
(1947) 09 BOM CK 0004

In the Bombay High Court

Case No : O.C.J. Appeal No. 35 of 1947 : Suit No. 263 of 1941

Sherbanubai Jafferbhoy

APPELLANT

Vs

Hooseinbhoy Abdoolabhoy

RESPONDENT

Date of Decision : 24-09-1947

Acts Referred:

Arbitration Act, 1940 — Section 30(c)

Citation : AIR 1948 Bom 292 : (1948) 50 BOMLR 89

Hon'ble Judges : M.C. Chagla, Acting C.J.; Bhagwati, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.C. Chagla, Ag. C.J.

1. This is an appeal from a judgment of Mr, Justice Tendolkar by which the learned Judge refused to accede to the appellant's petition to set aside an award made by Sir Sajba Rangnekar on August 9, 1946.

2. The facts leading up to this appeal are briefly these. Jafferbhoy, the brother of respondent No. 1, died on May 14, 1936, leaving a will dated June 13, 1933, under which he appointed his wife, the petitioner, his brother, respondent No. 1, and his brother's son, respondent No. 2, executrix and executors. Before the death of Jafferbhoy he and Hooseinbhoy, respondent No. 1, were doing business in the name of Abdullabhoy Lalji and Co. and this firm also did business in other names. By Clause 12 of his will Jafferbhoy authorised his executors to carry on the business on behalf of the estate, and pursuant to the directions contained in this clause Hooseinbhoy and the executors of Jafferbhoy agreed to carry on the business. The petitioner then filed a suit for dissolution of this partnership and for accounts. On March 27, 1941, the petitioner took out a notice of motion for the appointment of a receiver. On April 5, 1941, respondents Nos. 1 and 2, who were defendants in that suit, took out a notice of motion for stay of proceedings on the ground that in the partnership agreement there was a submission clause.

Both the notices of motion came on for hearing on April 17, 1941. The Court appointed the Court Receiver as the Receiver of the books of account of the partnership and also made an order referring all matters in dispute between the parties to the sole arbitration of Sir Sajba Rangnekar. The arbitrator was directed to make his award within eight months after entering on the reference and he was given the liberty to take only such evidence as he in his absolute discretion thought fit to call for or allow. The learned arbitrator made his award on August 9, 1946, and this petition was filed on October 21, 1946, to set aside the award. The learned Judge, as I have said, dismissed the petition and upheld the award.

3. The award has been challenged on three grounds. The first ground is that the arbitrator assumed to himself powers wider than those conferred upon him by the Court. Now, the position in law is that an order of reference is made by the Court u/s 23 of the Indian Arbitration Act and in making the order of reference the Court substitutes a domestic forum in its own place. But it does not follow that the Court give's up its supervision over the conduct of the reference. In *Ram Protap Chamria v. Durga Prosad Chamria* 28 L.R. 217 a suit had been filed for a dissolution of a family partnership and accounts, and while the suit was pending, the members of the family referred to arbitration all matters in difference between them. Some of the differences so referred were not the subject of the suit, and a member of the family who was not a party to the suit was interested in certain of them. The Court made an order referring to the agreed arbitrators all matters in difference in the suit between the parties to the suit. The arbitrators made an award as to all the matters in dispute without discriminating between those which were the subject of the suit and those which were not, and the Privy Council held that the award so far as it dealt with matters in difference in the suit was rightly set aside, as it was one which was "otherwise invalid", and Lord Blanesburgh delivering the judgment of the Privy Council said (p. 266):

It is incumbent upon arbitrators acting under such an order strictly to comply with its terms. The Court does not thereby part with its duty to supervise the proceedings of the arbitrators acting under the order.

And at p. 268 Lord Blanesburgh also remarks that an award which takes into consideration matters other than those referred to the arbitrator is in no true sense one made in obedience to the order of May 23, 1922, which was the order of reference. Therefore, an arbitrator has got to make an award which is in obedience to the order of reference.

4. Now, in this case after the hearing before the arbitrator had proceeded for a considerable time, in March 1946, the parties signed an agreement conferring certain powers upon the arbitrator. These powers were that the parties were to leave it to the arbitrator to make an award summarily after hearing arguments on such points as he may require and such award was to be deemed a consent award in the sense that whatever he decided was to be treated as having been agreed to and accepted by the parties. Whereas in the original order of

reference, as I have pointed out, the arbitrator was given the power to take only such evidence as he in his absolute discretion thought fit to call for or allow, by this agreement the parties conferred upon the arbitrator the wider power of hearing arguments only on such points as he might require. It is true that certain summary powers were given to the learned arbitrator by the order of reference, but there can be no doubt that these powers were considerably increased by agreement between the parties.

