

(1985) 02 CAL CK 0011

In the Calcutta High Court

Case No : Appeal No. 249 of 1974 and Award Case No. 219 of 1970

Oriental Fire and General Insurance Co. Ltd.

APPELLANT

Vs

Murlidhar Gopikissen Pvt. Ltd.

RESPONDENT

Date of Decision : 22-02-1985

Acts Referred:

Arbitration Act, 1940 — Section 30

Contract Act, 1872 — Section 124, 30

Citation : AIR 1985 Cal 301

Hon'ble Judges : R.N. Pyne, J;Prabir Kumar Mujumdar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.N. Pyne, J.—On the 6th of December 1963 the appellant Oriental Fire & General Insurance Co. Ltd., issued a Policy of Insurance in favour of the respondent Murlidhar Gopikisen Private Ltd, against loss of cash or bank-notes (otherwise than by the infidelity) of the employees of the respondent. The said policy provided, inter alia, as follows:

"It is hereby agreed that during the continuance of this policy or any renewal thereof the company shall subject to the provisos and conditions hereinafter stated pay or make good to the insured the amount of any cash or bank-notes belonging to the insured lost otherwise than by the infidelity, fraud or dishonesty of the insured's employees by theft or robbery with or without violence or from any other cause whatsoever while in transit within the limits set forth in the Schedule hereto and in the custody or charge of the insured or his duly authorised representative for the purpose of such transmission but only to the extent set forth in the said Schedule during any one transit".

The particulars of transit are mentioned in the Schedule and it is stated that the maximum amount of cash or bank-notes in transit at any one time was agreed to be Rs. 40,000/- and estimated amount of cash or bank-note in transit in any one year is stated to be Rs. 30,00,000/-. An arbitration clause is contained in Clause

7 of the conditions of the policy. The said clause is in the following terms :

"All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the arbitrators do not agree of an umpire appointed in writing by the arbitrators before entering upon the reference. The umpire shall sit with the arbitrators and preside at their meetings and making an award shall be a condition precedent to any right of action against the company. If the company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable."

On the 6th of March, 1964 the respondent wrote a letter to the appellant informing that respondent's Zamadar while proceeding with cash to Balasore at about 1-15 P.M. at Howrah Station lost Rs. 20,000/- and the matter was reported to the Howrah Police. Thereafter, the respondent on 12th March, 1964 filed claim before the appellant. The appellant repudiated the claim on 12th November, 1965. On the 29th March, 1966 the respondent's solicitor wrote a letter to the appellant reiterating the claim and on 25th May, 1966 the appellant again repudiated the claim on various grounds. Thereafter, on 11th September, 1966 the respondent wrote a letter to the appellant intimating that as the appellant had failed to settle and pay the claim the respondent desired to refer the matter and suggested the name of Shri Ajoy Kumar Mitra, Barrister-at-Law as arbitrator. The appellant's solicitor replied to the said letter stating that the appellant was not willing to agree to the appointment of Shri Ajoy Kumar Mitra and the appellant appointed Shri Nihar Ranjan Majumdar as arbitrator in terms of the arbitration clause. Thereafter, the respondent on the 27th October, 1966 wrote a letter to the appellant's solicitor M/s. M. L. Khemka & Co. stating that the respondent appointed Shri Ajoy Kumar Mitra as its arbitrator and requested that the appellant's arbitrator should contact Shri Mitra and proceed with the reference. On the 9th December, 1966 the arbitrators intimated that they had appointed Mr. Amal Chandra Sarkar, Barrister-at-Law as the umpire and intimated the time and place of the next sitting. It is stated that on the 14th December, 1966 a meeting was held and directions were given for filing of the statements and on the 23rd January, 1967 the respondent filed the statement of case. The appellant filed its counter statement on 24th January, 1967. On the 1st September, 1967 the appellant tiled an application for amendment of its counter statement of facts. This was kept on the file by the arbitrators to be considered later. The arbitration meetings were held between September and August 19, 1969 and the witnesses were examined. The matter was heard for about 57 days before the joint arbitrators and the umpire presided over the arbitration proceedings in terms of the arbitration clause. In the meetings before the joint

arbitrators presided over by the umpire various witnesses of both parties were examined and cross-examined. Arguments in great detail were made on behalf of both the parties. The appellant on 20th August 1969 received a copy of the letter dated 19th August, 1969 written by the joint arbitrators to the umpire in which they informed that they could not agree and requested the umpire to proceed to make the award. On 21st August, 1969 the umpire wrote letters to the attorneys for the parties giving notice that he had published his award. The appellant made an application challenging the propriety and validity of the award made by the umpire and for setting aside of the same. Subsequently, the award was filed in this court and the appellant made an application for setting aside of the award in the court of the first instance out of which this appeal has arisen. In the petition various points were taken challenging the award.

2. On behalf of the appellant (who was the petitioner in the court of the first instance) various contentions were made in the court of the first instance in support of the application. Learned trial Judge negatived those contentions and by his judgment and order dated 6th June, 1963 dismissed the appellant's application. The instant appeal has been preferred by the appellant against the said judgment and order dated 6th June, 1963.

