Balwant Singh Chaudhry and others v. Union of India and others

Mahajan, J.

For the reasons given above this petition fails and is dismissed. There will, however, be no order as to costs.

K.S.K.

APPELLATE CIVIL

Before A. N. Grover, J.

ALLEN BERRY & Co PVT. LTD.,—*Appellant*

versus

THE UNION OF INDIA,—*Respondent*

F.A.O. 123-D of 1961.

1963

Feb., 19th

Arbitration Act (X of 1940)—*Sections 16 and 30—Failure to consider the terms of contract—Whether amounts to error of law—Decision given on evidence—Whether can be interfered with by Court—Objections to the award—Whether should be specific—Remission of award—Whether in the discretion of the Court—Error of law—Documents from which to be determined—Schedule I, para 8—Costs of reference and award to be in the discretion of the arbitrator—Whether costs can be awarded in excess of what a Court can award—Jurisdiction of the arbitrator to decide disputes—How to be determined—Section 2(a)—Arbitration agreement—Whether can be inferred from pleadings—Section 35—Scope of—Suit in respect of some of the matters filed—Whether bars the jurisdiction of the arbitrator.*

Held, that if an arbitrator or umpire gives a decision on a point referred to arbitration by ignoring the express terms of the contract, he commits an error of law. But the mere fact that he makes no express mention of it, cannot justify the conclusion that he did not apply his mind to its terms, as the arbitrator or umpire need not refer to each piece of evidence.

Held, that if the decision of the arbitrator or umpire is given on the evidence on the record, the Court cannot decide whether the decision given by him on that evidence was right or wrong.

Held, that only those objections to the award can be entertained by the Court which are of a specific nature. General objections are not to be entertained.

Held, that whether an award should be set aside or remitted is a question of discretion of the Court and unless the Court thinks that the arbitrator can no longer be trusted, it can remit the award to him, though he has miscarried in the conduct of the reference.

Held, that the Court can find only from any document which is incorporated in the award whether any error of law has been committed by the arbitrator or the umpire. In other words, if the document is not specifically mentioned, it is not open to the Court to see how it would have affected the decision of the arbitrator in the matter of a conclusion on a question of fact. The parties must be confined to those documents only which have been mentioned in the award and with respect to which alone it can be shown whether any controversy on a question of law has been settled which is apparently erroneous.

Held, that where in the arbitration clause the assessment of the costs incidental to the reference and the award is left to the discretion of the arbitrators or the umpire, the arbitrators or the umpire can award such costs as they or he deem proper, and are not fettered by the rules for award of costs by the Courts of law. It cannot, therefore, be said that the arbitrators or the umpire cannot award more than Rs. 4,500 as counsel fee, the maximum provided by the Rules and orders of the High Court. The "costs of the reference" include all expenses properly incurred by the parties in the course of the whole inquiry before the arbitrators or the umpire.

Held, that in order to find whether an arbitrator has or has not the jurisdiction to decide the matters in difference between the parties referred to him, it has to be found whether the parties are agreed that a binding contract was made and then to decide whether it would be necessary to have recourse to that contract to settle the dispute which has arisen. If such a recourse is necessary, the arbitrator has the jurisdiction to decide that matter, otherwise not.

Held, that what confers jurisdiction on the arbitrators to hear and decide the dispute is an arbitration agreement

as defined in section 2(a) and where there is no such agreement, there is an initial want of jurisdiction which cannot be cured by acquiescence. The mere fact that pleadings have been filed before the arbitrators is not sufficient for the purpose of concluding that an agreement has come into being under section 2(a) of the Arbitration Act.

Held, that section 35 of the Arbitration Act makes proceedings before the arbitrator invalid in the absence of an order under section 34 staying the legal action where the whole of the subject-matter of the reference is covered by any legal proceedings taken with respect to it. In other words, an arbitrator can continue the proceedings and make the award on the reference unless the whole of the subject-matter of the reference is covered by the legal proceedings which have been instituted.

First appeal from the order of Shri Gurbachan Singh, Additional District Judge, Delhi, dated the 31st July, 1961 refusing to set aside the award, remitted under section 16 of the Arbitration Act, for reconsideration on certain points.

R. L. AGGARWAL AND MADAN GOPAL, ADVOCATES, for the Petitioner.

ACCHRU RAM AND PRELAD DAYAL, ADVOCATES, for the Respondent.

JUDGMENT

Grover, J.

GROVER, J.—Messrs Allen Berry & Co. Ltd. have filed an appeal under section 39 of the Arbitration Act, 1940 (hereinafter to be referred to as the Act) against that part of the order of the Court below by which it has refused to set aside an award which has otherwise been remitted under section 16 of the Act for reconsideration on certain points. The respondent (Union of India) has filed cross-objections. Both the appeal and the cross-objections will be disposed of by this judgment.

In order to understand the points in controversy which are a legion the background in which the disputes arose as also the other relevant facts must be stated. It is well known that World War II which began in September, 1939 ended in the year 1945.