5. The first question that has got to be determined is whether parties appearing before an arbitrator can by consent confer additional powers upon him. There can be no doubt that they cannot extend his jurisdiction. They cannot ask the arbitrator to enter upon a reference in respect of a subject matter which is not referred to under the order of reference. Can the parties confer upon him additional powers? The statement of the law is to be found in Halsbury's Laws of England, Hailsham Edition, Vol. I, para. 1079, p. 633:

Save by consent of the parties thereto, a submission to arbitration cannot be altered or amended.

At any time before the award is made the parties may by mutual agreement alter or amend the terms of the submission, but the arbitrator or umpire has no power so to do.

6. This refers to reference by consent out of Court. But it is made clear in this very paragraph that any alteration or amendment of a submission constitutes a fresh submission incorporating such of the terms of the original submission as remained unaltered. Therefore, even when there is a reference without an order of reference by the Court and the parties agree to alter or amend the submission, it constitutes a new submission. It must follow that any alteration in the powers of the arbitrator, when there is a reference by Court, even by consent of parties, must amount to a new submission; and there cannot be a new submission without an order of the Court. If parties desire that an arbitrator should have wider powers or different powers from those originally conferred upon him by the order of the Court, the proper procedure for the parties to follow is to go back to the Court and get a fresh order of reference or get the original order of reference amended or altered, but parties cannot by their mere consent confer upon the arbitrator powers different from those which the Court had originally conferred, because the principle is that the Court, as the Privy Council pointed out, has a duty to discharge in supervising the proceedings of the arbitrator and in seeing that the arbitrator is acting under the order made by it. There is no doubt that the arbitrator did exercise this power conferred upon him, viz., hearing arguments on such points as he might require, because in a note which he submitted along with the award, he has pointed out that there was likelihood of the matter taking considerably long time and therefore he persuaded the parties to agree to these terms so that the matter might be brought to an end expeditiously and within a short time. The record shows that the oral evidence had been completed. It is not clear whether all the

documentary evidence had been tendered, but the stage reached before the learned arbitrator was that solicitors for the parties were addressing him, and in order apparently to cut short the addresses which he thought might be inordinately long the arbitrator took upon himself this additional power of hearing arguments only on such points as he might require.

7. There is also a very serious objection to the award on another ground, and in order to appreciate this, perhaps it is necessary to set out in some detail what agreement was arrived at antecedent to the making of the award and what the terms of the award themselves were. It seems that on December 12, 1945, the arbitrator dictated a note as to the terms agreed upon between the parties and asked the parties to get it transcribed and sign the same which the parties agreed to do. This the arbitrator succeeded in doing, as he himself says, by inducing the parties to take a consent order instead of wasting further time and money, and although he had not succeeded in his previous efforts this time he did succeed. Now, this so called consent terms are headed "Arbitrator's Note", and after conferring the wider power upon the arbitrator, to which I have already referred, it sets out the points inter alia left to the arbitrator to be decided by him. The first point is, what sum should be ordered to be paid ex gratia or as of right or otherwise by the first defendant to the plaintiff or by the estate of Jafferbhoy to the first defendant. Point 2 was : What should the order for the payment of the liabilities of the firm to outside creditors and also what order should be made with regard to the payment of liabilities of the firm to the Indo Aden Salt Works and to the estate of Seth Abdoolabhoy Laljee in connection with which there was dispute between the parties. The third point was : What provision should be made with regard to the amount standing to the credit of the children of Hooseinbhoy and the children of Jafferbhoy in the books of account of the firm. The last two points deal with withdrawal of allegations and the decision on the question of costs by the arbitrator.

8. Now, I cannot understand how any Court or any judicial tribunal can award any sum to any party ex gratia. Ex gratia can only mean giving to a party something to which he is not entitled as a matter of legal right, and a Court of law does not act on sentiments, nor has it the power to dole out charity. It can only give relief to parties provided those reliefs are based on legal rights established before the Court. It is true that in a sense an arbitrator is not circumscribed in the same manner as a Court of law is. But when a Court of law refers a matter to an arbitrator it substitutes a domestic forum in place of itself. But that domestic forum has got to act judicially. There can be no doubt that arbitrators perform judicial functions and they must observe the fundamental rules which govern judicial proceedings. What a Court of law cannot do judicially an arbitrator also cannot do. It is common knowledge that a party very often agrees to make a payment to the other party ex gratia. But it is the party which makes the ex gratia payment never the Court, and the Court can have no jurisdiction to order a party to make a payment when the other party has no legal right to receive the payment. It has not been seriously disputed at the bar

that if the arbitrator had awarded any amount to any of the parties ex gratia, such an award would have been patently bad. But what has been argued is that although the arbitrator was given this power he never exercised it.