3. It has been contended on behalf of the appellant that under the Insurance policy maximum amount of cash and/or bank-notes of Rs. 40,000/- in transit at any one time is insured. In the statement of case filed by the respondent before the arbitrators it was alleged that Rs. 50,000/- was taken at one time in cash and Rs. 20,000/- was stolen and became missing from the said sum. It has been submitted on behalf of the appellant that the risk covered by the policy is maximum amount of cash and/or bank-notes in transit at any one time is Rs. 40,000/- and estimated amount of cash and/or bank-notes in transit during any year is Rs. 30,00,000/-. It was stated the risk covered in one single transaction was risk only of Rs. 40,000/- but it is stated by the respondent that its employee carried Rs. 50,000/- in one single transaction. Hence the risk was not covered by the policy. Therefore, the umpire's award is perverse and vitiated. It was submitted on behalf of the respondent that the relevant clause of the policy did not mean that in one single transaction nobody would be permitted to carry more than Rs. 40,000/- but the liability of the insurer would be limited to Rs. 40,000/- in case of loss in one transaction and would be limited to Rs. 30,00,000/- in a whole year. It was further submitted that the Magistrate Howrah declared the case filed before him by the respondent to be false and discharged the accused. The above fact was not denied by the respondent in the said case. The above facts were however before the joint arbitrators and the umpire. As these allegations relate to the merit of the case before the joint arbitrators and the umpire and they after adjudicating upon the same in the arbitration proceeding made the award it was not open to the court to go into these questions which relate to the merit of the case in the application for setting aside the award. The arbitrators and umpire were fully entitled to decide these questions. Further, under the policy maximum sum insured was Rs. 40,000/-. That does mean that

money more than Rs. 40,000/- could not be carried at a time. The insurer's liability under the policy was limited to Rs. 40,000/- only. Further, the rival contentions of the parties were before the arbitrators and the umpire and because one contention was accepted by the umpire it cannot be said that there was I misconduct on the part of the umpire or that I he committed an error of law. It is also to be noted that if two conclusions are possible and one contention is accepted by the arbitrator or the umpire which does not appeal to Court that does not mean that the award is perverse in the sense that no reasonable man would have taken that view. Hence we are unable to accept the above contentions of the appellant.

4. It was further submitted on behalf of the appellant that the umpire did not properly enter upon the reference and as such the award is vitiated. Further, the umpire did not inform the parties about his entering upon the reference after the arbitrators disagreed. According to counsel, under the arbitration clause, that is, Clause 7 of the agreement, the umpire was to act if the arbitrators did not agree. According to counsel, in the instant case there was no reference to the umpire. Until the arbitrators disagreed the umpire could not enter upon the reference. The umpire's sitting with the arbitrators and presiding over the arbitrators' meeting cannot be construed to mean reference to both the arbitrators and the umpire at the same time. Such reference is contrary to the express provision of the aforesaid arbitration clause. The object of the umpire's sitting and presiding over at the arbitrators' meeting was to enable him to know the matter and proceed expeditiously in case he was required to enter upon the reference upon the arbitrators' disagreement. That did not amount to the umpire's entering upon the reference. Referring to Section 3 and Clauses 4 and 5 of the First Schedule to the Arbitration Act, 1940 it was submitted that the umpire was to enter upon the reference if the arbitrators disagreed or their time to make the award expired unless the agreement contains express provision to the contrary. In the instant case there is no such express provision. It was further submitted that the umpire could not be deemed to have entered on the reference along with the arbitrators because that would mean if the arbitrators allowed their time to expire the umpire's time would also expire and he would not be able to enter upon the reference, hear the parties and make the award. In the instant case although the arbitrators' time to make the award was extended by the parties and by the Court's order but the umpire's time was never extended.

5. It has been further submitted that the umpire is to enter on the reference in terms of Clause 4 of the First Schedule, Arbitration Act, upon the arbitrators' time to make the award is allowed to expire without making the award or upon the arbitrators' giving notice in writing to the umpire stating that they cannot agree in making the award. It has also been submitted that the words "enter on the reference" cannot be possibly meant to proceed to give the award. It has been submitted that entering upon the reference means not when the arbitrator accepts the office or takes upon himself the duty but when he actually enters upon the matter of reference, when the parties are before him or under some

peremptory order compelling him to conclude the hearing ex parte. In support of the submission reliance was placed on various cases, to wit, *The Industrial Gases Ltd. Vs. The Ganesh Flour Mills Co., Ltd.*, ; *Firm Sardar Mal Hardat Rai v. Firm Sheo Baksh Rai Sri Narain*, AIR 1922 All 106; AIR 1955 126 (Nagpur) ; *Winterimgham v. Robertson* (1858) 27 LJ Ex 301; *Re; Tunno & Bird* (1833) 3 LJB 1; *Dhanasingh v. Ramchand*, AIR 1924 Sind 27 and *Karam Chand v. Mt. Jasodhan*, AIR 1927 Lah347.

6. Relying on a passage on Russel's Law of Arbitration (19th Edn.) pages 249-252 it has been submitted that the umpire has no jurisdiction until the arbitrators disagree and he enters on the reference. Further, relying on the case of *Keshavs in Keshavsinh Dwarkadas Kapadia, etc. Vs. Indian Engineering Company*, it was submitted that the arbitration clause as to the umpire being appointed by the arbitrators before their entering upon the reference and the matter being referred to the umpire in case of difference between the arbitrators was construed as not to exclude the applicability of para 4 of the First Schedule of the Arbitration Act. It was further submitted that the intention of the parties is that when the arbitrators would allow their time to expire without making the award, the umpire would enter upon the reference.