During the period of active hostilities there was an apprehension of an attack from Japan and the United States of America sent along with the American forces a large quantity of Military Stores including vehicles, trailers, spare parts and other equipment to certain depots in Assam and Bengal. On 16th May, 1946 the Government of that country entered into an agreement with the Government of India (Exhibit J/61), the effect of which was to transfer all the surplus stores to the latter. In order to dispose of these stores the Government of India created a Department known as the Directorate General of Disposals headed by the Director General who was assisted by a Deputy Director General and a couple of Directors and Deputy Directors. It was the Defence Department that had to make arrangements for taking over delivery of the stores from the U.S.A. army. Proper records were to be maintained by that Department until the stores were disposed of by the Directorate General of Disposals. The Defence Department set up an organisation called the USASS (United States of America Surplus Stores). There was a Central Controller at Delhi, one in Assam and one in Calcutta. In Assam there were two Zones—Chabua and Ledo—and in Calcutta there were three Zones called Zones I, II and III. Detailed inventories were made of the stores. These were called white SPB3s and SPB3/1, the latter being those inventories which contained corrections or withdrawals. Copies of these inventories were made in green as well as pink (apparently the colour of paper). The copies in green were made by the depot authorities of USASS from white for distribution to various officers. The pink ones were for the stores in respect of any found surplus by the depot authorities.

The first formal agreement between the Director General of Disposals acting for the Government of

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

India and the present appellants was entered into on 10th July, 1946. This contained generally the price as also the stores which were to be sold to the appellants and it was mentioned in the agreement that detailed record of terms would be made on the following day. It was followed by sale letter No. 160, dated 11/12th July, 1946 and a second sale letter No. 161, dated 12th July, 1946 issued by the Director General of Disposals. On 31st July, 1946 another formal agreement was entered into between the parties. That was followed by sale letter No. 197, dated 2nd/6th August, 1946. The other sale letters which were issued and are stated to relate to the second agreement were Nos. 301, dated 27th August, 1946, 308, dated 5th September, 1946 and 311, dated 11th September, 1946. Throughout the arbitration proceedings it is the aforesaid six sale letters (which hereinafter shall be referred to as sale notes) which have been treated as the contracts between the parties.

The appellants wrote a letter on 14th October, 1947 to the Regional Commissioner (Disposals), Government of India, Industries and Supplies, saying that since various questions, disputes and differences had arisen in connection with the above contracts and the same were to be referred to arbitration, R.B. Nathu Ram of Delhi had been appointed as their arbitrator. The respondent was called upon to nominate its Arbitrator pursuant to the arbitration clause contained in paragraph 13 of the general conditions of contract (in form Con. 117) to which all these sales were subject. The respondent moved the District Judge, Delhi, under sections 33 and 39 of the Act for declaring the appointment of R. B. Nathu Ram as an Arbitrator on behalf of the appellants as illegal and inoperative and for certain other reliefs. On 27th November, 1948 the learned District Judge decided that the arbitration clause governing the contracts in question was clause

Allen Berry and Co., Pvt., Ltd.
v.
The Union of India

Grover, J.

13 in form Con. 117 under which each party had to nominate its Arbitrator. Consequently the respondent nominated Bakhshi Shiv Charan Singh as its Arbitrator. Sir B. L. Mitter was named as an Umpire by the Arbitrators. He died and Shri Manohar Lal, a retired Judge of the Patna High Court, was nominated to take his place as Umpire. Claims, counter-claims, written statements and replications were filed before the Arbitrators who framed the issues. There was some difference between the Arbitrators with regard to which nothing need be said. The whole case was referred to the Umpire for decision. Shri Manohar Lal unfortunately died and the District Judge appointed Shri Harish Chandra, a retired Judge of the Allahabad Court, as an Umpire. He gave his award on 22nd March, 1958.

The appellants filed nine sets of claims. The respondent preferred 11 counter-claims and two additional counter-claims. Claims Nos. I (a) to (d) were connected with sale note 160. Claim I(a) was valued at Rs. 42,00,000 and related to 600 vehicles of which the respondent was alleged to have wrongfully withheld delivery. It was disallowed by the Umpire. Claim I (b) was in respect of certain diesel vehicles and was for Rs. 20,00,000. The Umpire decided that the appellants were not entitled to any compensation regarding these vehicles, the number of which was 97. Claim I (c) related to what were called "specialist" vehicles which according to the appellants had not been delivered to them. They claimed a sum of Rs. 25,00,000 with respect to such vehicles which were covered not only by sale note 160 but also by sale note 197. This claim was also disallowed. Claim I (d) related to an alleged heavy shortage in the stock of vehicles delivered under sale note 160. Compensation under this sub-head was claimed in the sum of Rs. 75,00,000. The Umpire did not accept this claim.

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

Claim II arose out of sale note 161. So far as sub-head (a) of this claim was concerned, the learned counsel for the appellants has stated that he does not wish to agitate anything with regard to it now. Claim II (b) related to non-delivery of 132 jeeps and was for a sum of Rs. 3,30,000. This was disallowed by the Umpire.

