

**In Re: Indian Arbitration Act**

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**SooperKanoon Citation :** [sooperkanoon.com/330569](http://sooperkanoon.com/330569)

**Court :** Mumbai

**Decided On :** Jan-28-1908

**Reported in :** (1908)10BOMLR351

**Judge :** Davar, J.

**Appellant :** In Re: Indian Arbitration Act

**Judgement :**

**Davar, J.**

1. The respondent, Mr. Ahmedbhoy Habibbhoy, is the owner of certain premises situated at Fergusson Road, whereon previous to October 1906 there was a mill known as the Victory Mills. This property was insured by the respondent with nineteen. Insurance Companies for various 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.

2. The arbitration proceedings having reached a certain stage a difference of opinion arose between Mr. Chamier, who was conducting the case on behalf of the Companies, and Mr. Hormasji, who represented the respondents, 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 appears at page 90 of the Printed Book of Proceedings and runs as follows :-

Without in any way deciding the question as to whether or not any and if so what consequential damages 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 matters of the reference. We think that it is open to the claimant to contend that under the policy the Companies did take possession and that they were bound to protect and clear the machinery.' On this decision being given the Companies presented the present petition wherein amongst other things they pray that they may be accorded leave to revoke the submission to arbitration.

3. This petition came on for hearing before me in Chambers on the 11th instant when one of the objections taken by Mr. Invera-rity on behalf of the respondent was that the procedure adopted by the petitioners was erroneous and that this is an application which ought not to have been made to the Judge in Chambers but must be made to the Court. I think the contention is correct. No doubt Rule 75, Clause (v), provides that ' applications in all matters arising under' amongst others 'the Indian Arbitration Act may be disposed of by a Judge in Chambers '. There is however a proviso to the clause which excludes all applications ' otherwise provided in the Act itself'.

4. This application is under Section 5 of the Act which provides that a submission shall be irrevocable 'except by leave of the Court'. The Rules of our High Court, framed under the power conferred on the Court by Section 20 of the Arbitration Act, do not specifically state whether an application of the nature such as the one before me should be heard by the Court or by the Judge in Chambers. Rule 414 leads me to think that it was within the contemplation of the framers of the Rules that all applications should be heard by the Judge in Chambers. Rule 409 provides that 'all applications under the Act shall be made by petition except as hereinafter provided for and in Rule 411, the expression used is 'for the opinion of the Court.'

Rule 414, however, provides that 'upon any application under the Act, the Judge shall direct notice thereof' and that 'the Judge shall pass such order as the Circumstances of the case may require.' Section 20 of the Act requires that the Rules made by the High Court should be consistent with the Act. The Calcutta High Court has framed Rules under the provisions of Section 20 of the Act and Rule 1 is very clear on the point, I am now considering. It provides:-

Every application

(1) For revocation of a submission to arbitration under R. 5 of the Act.

\* \* \* \* \* Shall be made to a Judge in Court on motion.

5. In the absence of any specific Rule of our Court I prefer to be guided by the words of Section 5 itself rather than by inferences to be drawn from the phraseology of the Rules. I think the proper procedure to be followed in moving for leave to revoke a submission to arbitration under Section 5 of the Arbitration Act (IX of 1899) should be by motion in Court.

6. My finding on this point in favour of the contentions of the respondent's counsel will, however, cause no inconvenience as he has consented in the event of my agreeing with his views that the hearing before me should be treated as a hearing on a motion before the Court.

7. Mr. Inverarity has further contended that the petitioner's procedure is erroneous in another respect. He has pointed out that there are nineteen different agreements between the parties whereby they have referred their differences to arbitration and he contends that they cannot ask for a revocation by one petition. It must be remembered that the respondent has entered into a separate agreement with each Company. In this way there are nineteen submissions. It is true that the evidence which the arbitrators are recording is by consent to be treated as evidence in all the submissions but there is no order consolidating the references and the respondent is not shown to have consented anywhere that the nineteen references should be treated as one. This objection of Mr. Inverarity appears to me to be sound though highly technical. This objection, however, could have been

easily removed if at the end of the argument I had considered it necessary by adjourning the further hearing of the petition and directing eighteen other petitions to be formally put on the record.

8. The important questions in the petitions, however, are whether the petitioners are entitled to obtain from the Court leave to revoke the submission and retire from the arbitration and whether I should comply with their alternative prayer which is ' that in the event of my being satisfied that the arbitrators will comply with my directions and ruling as to the proper course to be pursued, I should rule that the arbitrators have acted wrongly in law and direct the arbitrators as to the course that it is their duty to take'.