7. Further relying on the case of *Ramanath Agarwalla Vs. Goenka and Co. and Others*, it has been submitted that the arbitrator enters on the reference when he applies his mind to the disputes or controversy before him depending upon the facts and circumstances of the case. It was also submitted that in view of the above in the instant case the reference was to the arbitrators alone in the first instance and they had jurisdiction to adjudicate upon the disputes and the provision as to umpire sitting with the arbitrators and presiding over their meetings did not vest in the umpire any jurisdiction to adjudicate upon the matter.

8. It was submitted-that after the arbitrators gave notice of their disagreement in making the award by their letter dated 19th August, 1969 the umpire was required to enter upon the reference. In doing so, he was required to (a) apply his mind to the disputes of controversy between the parties; (b) he should do so on notice to and in the presence of both the parties; (c) hear the parties; (d) allow the parties to lead evidence and/or make arguments in the, matter; (e) to proceed ex parte only if the parties do not appear in spite of peremptory notice and (f) to make the award only thereafter. In the instant case the umpire did not do so. Therefore, the umpire made and published the award without entering upon the reference on notice to or in the presence of the parties and thereby the appellant suffered prejudice and his award is vitiated.

9. At this stage it would be convenient to refer to the cases cited on behalf of the appellant.

10. In the case of *The Industrial Gases Ltd. Vs. The Ganesh Flour Mills Co., Ltd.*, the facts were that the dispute between the parties was referred to three

arbitrators, namely, Sri Narendrajit Singh, Bar-at-Law, Sri Ganpat Sahai, Chief Engineer of the respondent Company and Sri H. S. Ramaswami, Chief Engineer of the appellant Company. Of these Sri Narendrajit Singh was to be umpire. The arbitrators took a long time over the arbitration and took repeated extensions for giving the award. Eventually arguments were heard on May 10, 1963. Sri Ganpat Sahai and Sri H. S. Ramaswami gave differing awards on May 14, 1963. Thereupon the umpire Sri Narendrajit Singh gave his award on May 15, 1963. Application was made for setting aside of the award. It was contended on behalf of the appellant that the award was vitiated and must be set aside as Sri Narendrajit Singh never really entered upon the reference as umpire. The Court held that the award was vitiated. The Court observed as follows :

"Sri Ganpat Sahai and Sri H. S. Ramaswami gave their differing awards on May 14, 1963 and Sri Narendrajit Singh gave his award the very next day, that is to say on May 15, 1963. When the two arbitrators differed, Sri Narendrajit Singh, the umpire, instead of proceeding to give his award forthwith, should have entered upon the reference, that is to say, he should have given notice to the parties so that they would have had an opportunity of making any other submissions that they desired in view of the difference of opinion between the two arbitrators mentioned above. I should not be understood to mean that Sri Narendrajit Singh could not act upon the evidence that was led and the arguments that were advanced before him and the other two arbitrators. He could have done so validly provided the parties had been given an opportunity of raising objections. In case they did not object, Sri Narendrajit Singh could have acted as he did".

It was further observed as follows :

"The words "enter on the reference" cannot possibly mean "proceed to give an award" and, yet this is exactly what Sri Narendrajit Singh did. In *Sardar Mal Hardat Rai v. Sheo Baksh Rai Sri Narain*. AIR 1922 Allahabad 106, a Division Bench of this Court quoted the following from an English decision with approval : "Entering upon the reference" means not when an arbitrator accepts the office, or takes upon himself the duty but when he actually enters upon the matter of the reference, when the parties are before him, or under some peremptory order compelling him to conclude the hearing *ex parte*". I am, therefore, of the view that the award should have been set aside in its entirety."

11. In the case of *Sardar Mal, Hardat Rai Vs. Sheo Bakhsh Rai, Sri Narain*, explaining what is meant by "entering on the reference" it was observed as follows :

"We are of opinion that the provisions "entering on the reference" and "having been called upon to act by notice in writing" are alternative in this sense, that where no reference is entered upon at all, then the time runs from the notice calling upon the arbitrators to act. But, on the other hand, even although the arbitrators may be called upon to act by entering upon the reference, if they

enter upon the reference, they have three months from that moment for making their award and for enlarging the time for making the award if the circumstances at the reference satisfy them that they cannot complete the award within three months. To hold otherwise would seem to strike out from Clause 3 the words "within three months after entering on the reference" in a case where one of the parties happened to call upon the arbitrators to act before they began the reference."

12. In the case of Keshavsinh Dwarkadas Kapadia, etc. Vs. Indian Engineering Company, it was observed that the fact that one of the two contingencies mentioned in R. 4 viz., reference to umpire in the event of difference arising between them is incorporated in the agreement cannot exclude the operation of the other contingency.

13. In the case of Ramanath Agarwalla Vs. Goenka and Co. and Others, it was observed that the arbitrator enters on a reference when he first applies his mind to the dispute. The Court observed as follows :

"Entering on reference, therefore, refers to the first step that the arbitrator takes in the reference, that is to say, when he begins to deal with the reference. The arbitrator, under the Act, may have to do various ministerial acts but the doing of any of the ministerial acts is not entering on the reference. It is only when he first applies his mind to the dispute referred to him then he enters on the reference. When, however, in a particular case, he first applied his mind to the dispute would depend on the facts and circumstances of that case".

14. The other cases relied upon on behalf of the appellant do not appear to be relevant on the point now under consideration.