9. Now, let us see what the position is with regard to this assumption of power by the arbitrator of making ex gratia payments. In the note itself which is signed by the parties, to which I have just referred, there is an obvious anxiety on the part of the arbitrator that his award should not be challenged and therefore the parties should agree to consider whatever award he made as a consent award in the sense that whatever he decided was to be treated as having been agreed to and accepted by the parties. I do not understand the significance of the expression "consent award" in this context, A consent award can only mean when parties agree to certain terms with reference to their dispute and ask the arbitrator to make an award in accordance with those consent terms. But that was not the case here because the decision was to be given by the arbitrator, but the arbitrator wanted the consent of the parties in anticipation of his decision. He wanted them to consent to something about which they did not know anything at all.

10. Then we come to the note which is appended to the award by the arbitrator, and in this note he is at great pains to point out how he explained the position clearly to the parties before the parties signed these consent terms. He says that he pointed out to them that their claims were diametrically opposed to each other, that whereas according to the petitioner Hooseinbhoy was liable to pay more than 10 lacs of rupees to her, Hooseinbhoy claimed at least 4 to 6 lacs of rupees from the estate of Jafferbhoy and that they were taking a risk in taking a consent award from him. Then he points out that the solicitors assured him that they had perfect confidence in him and rather than have a protracted trial they would leave him to decide the matter summarily and award to the petitioner any sum ex gratia or as of right and vice versa. Then a difficulty was raised by Mr. Sethna, who was appearing for Hooseinbhoy. He said his client had no objection to any sum being paid to the petitioner provided he (the arbitrator) made it clear that it was an ex gratia payment. This suggestion would not be accepted by Mr. Vakil, the solicitor for the petitioner, and ultimately a compromise was effected which was that if any sum was paid ex gratia to the petitioner it should not be so stated in the consent terms but that the consent terms should mention that he had a right to make a payment ex gratia or as of right. This to my mind clearly shows that the arbitrator wanted the whole matter to be left to him by the parties, that he wanted extra-judicial powers to be given to him to decide the matter on merits or otherwise and that according to him he was doing this in the best interest of the parties in order to avoid a protracted hearing of the reference.

11. Then we come to the award itself, and in the recitals we again find these consent terms set out which include, as I have said, the power of the arbitrator to award sums ex gratia to either of the parties. Now, coming to the award itself, I shall briefly summarise what the scheme of the award is. It awards to the

petitioner three amounts, Rs. 95, 826-8-0, Rs. 9,872-3-3 and Rs. 34,180-0-0. The first two amounts are to be received by the petitioner from out of the balance of the sale proceeds of a certain property at Warden Road and the third amount is to be paid by Hooseinbhoy personally. The award further provides that these sums are to be received by the petitioner in full satisfaction and discharge and as a final end and determination of all matters in difference between the parties and all disputes relating to various claims which are enumerated. These claims are with regard to properties at Worli and Kirkee, claims in respect of a 2? annas share each of the second respondent and of his brother Abbas Husseinbhoy which they had in the firm of Indo Aden Salt Works and which the petitioner claimed was really the share of the partnership firm in suit. Then the award provides for depositing by the petitioner and by Husseinbhoy of various sums of money which were shown to the credit of the sons of Jafferbhoy and of Husseinbhoy who were minors at the date of the award. I may point out that with regard to amounts that appear to the credit of the adult sons of the petitioner and Husseinbhoy releases were taken from these in favour of the parties to the reference. Then there is a provision with regard to debts and liabilities and the award provides that debts and liabilities should be discharged in equal shares by Husseinbhoy and the estate of Jafferbhoy. With regard to outstandings they were to be distributed when realised equally between Husseinbhoy and the estate of Jafferbhoy and the award finally provides that on payment by Hooseinbhoy of the sum of Rs. 34,180 to the petitioner the property of the partnership and assets including books of account, papers, documents and vouchers and goodwill shall vest in and belong to Hooseinbhoy. The only right that Sherbanoobai was to have was to inspect the books of accounts of the partnership in connection with all questions relating to the liabilities and outstandings of the firm. The award also provided that the plaintiff was to pay to the first respondent the sum of Rs. 10,000 in respect of the fees of the arbitrator which Hooseinbhoy had already paid.

12. Now, it will be noticed that there is nothing in the award to indicate what the liabilities of the suit firm were and what the value of the assets was. It is perfectly true that there is no obligation upon the arbitrator to indicate his reasons why he arrived at certain conclusions., But in view of the fact that he had assumed the power to decide the dispute between the parties not only on merits and on rights but also extra-judicially, it is necessary to consider whether it can be said that the amounts he arrived at which had to be paid to the petitioner were arrived at on the merits of the case. The petitioner's case is that as he had the right to order ex gratia payment from the petitioner to Hooseinbhoy and vice versa it may be that in arriving at the figure that he did he deducted from a larger amount which might be due to her on merits certain amount as solatium to Hooseinbhoy. It is difficult to say whether on merits the petitioner would have got more or would have got less. But the petitioner's main grievance is that she is entitled to have her dispute determined judicially. The question that we have to determine is whether the whole of this award is not