9. I will dispose of the last prayer first. There are no materials before me to show whether the arbitrators will or will not comply with my rulings or obey my directions. Under Section 10 of the Act they have power to state a special case for the opinion of the Court on any question of law involved in the proceedings before them. They have not chosen to do so. It appears that in England the Court can compel an arbitrator to state a case; see *In re Spellers & Baker, Limited, and Leatham & Sons* [1897] 1 Q.B. 312. I have no such power. The Indian Arbitration Act leaves it to the discretion of the arbitrators to state a special case or act as they choose. I have no power to enforce my rulings or directions if the arbitrators do not choose to follow my rulings or obey my directions; and, under those circumstances, I must decline to comply with the alternative prayer of the petition. I will, therefore confine myself to the consideration of the question whether petitioners have made out a case entitling them to withdraw from the submission to arbitration.

10. There is no doubt that when the arbitrators improperly admit evidence, which, in the opinion of the Court, should not have been admitted, the proper procedure for the party aggrieved is to come to the Court and ask that the submission may be set aside. In the case of *In re Lord Gerard and the London and North Western Railway Company* [1834] 2 Q.B. 915 on which the Advocate General relied in the course of his argument, a rule nisi to set aside a submission to arbitration on the ground of improper reception of evidence by the arbitrator was made absolute by a

divisional Court in the first instance. The matter went to the Appeal Court and the report of the proceedings in the Appeal Court is in Law Reports [1895] 1 Queen's Bench Division at page 459. The Appeal Court confirmed the decision of the lower Court and dismissed the appeal.

11. In the earlier case of the East and West India Booh Co. v. Kirk and Rendall, the House of Lords held that the Court had power to give leave to revoke a submission where it appeared that the arbitrator was going wrong in point of law even in a matter within his jurisdiction, and in this case the House of Lords reversing the decision of the Divisional Court and the Court of Appeal was prepared to exercise that power unless the parties agreed to the arbitrator raising the questions in a special case for the opinion of the Court.

12. In James v. James and Bendall (1889) 23 Q.B.D. 12 Lord Justice Lindley says :-

I have no doubt that we have power to grant leave to revoke the submission but I also have no doubt that it is a matter of discretion whether we would do so, and therefore the real question seems to me to be whether the facts of the particular case are such as to render it right for us in the exercise of that discretion to grant such leave.

13. Lord Justice Lopes, who follows Lord Justice Lindley, takes the same view and in commenting on the East and West India Docks v. Kirk and Rendall says :-

It seems to me clear from the decision that the power is a discretionary power, to be exercised according to the circumstances of each particular case.

14. Lord Denman C.J., in delivering the judgment of the Court in Scott v. Van Sandau (1841) 1 Q.B. 102 makes some very weighty observations which ought, I think, to be present to the mind of a Judge deciding a question like the one before me. After observing that submissions to arbitration were 'highly advantageous to the ends of justice' and that when 'resorted to on proper occasions the jurisdiction was of inestimable value'. He says :-

We will only observe that the discretion of the Court to which the appeal is made ought to be exercised in the most sparing and cautious manner, lest an agreement to refer, from which all might reasonably hope for a speedy end of the strife should only open the flood-gates for multiplied expenses and interminable delays.

15. The result of the authorities on this subject is summed up in Halsbury's Laws of England, Vol. I, p. 449, where it is stated:-

The power to grant leave to revoke a submission is exercised by the Court in a sparing and cautious manner and unless the applicant can establish that there will be failure of justice if the reference is allowed to proceed, he will not be allowed to revoke.

16. These authorities are valuable guides for the decision of the question arising under the present petition. The conclusions to be drawn from them are,-that when a party to a submission to arbitration feels aggrieved by the arbitrator deciding improperly or erroneously to admit evidence which they should have rejected, his proper course is to apply to the Court for leave to revoke the submission,-that on such application the Court will accord or refuse such leave according to the circumstances of each particular case that comes before it, that the power of the Court is discretionary and ought to be cautiously and sparingly exercised but that such power should be exercised by the Court in favour of the applicant if it appears to the Court that the main object of all submissions to arbitration, which is to obtain 'speedy end of the strife,' is not likely to be attained and the applicant is likely to be subjected to ' multiplied expenses ' and ' interminable delays ' by the conduct of the arbitrators, and, lastly, that leave to revoke should be accorded to the applicant in all cases where he 'can establish that there will be failure of justice if the reference is allowed to proceed.'