15. The question is whether the umpire entered on the reference before making the award. The appellant's case, as stated above, is that the umpire did not enter on the reference before making the award. As observed in the case of Ramanath Agarwalla Vs. Goenka and Co. and Others, that the arbitrator enters on the reference when he first applies his mind to the dispute or controversy before him depending on the facts and circumstances of the case. In our view the same principle applies in case of umpire. In the instant case the hearing of the case before the arbitrators was presided over by the umpire in terms of the arbitration clause. As the arbitration clause states that the umpire appointed by the arbitrators would preside over the meeting held before the arbitrators and not merely to be present at the meeting, the intention of the parties was that umpire as presiding officer would also take part in the proceedings. Accordingly, the umpire was required to apply his mind and to remove his doubt, he was entitled to put questions to the counsel and witnesses as also to hear the argument. It should be noted that the meaning of the word "preside" according to the Concise Oxford Dictionary is "to exercise control, sit or reign supreme". According to Webster's Seventh New Collegiate Dictionary the meaning of the word "preside" is "to occupy a position similar to that of a President or

Chairman; to exercise guidance, direction or control. In the instant case the umpire did so. As the umpire presided over the meeting held before the Arbitrators he was in the know of the subject matter of the reference in full. Therefore, no further hearing was necessary before the umpire. In view of the above facts and the circumstances of the instant case when the arbitrators by their letter informed that they could not agree and requested the Umpire to proceed to make the award the umpire applied his mind to the dispute referred to arbitration and as such entered on the reference and thereafter made his award and on 20th August wrote letters to the attorneys of the party that he had made and published his award. In the aforesaid view of the matter we are of the opinion that before making the award the umpire entered on the reference. The questions whether upon receipt of the notice of disagreement between the arbitrators and before making the award the umpire was required to give a notice to the parties and to give further hearing to the parties and hear further evidence have been discussed and dealt with hereinafter.

16. The next question raised by the appellant was that its application for amendment of the counter-statement of claim was not adjudicated upon by the arbitrators or the umpire although in the meeting it was specifically noted that the said application would be considered later on and this according to appellant constituted misconduct on the part of the arbitrators and the umpire and as such the award was vitiated. It was submitted that the arbitrators neither considered the said application nor allowed or rejected the same. As such, the appellant could have pressed the said application before the umpire (after the arbitrators' disagreement and upon receipt of the notice of the umpire's entering on the reference) and if the said amendment was allowed the appellant could have let evidence in support of the case made by the amendment. Hence the appellant suffered prejudice by the umpire's not giving it notice of his entering on the reference and an opportunity to press the said amendment application and lead evidence in the matter.

17. The above contention of the appellant was rejected by the learned trial Judge. In his judgment the learned trial Judge observed as follows:

"There was an application for amendment of the counter-statement of claim filed by the petitioner as mentioned in para 15 of the petition. It was stated that the said amendment application would be dealt with later on but there was no hearing given for this and the award gave no indication that this was done. In my opinion, the aforesaid position does not affect the validity of the award. There is no evidence that the arbitrators or the umpire did not take this into consideration. The fact that the arbitrators and the umpire had before them the amendment application and it is stated that they would give due consideration later on but ultimately they did not pass any order in respect thereto, in my opinion, leads to either of the two conclusions. It may be that the amendment application was rejected and if that view was taken, there is nothing to show that such rejection was illegal or wrongful or violative of the principles of law; or that

the amendment petition was accepted and the case was disposed of on the basis of the amended cause of action. If that is so, then again there was nothing in the award which makes it illegal or bad."

18. We respectfully agree with the above view of the learned trial Judge. The amendment application was on the record of the case. There is no material or evidence to show that the appellant's said application was not considered by the arbitrators or the umpire. It is, therefore, to be taken that the arbitrators and the umpire either did take into consideration the amendment application made by the appellant or rejected the same. However, no material was produced by the appellant either before the trial Court or before us to show that its amendment application was not considered by the arbitrators or the umpire.

19. It was further submitted on behalf of the appellant that the umpire misconducted the proceedings in making the award because he did so without (a) giving notice of his entering on the reference to the parties; (b) hearing the parties; (c) allowing the parties to tender such evidence as they wanted to offer after the umpire acquired jurisdiction to adjudicate upon the disputes upon the arbitrators' disagreement in making the award. It was also submitted that though the umpire was present at the meetings held before the arbitrators the parties did not make their submissions before the umpire and as such parties were prevented from having reasonable opportunity of placing their grievances before the umpire. Further submission was that for reasons stated hereinbefore the award is vitiated. In support of the above submissions reference was made to the cases of *The Industrial Gases Ltd. Vs. The Ganesh Flour Mills Co., Ltd.*, ; AIR 1955 126 (Nagpur) ; *Re : Tunno & Bird* (1833) 3 LJKB 1; *Dhanasing v. Ramchand*, AIR 1924 Sind 27 and *Karam Chand v. Mt. Jasodhan*, AIR 1927 Lah 347.

