of this Chapter, shall be punishable with fine which may extend to fifty rupees, and in the case of a continuing failure, with an additional fine not exceeding five rupees for every day after the first in regard to which he is convicted of having persisted in the failure.

97. Where any building, wall or structure, or anything affixed thereto, or any bank or tree, is, in the opinion of the Cantonment authority, in a ruinous state or in any way dangerous either, in the case of an occupied building, to the occupier or to the public, the Cantonment authority may, by notice in writing, require the owner or occupier thereof forthwith either to remove the same or to cause such repairs to be made as it may think necessary for the safety of the occupier or of the public, and, if there is, in the opinion of the Cantonment authority, imminent danger, it shall forthwith take such steps to avert the danger as it may think necessary.