Claims III (a) to (h) related to sale note 197. Under claim III(a) a sum of Rs. 16,50,500 was claimed on the ground that several obstructions had been placed in the way of smooth delivery of the vehicles by the representatives of the respondent. The Umpire awarded a sum of Rs. 6,49,000 as compensation under this sub-head. Under claim III (b) a sum of Rs. 1,20,000 was sought to be recovered by way of compensation on account of 24 vehicles the delivery whereof was said to have been wrongfully withheld. The Umpire disallowed this claim. Under claim III (c) a sum of Rs. 23,00,000 was claimed on account of certain cranes alleged to have been wrongfully detained by the Disposals Directorate from the appellants and later on sold to third parties. The Umpire rejected this claim. A sum of Rs. 8,00,000 was claimed under claim III (d) on account of certain low-bed trailers, the delivery of which was alleged to have been wrongfully withheld. The Umpire found that the appellants were not entitled to any compensation under this sub-head. Claim IIII (e) was for a sum of Rs. 45,00,000 in respect of 900 vehicles, the delivery of which was withheld on the ground that these vehicles had been the subject-matter of sale at one stage to the United Nations Relief and Rehabilitation Administration. The Umpire disallowed this claim. Under claim III (f) the appellants maintained that they were entitled to a compensation of Rs. 1,50,00,000 for withholding 2,000 to 3,000 vehicles of various types which formed part of the subject-matter of sale. The Umpire

held that the appellants were not entitled to recover any compensation under this sub-head. A sum of Rs. 45,000 was awarded to the appellants under claim III (g). It may be mentioned that claims III (g) and (h) are no longer the subject-matter of dispute.

Claim IV had reference to sale note 311, as amended and was in respect of "M. T. Spare Parts left by the American Army" for which compensation in the sum of Rs. 7,00,000 was claimed by the appellants but the Umpire disallowed the same.

Claim V arose out of several undertakings and assurances said to have been given by the Director General of Disposals as regards facilities to be provided for the resale of the vehicles and other stores purchased by the appellants. A sum of Rs. 1,40,00,000 was claimed under this head. The Umpire held that the appellants were not entitled to any damages.

Claims VI (i) to (ii) are connected with sale note 197. Under sub-head (i) the amount claimed was Rs. 11,64,000 on account of compensation with regard to what are called "Reverse Lend Lease" vehicles numbering 291. Under sub-head (ii) the amount claimed was Rs. 4,42,000 being the compensation for 26 tractors and 26 trailers. The Umpire disallowed compensation under both these sub-heads.

Claims VII (i) to (iv) related to sale note 197. Under sub-head (i) a sum of Rs. 6,21,000 was claimed on account of the removal and illegal sale of 69 Dodge trucks to Travancore State. The Umpire held that nothing was due to the appellants under this claim. Sub-head (ii) was for a sum of Rs. 3,00,000 for wrongful removal of 30 vehicles. This also was disallowed. Sub-head (iii) was for Rs. 3,16,000 in respect of 79 jeeps stated to have been removed by the respondent

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

for delivery to the Bengal Government. Sub-head (iv) was for a sum of Rs. 20,00,000 in respect of a number of vehicles and trailers alleged to have been removed from different depots mentioned in the sale note on the plea that they had been previously sold. Both the above claims were disallowed.

Claim VIII was a very vague sort of claim which was disallowed.

Claim IX was hardly a claim by the appellants and was connected more with counter-claim XI of the respondent but it is no longer in dispute now.

Counter claim I was connected with claim VII (i). This related to the price of one truck being Rs. 10,000. A sum of Rs. 9,000 was awarded by the Umpire to the respondent under this head.

Counter claim II was for a sum of Rs. 10,000 on account of certain air compressors. This was accepted by Umpire.

Counter claim III which was connected with claim IV related to certain spares and under this head the respondent was awarded a sum of Rs. 18,195.50 nP.

Under counter claim IV which related to the price of 589 bins, a sum of Rs. 5,890 was awarded to the respondent.

Under counter claim V which related to certain operational equipments a sum of Rs. 2,95,000 was awarded to the respondent.

Counter claim VI was connected with claim VI (i) and was in connection with what were called "Reverse Lend Lease" vehicles. A sum of Rs. 8,96,000 was awarded by the Umpire to the respondent.

Under counter claim VII relating to alleged loan of a number of articles lying in Brooklyn depot, a sum of Rs. 6,044 was awarded as compensation to the respondent.

Counter claim VIII related to alleged withholding by the appellants of certain equipment located in Moran depot in Assam. A sum of Rs. 30,000 was awarded in respect of the same.

Counter claim IX which was connected with claim VII (iii) related to sale of the jeeps to the Bengal Government. This was decided against the respondent.

Counter claim X was also decided against the respondent.

Counter claim XI and additional counter claims I and II were with regard to rent of certain sites. A sum of Rs. 23,53,553 was awarded to the respondent against the appellants.

The Umpire assessed the cost of the proceedings at Rs. 5,70,000 with regard to the claims and Rs. 80,000 with respect to the counter claims. In the result a sum of Rs. 5,40,544 was assessed as costs payable to the respondent by the appellants. The net result was that a sum of Rs. 29,29,682.50 nP. was found payable by the appellants to the respondent, apart from the costs.

On 2nd June, 1958 the respondent filed an application for making the award a rule of the Court. Objections dated 4th August, 1958 were filed by the appellants to the award. On 31st July, 1961 the additional District Judge made an order holding—

(1) The award suffered from an error apparent in respect of claim No. III (a).

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

(2) Counter claims Nos. II, IV, V and VII were not validly referred to the Arbitrators or the Umpire and the award to that extent was a nullity.