coloured and vitiated by the extra-judicial power which was conferred upon the arbitrator and which the arbitrator assumed to himself. If the matter merely rested at the parties agreeing to give him this power, perhaps it could have been argued with considerable force that it would be wrong for the Court to assume that an arbitrator acted extra-judicially when it was open to him to act judicially and to come to a particular conclusion. But when we take the whole record of the case into consideration, the note of the arbitrator and his award, there is no doubt in my mind that the arbitrator was overwhelmed with this feeling that he had to save the parties costs, that there had already been a protracted hearing, that he must try and do substantial justice between the parties but at the same time do justice by methods which may not be wholly judicial but may even be extra-judicial. I am not using this expression in any disparagement of the learned arbitrator. I have no doubt that what he did or tried to do was in the best interests of the parties. But what we have to consider is whether in trying to do so he did something which he had jurisdiction to do. In my opinion the parties have a right to obtain from a Court, whether it is a Court of law or a domestic forum, a decision on merits, a decision which is not tainted by any extra-judicial considerations, and I feel in this case that the petitioner has a justifiable grievance that the award of the arbitrator is not an award on the merits of the dispute between her and respondents but a decision coloured by considerations and factors which a judicial tribunal should not take into consideration

13. The learned Judge has taken the view that the award clearly shows that the amounts awarded to the petitioner were awarded on merits and not ex gratia. I am afraid I cannot agree with that view. The learned Judge says that the sums of Rs. 95,826-8-0 and Rs. 9,872-3-3 are clearly referable to the dispute of the parties with regard to a certain Warden Road property. In terms that is not so because all that the award indicates is the source from which these amounts are to be paid to the petitioner. But even assuming that were so, one cannot say the same thing with regard to the sum of Rs. 34,180. With regard to this sum there is only a direction that Hooseinbhoy should personally pay this amount. There is no indication that this amount is referable to any specific dispute between the parties.

14. The third ground on which the award is attacked is that the arbitrator in awarding that all the assets of the partnership should belong to Hooseinbhoy on his paying Rs. 34,180 was doing something which was clearly illegal and he had no jurisdiction to make such a provision in the award. Now, the position with regard to that contention is this. u/s 46 of the Indian Partnership Act when there is a dissolution every partner has the statutory right to have the assets of the firm applied in payment of the debts and liabilities of the firm, and Section 48 which lays down the mode of settlement of accounts between the partners provides that the assets of the firm shall be applied in the first instance in paying the debts of the firm to third parties. This mode can be varied by consent of the partners. Now, under the award the liabilities are to be discharged half and half by Hooseinbhoy and the petitioner, but to third parties and to outside creditors,

notwithstanding this agreement between the partners, the petitioner continues to be liable and her grievance is that the arbitrator has handed over all the assets to Hooseinbhoy as soon as he makes the payment of Rs. 34,180. The result may be that if for some reason or other Hooseinbhoy is unable to pay his share of the liabilities and she has to pay all the liabilities, she would not be able to look to the assets of the partnership which in law she is entitled to. What the arbitrator should have done according to the petitioner was to make a proper provision for the payment of the liabilities of the firm out of the assets of the partnership in the first instance. Now, I do not think it has been seriously suggested at the bar on behalf of the respondents that it was open to the arbitrator to make this provision in the award. But two answers are sought to be given : one is that the parties consented to this being done and the other is that the assets were really so nominal in value that the arbitrator has not caused any substantial injustice to the petitioner by making this provision. With regard to the first point, what is relied upon is a letter written by the solicitors of the petitioner to the arbitrator. In this letter, which is dated May 8, 1946, the solicitors refer to three assets of the firm, one is the 5 cent share in the Indo Aden Salt Works Co. in the name of Hooseinbhoy's son Haroon, the second respondent, and Abbas to which I have already referred. The other asset is a 35 cent share standing in the name of Haroon in a land at Worli which the petitioner contended belonged to the partnership and the third is a 7/16 share in a vacant plot at Kirkee. After setting out these assets the petitioner's solicitors suggest to the arbitrator that if he were to direct by his award that all or any of the assets of the firm should belong to Hooseinbhoy, then in making up the accounts the value of such assets should be debited to him. They also respectfully submit to the arbitrator that the arbitrator should in any event state that the assets should belong to Hooseinbhoy on his paying the amount, if any, which the arbitrator may be pleased to award to the petitioner.