20. On behalf of the respondent it was submitted that record of the case would bear out that the umpire did preside over the arbitration proceeding. All proceedings were held in presence of the umpire. Detailed submissions were made by the counsel on behalf of the respective parties on all points. Examination and cross-examination of the witnesses of both sides took place before the arbitrators and the umpire. It was no one's case that no opportunity was given for making submission. The arbitration clause provides that the umpire shall sit with the arbitrators and preside over the meeting. In fact the umpire was not only present at the meetings but did preside over the same with full knowledge and notice of all concerned without any protest at any point of time. It has been further submitted that the question of misconduct does not arise if while recording of evidence in his presence with consent of both the parties he put question to the witnesses for clarification and discusses with arbitrators on procedure, Both the parties had full opportunity to present their respective cases before the arbitrators and umpire. From the arbitration clause it is apparent that the intention of the parties was that to save cost, expenses and time there should be one hearing before the arbitrators presided over by the umpire and not

two hearings one before the arbitrators and another before the umpire if the arbitrators disagree. Therefore, it cannot be contended that no opportunity was given to the appellant. In support of the above submission reliance was placed on the case of K. Mohammadkutti Vs. The Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd., . Reference was also made to Russel on Arbitration (19th Edition) pages 249, 250 and 252 and Russel on Arbitration (20th Edition), pages 237, 240.

21. It was further submitted that in view of the arbitration clause in the instant case it was not necessary for the umpire to give notice to the parties or to rehear them. It is also submitted that the intention of the parties to the agreement should also be taken into consideration. The arbitration clause provides that the umpire shall sit with the arbitrators and preside over the meeting. The intention of the parties was quite clear and as such they came to such an agreement. In order to shorten the time and save expenses the parties wanted that the umpire shall sit with the arbitrators and preside over the meeting. The matter was heard at length before the arbitrators as well as umpire and as such the question of rehearing the matter again did not arise. It is further submitted that in the above view of the matter the clause in the First Schedule as well as Ss. 10 and 11, Arbitration Act, have no application in the instant case.

22. We have referred to the case of The Industrial Gases Ltd. Vs. The Ganesh Flour Mills Co., Ltd., and extracted the relevant observations made by the Court herein-before.

23. In the case of Chouthmal Jivrajjee Poddar Ramchandra Jivrajjee Poddar, AIR 1955 Nag 126 it was observed that the umpire only acts when there is a difference between the arbitrators themselves. He may sit with the arbitrators and watch the proceedings, hear the evidence and look into the papers, but he is not supposed to confer with the arbitrators so as to mould their decision. If the umpire acts and takes part in the deliberation before any difference arises between them and moulds their decision it constitutes an illegality.

24. In the case of Tunno & Bird, (1833) 3 LKKB 1 in challenging the award it was urged on behalf of the petitioner that the umpire made his award without hearing the evidence. In connection with that objection Derman, C. J. observed as follows :

"With regard to the fourth objection, there was no necessity for the umpire to hear the evidence. If it was necessary, for the justice of the case, that he should personally have heard the witnesses, and application had been made to him for that purpose, he would not have been justified in refusing to hear them; but here, no application was made to, or refusal given by the umpire in his character of umpire, to hear evidence; at the time when the application was made, he was appointed to that office in case the arbitrators should disagree, but was not acting as such".

25. In Dhansing v. Ramchand, AIR 1924 Sind 27 the facts were that the arbitrators having differed, appointed an umpire under the express terms of the

contract. On the 29th September, the umpire informed both the parties of his appointment, but fixed no date of hearing. No further steps were taken by any of the parties concerned till the 7th October when the umpire made his award whereupon the applicants objected on the ground that they had desired to lead evidence before him, but had no opportunity to do so. It was held that the duties of an umpire are identical with those of an arbitrator. And therefore the parties are entitled to a hearing before an umpire no less than before the arbitrator and it is incumbent on the umpire on appointment, to fix a day of hearing and apprise the parties of it. And in the absence of an opportunity of hearing of the parties before the umpire, the decision of filing the award must be set aside.

26. In the case of *Karam Chand v. Mt. Jasodhan*, AIR 1927 Lah 347 the facts were that there was a dispute between the parties as to the amount or number of ornaments in the possession of the petitioner which he had agreed to return to the respondent who was his wife. The parties agreed to refer the dispute to arbitration. The arbitrators were appointed and it was agreed that if the arbitrators differed they were to appoint an umpire and the decision of the majority was to prevail. The two arbitrators disagreed, one holding that the value of the ornaments was Rs. 400, the other holding that the value was Rs. 800 plus Rs. 40 on account of arrears of maintenance. An umpire was thus appointed and he, without calling upon the parties or giving any notice to them, proceeded to give his decision in which he agreed with the second arbitrator's decision. Thereafter, the respondent wished to make the award a rule of Court. Various objections were taken by the petitioner. It has been held that it is a legal misconduct on the part of the umpire to decide a case without giving notice to the parties or hearing their comments on the evidence.

27. In *Russel on Arbitration* (20th Edn.) at pages 237 and 240 it is stated as follows :

"In order to save the delay and expense of two investigations of evidence, it is often arranged that the umpire shall sit with the arbitrators and hear the evidence once for all. If without any special arrangement of the umpire sits with the arbitrators and hears the evidence, that is no ground of objection to the award, but the umpire ought not in such a case to interfere with the arbitrators when they discuss the case."

"What the parties generally desire, however, is that the arbitrators shall sit with the umpire, so that he shall be in a position to decide upon all the evidence and arguments presented to the arbitrators. For this reason it is a common practice in commercial arbitrations for the two arbitrators to express their disagreement in writing before formally hearing the evidence. There would seem to be no objection to this practice, which saves the expense of a double hearing".