(3) While awarding costs the Umpire had not assessed what was payable by each party in respect of each claim or counter-claim, with the result that it could not be found as to what was the amount of costs in respect of the aforesaid counter-claims.

While refusing to set aside the award, it was remitted under section 16(1) of the Act for reconsideration on the following points :—

"(1). To reconsider the award on claim No. III(a) and to award to the claimants price of 20 weapon carriers and 20 Dodge trucks which were in Jodhpur depot on 31st July, 1946 and which had been wrongly removed by their respondents.

(2). To reconsider the question of costs by making adjustment on enhanced compensation which may be payable to the claimants in respect of claim No. III and which the respondents were not entitled to receive in respect of counter-claims Nos. II, IV, V and VII."

The Umpire was directed to submit his award within four months.

Before entering on a discussion of the points that have been argued before me, it will not be out of place to mention that the records in this case are exceedingly voluminous, that the Umpire delivered an award covering 172 pages and that the Court below

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

(Additional District Judge) has given a judgment which covers 229 pages. The Court below has certainly taken a good deal of pains but it seems that though it was alive to the real ambit and scope of the functions of the Court in such matters, it could not resist the temptation of treating the case as an appeal from an award, particularly when it seems to have been argued as such before it. In *Thawardas Pherumal* v. *Union of India* (1), it has been laid down that a distinction must be drawn between cases in which a question of law is specifically referred and those in which a decision on a question of law is incidentally material in order to decide the question actually referred. If a question of law is specifically referred and it is evident that the parties desire to have a decision from the arbitrator about that rather than one from the Courts, then the Courts will not interfere, though even there, there is authority for the view that the Courts will interfere if it is apparent that the arbitrator has acted illegally in reaching his decision, that is to say, if he had decided on inadmissible evidence or on principles of construction that the law does not countenance or something of that nature. It has further been observed that an arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is bound to follow and apply the law and if he does not, he can be set right by the Courts provided his error appears on the face of the award. The single exception to this is when the parties choose specifically to refer a question of law as a separate and distinct matter. It has also been laid down in this case that facts must be based either on evidence or on admission; they cannot be found to exist from a mere contention by one side especially when they are expressly denied by the other. Thus it would follow that if the arbitrator found facts contrary to the afore-

(1) A.I.R. 1955 S.C. 468.

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

said rule, the error would be apparent. In *M/s Alopi Parshad & Sons Ltd.* v. *The Union of India* (2) Shah J., who delivered the judgment of the Court, laid down the extent of jurisdiction in such matters in the following words at page 825 :

> "The extent of the jurisdiction of the court to set aside an award on the ground of an error in making the award is well-defined. The award of an arbitrator may be set aside on the ground of an error on the face thereof only when in the award or in any document incorporated with it, as for instance, a note appended by the arbitrator, stating the reasons for his decision, there is found some legal proposition which is the basis of the award and which is erroneous, *Champsey Bhara and Company* v. *Jivaraj Balloo Spinning and Weaving Company, Limited* (3). If, however, a specific question is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law, does not make the award bad on its face so as to permit of its being set aside—*In the matter of arbitration between King and Divean and others* (4) *and Government of Kelantan* v. *Duff Development Company Limited* (5)."

In that case also the question arose whether the reference made by the parties to the arbitrators was a specific reference inviting decision on question of law.

(2) 1960 (2) S.C.R. 793.
(3) L.R. 50 I.A. 324.
(4) L.R. (1913) 21 B.D. 32.
(5) L.R. (1923) A.C. 395.

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

Issues had been raised on the claim filed by the claimants and the reply filed by the Union of India but according to their Lordships, framing of issues was meant presumably to focus the attention of the parties on the points arising for adjudication. It was observed that the Agents had made their claim before the arbitrators, and the claim and the jurisdiction of the arbitrators to adjudicate upon the claim were denied. The arbitrators were by the terms of reference only authorised to adjudicate upon the disputes raised. There was no foundation for the view that a specific reference, submitting a question of law for the adjudication of the arbitrators, was made.

It may be stated that in the present case a point has arisen whether any specific questions of law were referred and the Court below came to the conclusion that they had indeed been referred. The Court below was alive to the fact that no regular deed of reference had been executed by the parties in accordance with the arbitration clause in the sale notes. The appellants had only served a notice on the respondent in October, 1947 giving a list of sale notes and indicating that disputes had arisen in regard to those to which a reference has already been made. After the order of the District Judge dated 27th November, 1948 the appellants were called upon by the arbitrators to file a statement of claims to which a written statement was filed by the Union along with a statement of counter-claims. The appellants then filed a replication and written statement to the counter-claims and also filed additional statement of claims. The arbitrators framed certain issues arising out of the pleadings of the parties both on the questions of fact and law. The Court below followed *Union of India* v. *A. L. Rallia Ram* (6) where it has been held that when

(6) 1960 P.L.R. 829.