15. Now, there is a reply by the respondents' solicitors dated June 25, 1946, and this particular proposal of the petitioner's solicitors is treated with scant courtesy because they want nothing less than the last ten pages of that particular letter in which this suggestion is made to be expunged as containing something which goes beyond the directions given to the arbitrator. It is clear from this letter of May 3, 1946, and the reply of June 25, 1946, that as between the parties there certainly was no consent to the proposal made by the solicitors of the petitioner. And I do not myself read this letter of May 3, 1946, as referring to this particular point with which we are dealing. There is no reference to liabilities at all in this letter. It does not indicate that assets are to be given to Hooseinbhoy before the question of the payment of liabilities is settled. It merely hypothetically considers a certain eventuality and makes a certain submission and suggestion to the arbitrator. But that eventuality is irrespective of and without considering what was to be done with regard to the liabilities. I do not think, therefore, it is possible to spell out a consent required u/s 48 before the mode laid down in that section can be departed from by the Court.

16. As regards the second point it has been argued that the only tangible asset was the Kirkee property in which the partnership had 7/16 share. But it must not be overlooked that even with regard to the 5 cent share in Indo Aden Salt Works Co. Ltd. and the 35 cent share in the Worli property, although the arbitrator could not adjudicate upon this claim as there were third parties interested who were not parties to the reference, still a claim was being made on behalf of the petitioner that these properties belonged to the partnership and by his award the arbitrator has awarded all the assets of the partnership to Hooseinbhoy.

17. Then there is one more asset to which there is no reference in this letter of May 3, 1946, to which the arbitrator has himself referred and that is the goodwill of the business. But to my mind it is unnecessary to speculate as to what the value of the assets might be. The fact remains that contrary to the provisions of Section 48 the arbitrator has handed over all the assets such as they may be to one of the partners as against the other partner without providing for the liabilities of the firm as in law he was bound to do.

18. Taking all these facts into consideration, I have come to the conclusion that the award cannot stand and must be set aside. It is with considerable reluctance that I have come to this conclusion. I am conscious of the fact that this suit was filed as far back as 1941. The reference was made in April, 1941, and it took more than five years before the award was published, and the result of the setting aside of the award would be the going on of the suit which may take a considerably long time for its disposal. But reluctant as I am, I cannot possibly refuse to accede to the petitioner's petition when the award is challenged on the grounds I have indicated in my judgment. I do not think that this is a case, as Mr. Billimoria has suggested, of remitting the award u/s 16 of the Indian Arbitration Act. Either the award has to stand or it has to be set aside, and in my opinion this is a case where the Court must come to the conclusion that there was legal misconduct on the part of the arbitrator, that he acted without jurisdiction, that he assumed powers which he did not possess and on all these grounds the award must be set aside.

19. I would therefore allow the appeal, make the petition absolute and set aside the award. With regard to costs I would order that the respondents must pay the costs of the appeal. With regard to costs in the lower Court, the petitioner challenged the award on various grounds. All those grounds have not been persisted in before us. We therefore think that the fair order to make with regard to the costs in the lower Court would be to make the respondents pay two-thirds of the costs of the petition. Costs should be taxed on the long cause scale in the Court below. There is one more point with regard to costs. A very prolix affidavit was put in in support of the petition and the learned Judge took the view that in any event and in any view of the case costs of that affidavit should not be allowed to the petitioner. We see no reason to differ from the view taken by the learned Judge, and we direct that on taxation the petitioner should be deprived of the costs of this affidavit. Cross-objections dismissed with costs.

Bhagwati J.

20. By a consent decretal order of reference to arbitration, dated April 17, 1941, the suit and all matters in dispute mentioned in the plaint and in the affidavits made by the parties on a notice of motion for receiver and a notice of motion for stay including the question of costs of the suit as well as the arbitration proceedings were referred to the final determination of Sir Sajba S. Rangnekar and the arbitrator was given liberty to take only such evidence as he in his absolute discretion thought fit to call for or allow. The arbitrator entered upon the reference and considerable oral and documentary evidence was taken before him. He, however, realised that if the arbitration was allowed to take its full course before him including arguments on all points which were raised by the parties appearing before him, it would take considerable time and therefore in December, 1945, certain consent terms were arrived at between the parties which were incorporated in the arbitrator's note which he dictated, according to which power was given to the arbitrator to make an award summarily after hearing the parties on such points as he might require, and whatever he decided was to be treated as having been agreed to and accepted by the parties. The further provision which was made in this consent order was that the arbitrator was to decide inter alia what sum, if any, whether ex gratia, or as of right or otherwise, should be ordered to be paid by one party to the other, and what order should be made for the payment of the liabilities of the suit firm to outside creditors, if any, and what order should be made for the liabilities, if any, of the firm to the Indo Aden Salt Works and to the estate of Seth Abdoolabhoy Laljee, and how the liabilities were to be paid by one of the parties to the other and in such sums or proportions as he might deem proper. The signatures of the parties were subscribed to these consent terms and they were submitted to the arbitrator in March, 1946. Certain arguments in writing were addressed to the arbitrator by the attorneys of the parties, a few further meetings were held and the arbitrator made and published his award on August 9, 1946. In the recitals to the award the arbitrator set out these consent terms which had been arrived at between the parties and made them parts of the recitals obviously with a view to show the powers which he had been invested with and which he had exercised in arriving at the terms of his award. Not only did the arbitrator make these consent terms a part of the recitals to his award, but he also appended to the award a note which explained inter alia the circumstances under which these consent terms had been arrived at between the parties. Paragraph 11 of this note is very suggestive and it is only necessary for me to point out one particular passage therefrom which says:

It was agreed that it should not appear on the face of the award that the payment if any allowed by me in favour of the plaintiff was ex gratia but that it should be stated in the consent terms that the arbitrator may award a payment em gratia or as of right.