17. Keeping this in mind I have carefully considered the arguments addressed to me and the proceedings before the arbitrators. It appears to me that the decision the arbitrators have pronounced-though on the face of it, it shows that it was intended to be cautious-is extremely weak. It carries with it the impression that the arbitrators after having heard lengthy and learned arguments were left in doubt and resorted to a short cut by deciding to admit the evidence offered ' without in

any way deciding the question etc. ' It would be a great waste of time, energy and money to go on recording evidence for days when in the end they may come to the conclusion that such evidence was either irrelevant or useless for the purposes of deciding the question before them. It seems to me to have been clearly the duty of the arbitrators to decide definitely questions of admissibility or relevancy of a particular class of evidence as soon as the questions are raised before them. They had the submissions before them. They ought to form a clear and definite opinion as to what questions are referred to their arbitrament, and decide what is within the scope of the reference and what is outside of it. If this is once definitely settled there would be no difficulty in their deciding the question of admissibility of any evidence that may be tendered by one or other of the parties. Their attention might with advantage have been drawn to the power conferred on them by Section 10 of the Arbitration Act which entitles them to state a special case for the opinion of the Court on any question of law. The questions argued before them were undoubtedly questions of law and it is possible that the number of passages cited from law books may have tended to accentuate their doubts.

I refrain from expressing any opinion on the merits of the question argued before the arbitrators and before me. I have endeavoured to confine my attention to the simple question whether under the present circumstances I should give leave to revoke the submission or not. I will, however, say this that I was considerably impressed by the very weighty arguments addressed to me by the Advocate General. The object of a submission to arbitration is, in the words of Lord Denman, to obtain a 'speedy end of the strife' and to avoid ' multiplied expenses and interminable delays'. These objects are not attained by shelving questions that arise before the arbitrators.

18. Mr. Inverarity argued that if I revoked the submission his client might possibly be precluded from filing suits under the conditions of some of the policies. I am afraid this is a consideration which is more for the respondent's legal advisers to consider when they tender evidence before the arbitrators than for the Court. It would be the duty of the Court to revoke a submission if it is proved to its satisfaction that the arbitrators were improperly admitting evidence that should not be admitted or that they were acting in a manner that, in the opinion of the Court,

is likely to lead to a failure of justice if the reference is allowed to proceed.

19. After much anxious consideration I have come to the conclusion that under the circumstances so far as they have gone I ought not to grant, leave to revoke the submission. The arbitrators up to now have really decided nothing. It may be that they would in the end be right and that the evidence which they are now-so to say provisionally admitting-may be good and relevant evidence on some question that may well be within the scope of their reference. I am not in a position to say at present that there will be failure of justice if the arbitration is allowed to proceed and I think it would on the whole be very detrimental to the interests of both sides to revoke the arbitration and relegate them to their legal remedies. It may be that the respondent's contentions are right. That is a question which in my opinion ought to have been decided. The legal advisers of both parties have heard the questions argued by eminent counsel before me-if both parties still, insist on their respective contentions the arbitrators ought, in my opinion, to decide the questions-and if they feel any difficulty in the matter their obvious course is to submit a special case to the Court.

20. For reasons which I have already specified I have declined. to give any ruling or directions but I have thought it desirable to express my views in the hope that the arbitrators who I have no doubt are as anxious us the parties to see a speedy end of the strife would adopt a decisive line of action and put an end to all uncertainties as to their present and future proceedings.

21. Before I conclude I must notice one small point urged before me. Mr. Inverarity argued that the present proceedings are a breach of the understanding arrived at and mentioned at page 27 of the Printed Book, where the note of the arbitrators is:-

By consent this point was reserved for argument hereafter, i.e., after the evidence is closed.

22. I accept the explanation Mr. Chamier has given. The words that follow ' i.e., ' must be due to some misunderstanding for it seems to me that it would be futile to argue a question of admissibility or relevancy of evidence after the whole evidence

is given. If it then appeared to the arbitrators that the evidence was inadmissible or irrelevant all the time money and energy expended would be wasted.

23. I make no order on the petition. I am afraid I have no alternative but to direct the petitioners to pay the respondent's costs. Costs will be taxed on the basis of this being Motion in Court.

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