Allen Berry and Co., Pvt., Ltd.
v.
The Union of India

Grover, J.

disputes arise out of a contract and pleadings have been filed by the parties in the same way as in a suit and specific issues are struck which embody pure questions of law, it must be deemed that specific points of law have been referred for decision by the arbitrators. Even in this decision it has been pointed out that it is a matter of difficulty to decide in exactly what form a point of law has to be referred to arbitration in order for the award to be binding on the parties and not liable to be upset by the Courts on the ground of error. *In Messrs Alopi Parshad's case,* pleadings had been filed by the parties and issues had been framed in the same way as in a suit and yet their Lordships decided that there was no specific reference submitting questions of law to the arbitrators. In this view of the matter the Court below does not appear to be right in holding that specific questions of law were referred to the arbitrators in the present case. Mr. Achhru Ram for the respondent endeavoured to distinguish the above decision but I do not consider it necessary to express any final opinion on the point as it is not likely to affect the ultimate result of the appeal and the cross-objections.

In order to understand the controversy in respect of claims I (a) to (d) it will be useful to refer to the terms and conditions of the contract or contracts entered into between the parties. The first formal contract is Exhibit I dated 10th July, 1946 the material part of which is as follows :—

"Pending detailed record of terms tomorrow the following are the broad heads of agreement, which will form the basis of sale of surplus vehicles;

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

(1) M/s. Allen Berry will buy the Moran Vehicles Depot 'as is where is' for Rs. 1,80,00,000.

(2) A deposit of Rs. 20,00,000 will be made by M/s. Allen Berry in a Government treasury on 12th July.

(3) M/s. Allen Berry will also buy from Calcutta.

(a) 200 jeeps at a price of Rs. 2,500 each i.e. for a total of Rs. 5 lakhs.

(b) 200 'Auto Car' and 'White' tractors (only the prime movers without the trailer) at a price to be negotiated.

(c) Any Dodge 4×2 trucks not committed to other parties, estimated at approximately six hundred at Rs. 7,500 each."

The Directorate General of Disposals addressed a letter dated 12th July, 1946 bearing No. 160, the relevant parts of which may be set out—

"1. The undernoted quantities of——— available for disposal are sold to you at the prices noted below subject to the general conditions of contract (Form Con. 117) and special conditions overleaf :

Location	Particulars of stores	Unit / Weight/Nos.	Quantity	Price per Unit of Quantity / Rate
Moran, Assam	All Vehicles and Trailers lying in Moran Depot on 10th July, 1946 (hereinafter referred to as 'the said vehicles and trailers')			

Allen Berry and Co., Pvt., Ltd.
v.
The Union of India

Grover, J.

(2) * * * * * * * * *

(3) This sale is made on the understanding that the purchaser has thoroughly satisfied himself regarding the exact condition of the stores as to which, this office accepts no responsibility, since all stores are offered and sales effected subject to the stores being available and on the understanding that Government is not liable in respect of any faults, mis-statements or errors of description.

(4) It is agreed that by 15th July, 1946 the purchaser will be entirely responsible for the safeguarding of the vehicles and trailers hereby sold and that he will pay rent and other charges (if any) due payable by the Government of India due in respect of the occupation of the land at Moran whereon the said vehicles and trailers are now lying.

(5) Payment for the said vehicles and trailers will be made as follows :—

(a) by depositing on or before 12th July, 1946 the sum of rupees twenty lakhs and (b) payment of the balance of rupees one hundred and sixty lakhs on or before 12th September, 1946. Payment will be made by depositing the amounts aforesaid in the Government Treasury. The head of account to be indicated on the treasury challan is creditable to CSA Civil American Surplus Section, New Delhi.

(6) It is agreed that any vehicle or trailer moved by any party other than the purchaser out of the Moran Depot after 10th

July, 1946 is nevertheless deemed to be the property of the purchaser and if any such vehicle or trailer is so moved under the orders of the seller it will be delivered to the purchaser in Calcutta on payment of the actual cost of rail transport. The provision of this clause shall in no way be construed to relieve the purchaser of his responsibility under clause 4 hereof;

(7) It is agreed that this purchase includes all United States Army Surplus Stores excluding land and buildings lying within Moran Depot and transferred to the Government of India from the Governmen of the United States.

(8) Except in so far as the same are repugnant to the terms hereof the terms of Contract form Con. 117(a copy of which is annexed hereto) shall be deemed to be incorporated herein."

In the statement of claims filed by the appellants before the arbitrators it is said in paragraph 1 that the Directorate General of Disposals contracted to sell to them the entire stock of vehicles, trailers, equiqment and stores in the use of the American Army in Assam area and more particularly all such vehicles, trailers, equipment and stores as were on the record of or were intended to be moved into, the Moran Depot for a price of Rs. 1,80,00,000. It was further stated that on 11th July, 1946 the Directorate General of Disposals issued sale note 160 wherein the stores sold were loosely described as "all vehicles and trailers lying in Moran Depot on 10th July, 1946". It was asserted that this description of the stores sold was ambiguous

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

because in the negotiations preceding the sale and clarifications or modifications subsequently made by correspondence or verbally or in conferences, by the Director General of Disposals and other officers of the Department, it was said that the aforesaid sale covered all vehicles, trailers, equipment and stores which were in use of the American Army in the Assam area. In the written statement filed on behalf of the respondent, reference was made to the contract entered into on 10th July, 1946 and it was pointed out that the sale was to be on 'as is where is' basis. According to the written statement, the vehicles and trailers sold were fully and correctly described in sale note 160 which correctly recorded the terms of the contract of sale and was their sole repository. It was not admitted that the description of stores was ambiguous, nor was it admitted that in any of the negotiations preceding the sale or in any clarifications subsequently made by correspondence or discussion following it, it was accepted that all the stores which were in use of the American Army in Assam had been sold by means of the aforesaid sale note.