21. The petitioner filed a petition to set aside this award on October 21, 1946,

urging various grounds of objection to the validity of the same. All of these grounds were considered by Tendolkar J., who held against the petitioner on all of them and dismissed the petition. This appeal has been filed by the petitioner against that judgment of Tendolkar J.

22. At the hearing of the appeal before us three grounds were urged by counsel for the appellant, and they were these : (1) that the arbitrator assumed wider powers unto himself under the agreement than those conferred on him by the decretal order of reference without obtaining an order of the Court in that behalf; (2) that the arbitrator assumed power to order a sum whether ex gratia or as of right or otherwise to be paid by one party to the other, a power which even the Court trying the matters would not have; and (3) that the arbitrator acted contrary to the provisions of Section 48 of the Indian Partnership Act in so far as under the terms of his award he awarded to defendant No. 1 all the property of the partnership and assets thereof including goodwill without applying them in paying the debts of the partnership to third parties.

23. The first two grounds if made good would make the award "otherwise invalid" within the meaning of Section 30(c) of the Indian Arbitration Act, and the third ground if made good would make it bad u/s 30(a) of the Indian Arbitration Act.

24. It is to be observed that this was an arbitration in suit, which is the subject-matter of c. iv of the Indian Arbitration Act, and the order of reference was made by the Court u/s 23 of the Act. The powers and jurisdiction of the arbitrator are circumscribed within the terms of the reference itself. It is the substitution of a domestic forum by the Court within the terms of the order of reference which is passed by the Court. If any authority for this proposition were needed, it is to be found in the observations of their Lordships of the Privy Council in *Ram Protap Chamria v. Durga Prosad Chamria* 28 Bom. L.R. 217 :

It was an order made in pursuance of paragraphs 1 and 2 of the Second Schedule to the Code of Civil Procedure, and in the exercise of a power thereby given to the Court to refer to arbitration matters in difference in a suit defined by itself in the order of reference. It is incumbent upon arbitrators acting under such an order strictly to comply with its terms. The Court does not thereby part with its duty to supervise the proceedings of the arbitrators, acting under the order. An award made otherwise than in accordance with the authority by the order conferred upon them is, their Lordships cannot doubt, an award which is "otherwise invalid" and which may accordingly be set aside by the Court under paragraph 15 of the same schedule;

a provision which is analogous to the provision contained in Section 30(c) of the Indian Arbitration Act. If this is the scope of the reference to the arbitrator, is it possible for the arbitrator to have wider powers conferred upon him or extended jurisdiction conferred upon him without an order of the Court? The proposition is well established that any alteration or amendment of a submission constitutes a fresh submission incorporating such of the terms of the original submission as

remained unaltered. As a corollary of this proposition it has been held in England that if it is intended that the provisions of the Arbitration Act, 1889, should apply to the reference, the alteration or amendment must be made in writing and signed on behalf of the parties thereto; if the alteration or amendment be made orally, the submission becomes an oral submission, and the Arbitration Act, 1889, has no application. See Halsbury's Laws of England, Vol. I, p. 633, para. 1079. This is the position no doubt when there is arbitration by a valid submission paper signed by the parties without the intervention of the Court. When, however, an arbitration is the result of a reference by the Court, it follows that any alteration or amendment of the submission which is tantamount to a fresh submission should also be by an order of the Court in that behalf. If no such order of the Court is obtained, the arbitrator who has been invested with the powers and the jurisdiction to decide the matters in dispute between the parties by the original decretal order of reference passed by the Court has no further powers or jurisdiction conferred upon him which can only be conferred upon him again by an appropriate order of the Court in that behalf. In my opinion, therefore, if any powers were to be given to the arbitrator of the nature which were sought to be conferred upon him by the consent terms which are to be found in the arbitrator's note above referred, to, it could only be done by a fresh order obtained from the Court investing the arbitrator with those powers. That not having been done, the arbitrator had no powers or jurisdiction of the nature sought to be invested in him by the consent terms even though they were agreed upon between the parties. It is clear from a reference to the powers which were given to the arbitrator under the decretal order of reference dated April 17, 1941, and the powers which were sought to be conferred upon him by the consent terms under the agreement which is recorded in the arbitrators' note that the powers and jurisdiction which were sought to be conferred on the arbitrator by the consent terms were certainly wider than those which were conferred on him by the original decretal order of reference. If that were so, certainly it was necessary for the parties to obtain a fresh order from the Court in that behalf.