28. In the case of *K. Mohammadkutty Vs. The Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd.*, it has been observed that the award is vitiated for misconduct of umpire

when he does not have discussions with the arbitrators on the dispute and does not influence the course of the proceedings with suggestions on conclusions. When the very purpose of recording evidence in his presence is to avoid duplications of proceedings it is open to him to so question the witnesses.

29. The question as to whether the umpire upon entering on the reference, after the arbitrators had differed and before making his award, should have given notice to the parties, heard their witnesses and further submissions again is to be considered in the context of the arbitration clause agreed by and between the parties and the facts and circumstances of this case. Where the arbitration clause requires or it is agreed by the parties that the umpire will sit with the arbitrators at the meeting only then if the arbitrators disagree or allow their time to expire without making the award and the umpire enters on the reference the umpire should give notice to the parties about his entering on the reference and would allow them to examine the witnesses and make submissions afresh if they so desire although that may amount to duplication of hearing of the case. The facts of the instant case are, however slightly different. In the instant case the arbitration clause enjoins the umpire not only to sit with the arbitrators at the meeting but also to preside over the same. Therefore, he was required to participate in the meeting. From the records it appears that the umpire took part in the meeting, sometime active and sometime decisive, in the presence of the arbitrators. He settled the issues, put questions to the witnesses and the counsel and also heard the submissions made on behalf of the parties. As the umpire presided over the meeting according to the terms of arbitration clause no objection was raised on behalf of the parties to the aforesaid acts of the umpire. The obligation and right of presiding over the meeting gave the umpire something as of right, larger or greater, than a mere right of sitting in the meeting as an onlooker or attending the proceeding. We have already mentioned hereinbefore the dictionary meaning of the word "preside". The umpire is enjoined by the arbitration clause itself to be a participant of the proceeding of the arbitration. To what extent he should participate depends upon the facts and circumstances of the case and the right conferred by the arbitration clause. The President of a meeting is entitled to perform various functions varying with the circumstances of the case. Sometime he has only a passive role and at other times a more active role. But it should be noted that whatever participation the umpire does, his participation should not be and must not be in derogation of the right and duty of the arbitrators. The umpire in exercising his right and discharging his obligation as the presiding officer of the arbitrators' meeting shall not interfere with the right and obligation of the arbitrators. In the instant case there is no evidence that the umpire as the presiding officer of the meeting in any way interfered with the exercise of the right or discharge of the duties and functions of the arbitrators or any one of them in any way felt in any manner interfered with by the umpire's participating in the arbitration proceedings. In the proceedings held before the arbitrators no objection was taken by any party regarding the manner in which the umpire presided over the meetings held by

the arbitrators or acted in the same. From what is stated hereinbefore and what appears from the proceedings held before the arbitrators both parties had full opportunity to place their respective cases, examine and cross-examine the witnesses and to make their respective submissions. Both the parties, it appears, was given fullest opportunity to do the case in the proceedings held before the arbitrators and presided over by the umpire and there was no objection by any of the parties in that behalf.

30. As stated earlier the arbitration clause provides, *inter alia*, that the arbitrators before entering upon the reference will appoint a umpire in writing and he shall sit with the arbitrators and preside at their meetings. We have already stated hereinbefore the rights conferred and duties enjoined upon the umpire by the arbitration clause. The umpire would not only sit in the meeting but would also participate in the proceeding. He was entitled to exercise control over the meeting, i.e., to hear the witnesses and put questions to them as also to put questions to the lawyers appearing on behalf of the parties and hear their submissions. By conferring right upon the umpire to preside over the meetings held before the arbitrators parties intended that in the event the arbitrators differ the umpire would enter upon the reference and make and publish his award without any further hearing. The intention of the parties appears to be that in case of difference between the arbitrators there shall not be duplication of hearing including hearing of witnesses in order to save delay and expenses of two investigations of evidence. The umpire sitting with the arbitrators and presiding over the meeting will be in the know of the matter in full and have full hearing of the case. By the arbitration clause in the instant case parties intended and arranged that the umpire would sit with the arbitrators and hear the evidence and submissions of the parties once for all. The parties had full opportunity to place their respective cases before the umpire. He also fully heard the evidence adduced by the parties and the submission made on their behalf. Therefore, in the above view of the matter and in view of intention of the parties as expressed by the arbitration clause as stated hereinbefore no prejudice has been caused to the parties in the absence of any further hearing of the case before the umpire. The cases relied upon by the appellant are distinguishable. In those cases the arbitration agreement did not provide that the umpire would preside over the meeting of the arbitrators. Hence in our view the umpire did not misconduct the proceeding which had the effect of vitiating his award. Therefore, we are unable to accept the contention of the appellant.

31. On behalf of the appellant it has been submitted that the arbitration clause contained in the insurance policy provides that if the appellant shall disclaim liability to the respondent for any claim under the policy and such claim shall not within twelve calendar months from the date of such disclaimer has been referred to arbitration according to the arbitration clause then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable. According to Counsel, the aforesaid provision qualifies arbitration agreement i.e., the arbitration agreement ceases to be effective if the said event

occurs. According to Counsel in the instant case, the claim of the respondent was disclaimed by the appellant's letter dated 12th November, 1965. The claim was not referred to arbitration until January 24, 1967 i.e., within 12 months from the date of disclaimer. Therefore, the reference to arbitration in the instant case was invalid, because it was barred by limitation. It has been further submitted that the respondent's submission that the reference was made on the appointment of arbitrator by the respondent by its letter dated 27th October, 1966 is not correct. Appointment of arbitrator can not be equated with the reference to arbitrators. It cannot be said that by inclusion of the names of the arbitrators in the arbitration agreement to refer future disputes, the reference of disputes to the arbitration is then and there made i.e., even before the disputes or difference arise between the parties, is not correct. According to Counsel, the contention as to the arbitrator's alone having jurisdiction to decide this dispute is also not correct. Questions relating to jurisdiction can only be provisionally decided by the arbitrators but the final decision rests with the Court.