Before the Umpire it appears that the appellants did not base their case on the contract dated 10th July, 1946 but relied mainly on sale note 160, the contention of course, being that all the vehicular stores in Assam were covered by the aforesaid sale note. At page 94 of the award of the Umpire the decision on this point is recorded along with the scope of the other sale note No. 197 by which according to the appellants all such stores in Bengal area had been sold to them. The Umpire's decision may be reproduced in his own words :—

> "I have given the whole matter by most serious and earnest consideration and my view is that apart from the language of the two

sale deeds being against such a contention, the evidence too considered as a whole does not support it. Accordingly, I hold that the stores sold to the claimants in the case of Assam were those actually located in Moran depot on July 10, 1946 and in the case of Bengal those actually located in Jodhpur and other depots specified in the sale letter on July 31, 1946."

The contentions with regard to sale note No. 197 will be dealt with at the proper stage. The matter that has been raised with a good deal of vehemence before me by Mr. Radhey Lal Aggarwal, who appears for the appellants, is that the contract dated 10th July, 1946 has been entirely ignored by the Umpire and that being the basic contract so far as Moran depot was concerned, the award is vitiated on that ground. It is contended that the real formal contract between the parties was of 10th July, 1946 which was executed in the proper form as required by section 175(3) of the Government of India Act, 1935, and the language employed therein clearly shows that the whole of the Moran Vehicles depot was to be sold on what may be called 'as is where is' basis. Sale note 160 was issued pursuant to this contract and has to be read and interpreted in the light of what was stipulated in the earlier formal contract. The submission on behalf of the appellants is that when the entire depot was being bought by them and was being sold to them by the respondent, it meant that all the vehicles which were borne on the records of that depot or pertained to that depot whether they were actually physically lying within the precincts of that depot or were lying at places outside the depot for one reason or the other, would be covered by that transaction. According to Mr. Aggarwal, the Umpire could not ignore the express term of the contract and if he has done so, the Court

Allen Berry and Co., Pvt., Ltd.
v.
The Union of India
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Grover, J.

below ought to have set aside the award. In *M/s Alopi Parshad & Sons Ltd.* v. *The Union of India* (2), to which reference has already been made, it was so held by their Lordships provided there was no specific reference of a question of law, namely, the construction of the contract or contracts out of which the disputes had arisen. The Court below entertained the view that the question of the scope of sale note 160 had been specifically referred as a question of law. As this view cannot presumably be upheld owing to the pronouncement of the Supreme Court mentioned before, it is necessary to consider whether the decision of the Umpire on this point was given by ignoring the express terms of the contract.

It has been pointed out by Mr. Achhru Ram, who appears for the respondent, that the Umpire could not be said to have ignored or disregarded the contract dated 10th July, 1946 because his decision was never invited with reference to the aforesaid contract. According to him, the case as is laid and argued before the Umpire was confined to the terms of sale note 160 which was treated by the appellants as the sole repository of the transaction relating to Moran depot. In this connection my attention has also been invited to the letter written on behalf of the appellants on 14th October, 1947 calling upon the respondent to appoint its arbitrator and in that letter there was no reference to the contract dated 10th July, 1946 and there was a clear mention of the sale notes alone with regard to which it was stated that various questions, disputes and differences had arisen. The language of that letter lends support to the view that at that time the appellants regarded the sale letters as the contracts with regard to which or in connection with which the disputes and differences had arisen. Mr. Aggarwal says that the Umpire was bound to look at the terms of the contract dated 10th July, 1946 because that was

the only formal contract relating to the sale of the Moran Vehicles depot and it was wholly immaterial whether in the letter dated 14th October, 1947 any mention was made of that contract or not. He has further referred to the pleadings of the respondent in which the aforesaid contract is specifically referred to and relied upon and, therefore, it is submitted that the Umpire had committed an act of judicial misconduct in ignoring the document which went to the root of the matter. In my opinion, the Umpire does not appear to have ignored the contract dated 10th July, 1946. The mere fact that he makes no express mention of it cannot justify the conclusion that he did not apply his mind to its terms. In the award it has been stated in clear words which have been reproduced before, that he had considered the entire evidence. The contract dated 10th July, 1946, on which so much reliance is being placed on behalf of the appellants now must have been pointedly brought to the notice of the Umpire and he must have been alive to it because it is mentioned in the pleadings of the respondent. I cannot consequently, accede to the contenion of Mr. Aggarwal that the contents of the contract dated 10th July, 1946, were not present to the mind of the Umpire. It is well settled that the Arbitrator or the Umpire need not refer to each piece of evidence.

The next question to consider is whether the Umpire has given a decision with regard to Moran depot which is contrary to or which ignores the terms of the contract relating to the same. Although it has been maintained by Mr. Achhru Ram that the only contract in point is sale note 160, but it is not possible to see how the contract entered into on 10th July, 1946, in a formal manner, by means of which the broad heads of agreement which were to form the basis of sale relating to the surplus vehicles of Moran depot were settled can be treated as irrelevant for deciding what the terms and conditions of sale were.