25. As regards the second point, viz. whether any jurisdiction could be conferred on the arbitrator giving him powers to grant sums of moneys ex gratia or as of right or otherwise, it is necessary to observe that no such power could ever be exercised by any Court of law. My Lord the Chief Justice has adverted to the various considerations which go against any contention as regards the Court of law having any such powers. If the Court of law would have no such power to make an order for ex gratia payment, much less would the arbitrator have any such powers. The proceedings before the arbitrator are in the nature of judicial proceedings and the principles of justice must be observed. The arbitrator must observe the fundamental rules which govern judicial proceedings and the arbitrator has no power to do anything which the Court of law would not be entitled to do. It therefore remains to be seen how far this power which the arbitrator assumed unto himself of giving ex gratia payment was in fact

exercised by him or coloured or tainted the award which he ultimately made between the parties. In this connection I will not advert to the circumstances in any particular detail. I shall only content myself with pointing out that the very recital of this power in the award, the narration of the circumstances under which the arbitrator came to assume this power in the note which accompanied the award and particularly paragraph 11 thereof, are enough to show that this power of making ex gratia payment which he assumed unto himself or which was conferred upon him by these consent terms materially affected or coloured the award which he ultimately made and published. In this behalf I may also refer to a passage from the affidavit of the first respondent himself appearing at p. 59 of the appeal paper book in which he has definitely averred as follows:

At no time was it ever suggested before the learned arbitrator that I should receive any payment ex gratia from the plaintiff. Whatever payments have been directed by the learned arbitrator in his award to be made to the plaintiff are in the nature of ex gratia payments.

26. He then referred to the arbitrator's note which I have already referred to above and further stated:

I submit that the above quotation clearly shows that the contention in para. 11 that the learned arbitrator may have awarded to me any sum ex gratia is entirely groundless and I repeat that whatever payments have been awarded to the plaintiff are in the nature of ex gratia payments.

27. It was urged in this connection that even though the arbitrator had assumed to himself the power to award the payment etc gratia, it should not be assumed that he had exercised that power in the making of that award as he did, and the onus lay on the petitioner to show that he did in fact exercise that power when he made the award. Reliance was placed in support of this contention on the observations of Lord Davey in *Falkingham v. Victorian Railways Commissioner* 1900 A.C. 452 :

Their Lordships agree that if a lump sum be awarded by an arbitrator, and it appears on the face of the award or be proved by extrinsic evidence that in arriving at the lump sum matters; were taken into account which the arbitrator had no jurisdiction to consider, the award is bad.

It was therefore contended that the petitioner should have, if there was nothing on the record to show that, called the arbitrator as a witness in order to prove that he was affected by this power to make payment ex gratia in the making of his award. This position, however, does not obtain in this case for the simple reason that the case comes within the observations of their Lordships of the Privy Council which occur in the same passage a little later:

It is true that in inferior courts the Maxim "*Omnia praesumuntur rite esse acta*" does not apply to give jurisdiction, as was laid down by Court of Queen's Bench in *The King v. The Inhabitants of All Saints, Southampton*(1828) 7 B. & C. 785

and by Willes J. in *Mayor etc., of London v. Cox* (1866) L.R. 2 H.L. 239 . That rule is applicable to the award of an arbitrator where no jurisdiction is shewn to make the award but where, as in the present case, there is jurisdiction to make an award, and the question is only of a possible excess of jurisdiction, it has no application.

The case before us is, on the principles which I have discussed above, a case of no jurisdiction in the arbitrator to make any payment *ex gratia*, and it is not a case of an excess of jurisdiction, with the result that the considerations which I have adverted to above apply. It was further argued that the very terms of the award showed that there was no *ex gratia* payment awarded by the arbitrator, and reliance was placed in support of this contention on the cls, 2, 3, 4 and 5 of the award. It was contended that the payments therein mentioned were referable to the disputes between the parties and that therefore there was no scope for an argument that there was any payment made by the arbitrator *ex gratia* to any party. If one has regard to the terms of the award and the particular provisions which are referred to in this behalf, they do not mention at all that the said payments were in respect of any particular item claimed by the plaintiff to be the property of the partnership. They only indicate the sources out of which the moneys which are awarded have to be paid. No support can be derived to this argument even from the terms of Clause 6 of the award which says that:

The said sums shall be received, recovered by the plaintiff and accepted and taken by her as and in full satisfaction and discharge of all matters in difference between the parties and all disputes, differences, questions and all claims so referred to and raised in the suit.