32. It has been further submitted on behalf of the appellant that the case of Ruby General Insurance Co. Ltd. Vs. Pearey Lal Kumar and Another, relied upon by the respondent is distinguishable. The question as to whether the arbitration agreement cases to become applicable or not upon repudiation has not been raised or considered or decided in the said case. Further, in the case of Mury Exportation Vs. D. Khaitan and Sons Ltd., relied upon by the respondent the reference to arbitration was to International Chamber of Commerce and the claim before the said Chamber was filed within time. In the said case the date of filing such claim was taken to be the point of time of the reference to arbitration and it was specifically held that the date of the appointment of the arbitrators or the date of their entering upon reference was not date of reference. It has been submitted that applying the said principle, in the present case, reference was made on January 24, 1967, that is, beyond time.

On behalf of the respondent it has been submitted that from the record of this case it is evident that the respondent lodged its claim well before the period of 12 months from the date of disclaimer. Reference was also made within 12 months from the date of repudiation. It has been submitted that first repudiation was by appellant's letter dated November 12, 1965. Final repudiation was by the appellant's Solicitor's letter dated May 25, 1966. By letter dated October 19, 1966 the appellant appointed Mr. Nihar Ranjan Majumdar as its arbitrator. Therefore, the arbitration commenced on the said date. It is further submitted that by letter dated October 27, 1966 Mr. A. K. Mitra was appointed as arbitrator by the respondent. By letter dated December 9, 1966 notice of first meeting was given. On December 14, 1966 meeting was held by the arbitrators and umpire. It is further submitted that even if 12th November, 1965 is taken as the date of repudiation the claim is not barred inasmuch as arbitration commenced on 19th October, 1966. Therefore, the claim was not barred by limitation. According to counsel according to the arbitration clause claim has to be referred to arbitration within twelve months from the date of disclaimer; otherwise the claim will be

deemed to have been abandoned. Both parties referred the matter to arbitration within 12 months. The date of entering into reference is not the criterion in this regard.

33. It was further submitted on behalf of the respondent that the point of limitation was taken as a defence in the arbitration proceeding and the same was rejected by the arbitrators as well as the umpire. Whether the claim of the respondent was barred by limitation or not was well within the domain of the arbitrators and umpire. The point of limitation has already been decided in the arbitration proceeding and as such the point cannot be urged and the point of limitation cannot be gone into by the court. Further, the question of limitation was expressly abandoned by the appellant in the meeting dated August 22, 1967. Having abandoned the point of limitation the appellant has no right to urge the same before the Court.

34. On the point of limitation the following cases have been cited on behalf of the respondent which would clearly show that the question of limitation in the instant case does not arise. Reliance was placed on the cases of Mury Exportation Vs. D. Khaitan and Sons Ltd., ; Ruby General Insurance Co. Ltd. Vs. Pearey Lal Kumar and Another, and State of Madhya Pradesh Vs. Bhailal Bhai and Others, . In the above view of the matter it has been submitted that the appellant is estopped from raising the point of limitation before this Court.

35. It has been further submitted on behalf of the respondent that in the instant case the consideration and decision regarding respondent's claim was well within the jurisdiction of the arbitrators as well as the umpire. It is evident from the documents filed before the arbitrators that at the very inception of the proceeding the Counsel appearing on behalf of the appellant in the arbitration proceeding conceded the said point. Moreover, having submitted to the jurisdiction of the arbitrators and umpire the appellant is estopped from urging the point before the Court. The question of jurisdiction in the instant case was well within the domain of the arbitrators as well as the umpire. The said point cannot be gone into by the Court.

36. Before dealing with the contentions made on behalf of the parties a reference may be made to the cases cited at the Bar.

37. In the case of Ruby General Insurance Co. Ltd. Vs. Pearey Lal Kumar and Another, the facts were that a policy of motor insurance contained the following arbitration clause. "All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to

have been abandoned and shall not thereafter be recoverable hereunder". The policy holder made a claim upon the company for the loss of his car in communal riots. The Company repudiated its liability under the policy on three successive occasions, the last of such disclaimer being on 1-8-1948. On 21-11-1949 the policy holder appointed an arbitrator. The company thereupon made an application u/s 33 Arbitration Act, praying for a declaration that the reference was illegal and for an injunction to restrain the arbitrator from proceeding in the matter. The company's case was that as the appointment of arbitrator was made more than 12 months after even the last disclaimer by it, the claim must be deemed to have been abandoned. The case of the policy holder, on the other hand, was that there was no valid disclaimer by the Company. The question for decision was whether the point in dispute fell to be decided by the arbitrator as being a difference arising out of the policy or by the Court u/s 33 Arbitration Act.