Allen Berry and Co., Pvt., Ltd.
v.
The Union of India

Grover, J.

Turning to it one finds that the language employed in it was general and all that was agreed upon was that pending detailed record of terms which were to be settled on the following day the broad heads of agreement which were to form the basis of the sale of surplus vehicles were that Messrs Allen Berry & Company Ltd. "will buy" the Moran Vehicles depot as is where is for Rs. 1,80,00,000, etc. The price was certainly settled and the basis was also laid with regard to the sale of the Moran Vehicles depot but then detailed terms were to follow and the depot was to be bought on what was called 'as is where is' basis. The use of the word "will" shows that it was merely an agreement to buy and that was to be followed by something more specific which presumably was to be a document effecting sale. In sale note 160 the words are that the stores mentioned therein "are sold" which means that this was a sale note or a document evidencing sale and not merely an agreement to sell. The detailed terms were also given in this note which have been set out previously. In the sale note itself the language employed was clear and unequivocal namely that all vehicles and trailers lying in Moran depot on 10th July, 1946, were being sold. To my mind and that is ultimately the position adopted by the learned counsel for the parties (in case their other contentions on this aspect of the matter are not accepted), both these documents have to be read together and not in isolation. As the earlier document of 10th July, 1946, did not give any details of the terms, for these details it is to sale note 160 that reference has to be made and therein no doubt is left that it is only the vehicles and trailers lying in Moran depot on 10th July, 1946, which were the subject matter of sale.

Mr. Aggarwal contends that when both the above documents are read together it is still not possible to

ignore the fact that on 10th July, 1946, the Moran Vehicles depot 'as is where is' was agreed to be sold and sale note 160 could not limit or restrict the meaning of the language employed therein. Mr. Achhru Ram points out that the Moran Vehicles depot did not and could not possibly mean the vehicles borne on the records of that depot or pertaining to it and that the words 'as is where is' qualify the depot and not the vehicles wherever they may be lying. According to him, it is significant that no such language was employed in the contract of 10th July, 1946, because if the intention on the part of the appellants was to buy all the vehicles borne on the records of the Moran Vehicles depot or pertaining to it, then there was no difficulty in employing that language. My attention has also been called to the meaning of the words 'as is where is' with reference to clauses 4 and 6 of the general conditions of contract (Exhibit 'B') which formed part of sale note 160. Clause 4 relates to the condition of goods and it is stated that the goods are sold as they lie etc. Clause 6 relates to delivery and is to the effect that goods sold will be removed by the buyer from the position where they lie. Mr. Achhru Ram also sought to refer to certain other documents on the records of the Umpire to show that it was in this sense that the words 'as is where is' were commercially employed but I do not consider that it is necessary to refer to the same. In my view when the contract dated 10th July, 1946, is read with sale note 160 as also the general conditions of contract which formed part of it the meaning of 'as is where is', it is clear that what was agreed to be sold and was actually sold was the entire stock of vehicles and trailers which were lying in Moran depot on 10th July, 1946. It cannot, therefore, be said that the decision of the Umpire on this point was opposed to the terms of the contract or contracts in question.

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

Mr. Aggarwal next contended that the Umpire had even proceeded to decide on the assumption that the language used in the sale note was ambiguous and evidence could be produced to show that stores over and above those expressly mentioned in the sale note had in fact been sold to the appellants. He, therefore, sought to refer to a number of documents including letters and meeting notes said to embody admissions on the part of the officers of the Disposals Department as also clarifications made by the parties which would lead to the conclusion that all the vehicles etc. which pertained to the Moran depot or were borne on its records had been sold by means of the contract dated 10th July, 1946, and sale note 160. As it has been held by me that there is no ambiguity in the contract or contracts relating to the matter no question arises of looking into or discussing the documents relied on by Mr. Aggarwal. Moreover, the Umpire proceeded even on the assumption that such evidence could be led for the purpose of removing the ambiguity and then came to the conclusion that the interpretation sought to be placed by the appellants could not be accepted. The Court, consequently is precluded from examining this matter as there is no question of law or proposition of law which has been stated by the Umpire and which discloses an error on the face.

Before the Court below as also before me a great deal of stress has been laid on proviso (6) to section 92 of the Indian Evidence Act, 1872. As is well known, that section excludes evidence of an oral agreement when the terms of any contract have been reduced to the form of a document but there are certain exceptions to that rule, one of them being proviso (6) according to which any fact may be proved which shows in what manner the language of a document is related to existing facts. Mr. Aggarwal says that evidence could be produced for proving any fact which