Even though any of these payments which are directed to be made to the petitioner were *ex gratia* or were coloured with the power to make *ex gratia* payment which was assumed by the arbitrator, these would be the terms of the award, because whatever payment was ordered to be made by the arbitrator whether *ex gratia* or as of right or otherwise was to be certainly in full discharge of all claims which were referred to in the suit. The terms of Clause 6 therefore do not lend support to the argument advanced by counsel for the respondents. These circumstances, leave no doubt in my mind that the award of the arbitrator was plainly coloured if not wholly dictated by the *ex gratia* power which he had assumed unto himself or which had been conferred on him by the parties under the consent terms which they had signed in March 1946.

28. The third objection which has been made to the validity of the award turns on Section 48 of the Indian Partnership Act. Section 48 of the Indian Partnership Act provides that the assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order:

In paying the debts of the firm to third parties:

It is contended that in the terms of this award the arbitrator under Clause 12 thereof awarded to the first respondent all the property and assets and the goodwill on payment by him to the petitioner of the sum of Rs. 34,180 and that there was no provision made in the award as it should have been done if the terms of Section 48 of the Indian Partnership Act were adhered to, for paying the debts to third parties before any part of the assets could be handed over to respondent No. 1. It was, however, urged by counsel for the respondents that there was an agreement to the contrary, and that agreement was to be spelt out of the letter addressed by the plaintiff's attorneys on May 3, 1946, to the arbitrator. In that letter, after discussing what were the assets of the said firm, the plaintiff's attorneys had stated that if the arbitrator was to direct by his award that all or any of the assets of the firm should belong to respondent No. 1, then in making up the accounts the value of such assets should be debited to him. This was really a submission made by the petitioner's attorneys to the arbitrator in the written arguments which were submitted to him as to what he should do in the event of his deciding to adopt a particular course or deciding to make the award in a particular form. In the terms of that letter it is impossible to spell out any agreement. At best it may be treated as an offer which was made by the plaintiff's attorneys which in order to be converted into an agreement required to be accepted by the attorneys of the defendants. When one comes to the letter of the defendants' attorneys, dated June 25, 1946, one finds that the last 10 pages of the plaintiff's attorneys' letter in which this offer was contained are characterised by them as being without any justification and an application was made by them that they should be expunged. The last paragraph of that letter no doubt referred to the offer which had been made, but there also a counter offer was made by them with regard to the property at Kirkee which counter offer was not accepted, with the result that the offer which was made in the plaintiff's attorneys' letter dated May 3, 1946, was not accepted by the defendants' attorneys at any time. It cannot be argued that when the arbitrator, if at all he did so, made his award on the basis of the offer contained in the plaintiff's attorneys' letter, there was any acceptance of that offer or that there was any agreement arrived at between the parties which would be an agreement as required by the provisions of Section 48 of the Indian Partnership Act. It was further argued that the assets were of a negligible value and that therefore when the arbitrator awarded the assets to the first respondent under Clause 12 of the award, there was no substantial harm done to the petitioner and that the award should therefore not be held to be bad merely because these negligible assets were not realised and the proceeds devoted to the discharge of the liabilities of the partnership. It has, however, to be observed that howsoever small the assets may be, in law, when the affairs of the partnership are being wound up, it is imperative in the absence of an agreement to the contrary as provided in Section 48 of the Indian Partnership Act that the assets must be realised, that out of the fund which is in the hands of the Court or its officer, the liabilities of the firm should be first paid and whatever adjustment of the affairs of the partnership may have to be made between the partners be made thereafter. It is no answer

to say that the assets of the firm were negligible. As a matter of fact the arbitrator in his award in Clause 12 thereof has awarded the property of the partnership and assets and the goodwill to the first respondent taking them to be of some value. What value exactly they bore is a matter on which I do not consider myself called upon to speculate. The fact remains that there were assets of the partnership which in accordance with the provisions of Section 48 of the Indian Partnership Act should have been realised and devoted to the discharge of the liabilities of the partnership firm, and that has not been done. In the result, I am of opinion that there is an error of law patent on the face of the award in so far as this provision of Section 48 of the Indian Partnership Act is flouted in the terms of the award.

29. As a result of the above, I have come to the conclusion that the award of the arbitrator is bad on all the three grounds mentioned above, that it is otherwise invalid under the terms of Section 30(c) of the Indian Arbitration Act and that the arbitrator has misconducted himself in terms of Section 30(a) of the Indian Arbitration Act, and that therefore the award is liable to be set aside.

30. I share the regret of the learned Chief Justice in so far as the result of our decision would be that the award which was made by the arbitrator after considerable time and money of the arbitrator and the parties was spent in the hearing of the matter before him would be set aside. The position in law, however, is one which is absolutely against the upholding of the award and we must accordingly set aside the award. I therefore agree with the order made by the learned Chief Justice.