38. In that case on the above facts it was held that the test in such cases was whether recourse to the contract by which the parties were bound was necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract was necessary, then the matter must come within the scope of the arbitrator's jurisdiction. In the present case both the parties admitted the contract and stated that they were bound by it. In fact each of them relied upon it to support its case. The difference between the parties was therefore a difference arising out of the policy and the arbitrator had jurisdiction to decide it, the parties having made him the sole judge of all differences arising out of the policy.

The Court further observed as follows : --

"Again, no question of determining the effect of the arbitration agreement arises, because there is no dispute between the parties as to what it means. The language of the arbitration clause is quite clear, and both parties construe it in the same way. The real question between them is whether respondent I has or has not complied with the conditions of the agreement. But this question does not turn on the effect of the agreement. This is the view which has substantially been taken by the High Court and in our opinion, it is correct".

39. In the case of Mury Exportation Vs. D. Khaitan and Sons Ltd., it was observed that when the plaintiff in pursuance of an arbitration clause in a contract had put its claim before the International Chamber as early as 27-1-1950 at which date the plaintiff's claim had not become barred by the Indian laws of limitation the fact that the International Chamber of Commerce finally constituted a Court of Arbitration in 1953 does not make the claim made in 1950 barred. The limitation for a claim is judged by the point of time when the claim is instituted and not by the day when the Court itself actually takes up the claim for disposal.

40. It appears from the case of State of Madhya Pradesh Vs. Bhailal Bhai and Others, that the decision on the question of limitation is a decision on the merits

of the question.

41. The points of limitation and the jurisdiction taken by the appellant (the petitioner in the court of the first instance) have been dealt with in detail by the learned trial judge in his judgment. (See pp. 66 to 69). We respectfully agree with the decision of the learned trial Judge on this point and his reasons for the same.

42. In the instant case as the arbitration clause is very wide the questions regarding limitation and jurisdiction as taken by the appellant were well within the jurisdiction of the arbitrators and umpire to decide. As the arbitration clause is very wide it covers the question of dispute as to whether a particular claim was recoverable in the facts and the circumstances of the case or not. Further, as the questions of limitation and jurisdiction in the instant case relate to the merit of the case the arbitrators and the umpire were competent to decide the same and unless it can be shown or established that a wrong principle has been followed or there is an error of law apparent on the face of the award such decision cannot be challenged in the Court of law. Accordingly, the arbitrators and the umpire had jurisdiction to decide the question of limitation or whether it was barred by limitation and the decision, right or wrong, one way or the other would not. In our opinion, vest the Court with the authority to set aside the decision unless it can be shown that the arbitrators or the umpire had proceeded either on an erroneous principle of law or on a basis which was perverse or unsustainable or could not be sustained by any reasonable man. In the facts and circumstances of the instant case it is not possible to take the above view. If the dispute between the parties is whether the contract containing the arbitration clause had ever been entered into at all or the making of such contract was illegal or void ab initio because making of such contract was illegal and as such the arbitration clause itself was also void then the arbitrators or the umpire would not be competent to decide such questions under the arbitration clause because the party denying that he had ever entered into the contract was thereby denying that he had ever joined in the submission. If the agreement containing the arbitration clause is denied by a party then the clause would not operate because in that view the arbitration clause would also be void. If, however, both the parties assert that they had entered into a binding contract, but a difference had arisen between them as to whether there had been a breach by one side or the other or as to whether the circumstances had arisen which have discharged one or both the parties from further performance, as in the instant case, the arbitrators or the umpire would have jurisdiction to decide such questions because in that case the disputes and differences between the parties would be regarded as disputes and differences which had arisen in respect of, or with regard to, or under the contract and the arbitration clause would be construed accordingly. There is another significant point on this aspect of the case which should also be noted. It appears from the minutes of the meeting dated 22nd August, 1967, the question of jurisdiction of the arbitrators had been abandoned or expressly given up by the appellant.

43. In the instant case it appears that the first repudiation of the respondent's claim by the appellant was by its letter dated November 12, 1965 but then again the Solicitor for the respondent wrote to the appellant and the appellant finally repudiated the respondent's claim by the appellant's Solicitor's letter dated May 25, 1966. In this letter it was not stated the repudiation of the respondent's claim was made long prior thereto. Therefore, it was possible to argue and take a view that the arbitrators had the assumption that a final repudiation had been made in May 1966 and if the date of the final repudiation is taken to be the date of disclaimer of a liability by the appellant in terms of clause, then the question of limitation of the respondent's claim would expire only after May 1967 and it is admitted position that long prior thereto the arbitrators had entered upon the reference and the reference had been made to them. If, however, the date of repudiation is taken to be 12th November, 1965 then the picture is slightly changed. Then again the question will arise whether the appointment letter to Shri Ajoy Kumar Mitra, appointing him as an arbitrator made a reference and it must be to a reference to arbitration in terms of Clause (7), Arbitration Agreement. In the aforesaid view of the matter and in the facts and circumstances of this case two possible views, in our opinion, can be taken. If the arbitrators or the umpire have taken one view then this Court cannot in an application for setting aside the award in the facts of this case, say that the umpire has committed either an error of law or misconstrued the provisions of law or the award was perverse.

44. For all the reasons stated hereinbefore, in our view, the appeal should fail and be dismissed. The appeal is, therefore, dismissed. There will, however, be no order for cost.

Prabir Kumar Majumdar, J.

45. I agree.