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

showed in what manner the language employed in sale note 160 namely all vehicles and trailers lying in Moran depot on 10th July, 1946 was related to existing facts. He has sought to derive support from *Baijnath Singh* v. *Hajee Vally Mahomed Hajee Abba* (7), *Agra Electric Supply Co. Ltd.* v. *Firm Bansidhar Prem Sukh Das* (8). In reply Mr. Achhru Ram invites attention to the rule laid down in *Chandra Sekhar Pathak* v. *Mural Gope* (9) *and Sait Bolumal Dharmadas Firm* v. *Gollapudi Venkatachelapathi Rao* (10), that the aforesaid proviso comes into play only when there is a latent ambiguity in a document that is to say when the language of the document is not *prima facie* consistent with the existing facts or, in other words, when there is a conflict in the plain meaning of the language used in the document and the facts existing or when they put together, lead to an ambiguity. But when the language used in a document is plain and not in any way ambiguous in reference to facts existing there is no scope for application of the proviso. In the first place, I do not see how the Court can go into this matter when there is no reference to the proviso or the rule or principles relied on by either party in the award of the Umpire. There is thus no error of law which can be re-examined by the Court. Secondly it has already been held by me that there was no question of any ambiguity in the language employed in the material document embodying the contract and furthermore the language employed therein cannot be said in any way to be ambiguous with reference to existing facts. The sale note read with the earlier contract of 10th July, 1946 referred to the vehicles lying in the Moran depot and by no stretch of reasoning can the proviso be made applicable particularly when a decision has

(7) A.I.R. 1925 P.C. 75.
(8) A.I.R. 1946 All. 406.
(9) A.I.R. 1957 Pat. 673.
(10) A.I.R. 1959 Andh. 612.

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

been given by the Umpire who, as stated before, has made no reference to any proposition of law which could be regarded as patently erroneous.

It may be mentioned that in the Court below arguments appeared to have been addressed on a number of other points also relating to extension of the terms of sale note 160 by means of various documents which had not been executed in accordance with section 175(3) of the Government of India Act but before me these matters have not been debated at all. It will also be presently seen that the entire discussion about the scope of the contracts relating to sale of vehicles etc. in Moran depot is more or less academic because the Umpire even decided on the assumption that the appellants were entitled to lay their claim on the basis that all the vehicles etc. borne on the records of the Moran depot had been sold by sale note 160.

Claim I(a) relates to operational vehicles in Assam and arises out of sale note 160. According to the appellants one thousand vehicles had been taken out of the Moran depot by the Army for operational purpose and as these vehicles formed subject-matter of sale note 160 their delivery ought to have been given which had been withheld. The claim was ultimately restricted to 600 vehicles. It was denied by the respondent that delivery of operational vehicles had not been made. The Umpire held that these vehicles which were in operational use in Assam and were not lying in the Moran depot were not included in the deed (sale note 160). He was, however, "on a very careful consideration of the evidence" satisfied that substantially all operational vehicles in use in Assam outside the Moran depot had been ultimately handed over to the appellants and if by any chance a few of these vehicles were not passed on to the appellants, they had been compensated by a larger number of non-operational vehicles outside Moran depot to which they

were not entitled under the terms of sale note 160. He declined to award any compensation to the appellants for these vehicles. Before the Court below, the contention raised on behalf of the appellants was that certain documents mentioned in the judgment produced by the respondent had been erroneously excluded from evidence by the Umpire and that the finding of the Umpire that substantially all operational vehicles in use in Assam had ultimately been handed over was not based on any evidence etc. These contentions were rejected by the court below. Mr. Aggarwal has argued before me :—

(1) the Umpire was bound to decide what was the total number of operational vehicles in use in Assam;

(2) the plea of compensation by handing over non-operational vehicles outside the Moran depot to the appellants had never been taken up in the written statement and the Umpire had made out a new case;

(3) the Umpire had acted as a conciliator and not as an Arbitrator; and

(4) there was no evidence on which the Umpire had based his findings.

I cannot see on what principle the Umpire was bound to decide what the actual number of operational vehicles lying in Assam was. In the first place, it was wholly unnecessary to do so after his decision that any vehicles which were lying outside the Moran depot had not been sold to the appellants. Secondly, the Umpire was not bound to go into details and it was sufficient for him to decide that even if the appellants were entitled to operational vehicles outside Moran depot, the same had been handed over in substance and effect. Even if a plea was not taken in the written statement,

Allen Berry and Co., Pvt., Ltd.
v.
The Union of India

Grover, J.

while determining whether any compensation could be awarded to the appellants or not, it was open to the Umpire to find and hold that certain other vehicles had been handed over to the appellants in place of the operational vehicles thus disentitling them to any compensation. It cannot, therefore, be said that the Umpire had acted merely as a conciliator, nor can it be said that he had given the findings without there being any evidence. The Court below in paragraph 223 has referred to the evidence which existed on the record of the Umpire and if there was evidence, then it is not for the Court to decide whether the decision given by him on that evidence was right or wrong.

As regards claim I(B) the case of the appellants was that sale note 160 also covered 200 diesel vehicles in Assam area. According to what was alleged in the statement of claims the delivery of these diesel vehicles was wrongfully withheld and it appeared that they had been illegally sold by the Directorate General of Disposals to third parties. It was admitted before the Umpire that the number of such diesel vehicles was 97 and not 200. It was also not disputed that they were Reverse Lend Lease vehicles transferred by the Government of United States to the Government of India. The Umpire found that the Government of India had acquired full title to them under the terms of the agreement (Exhibit J/61) and they did not form part of the American surplus stores which passed on to the Government of India under that agreement. It was, therefore, found that the appellants had no title to these vehicles. Apart from the general argument that all the vehicles borne on the records of Moran depot had been sold by the contract dated 10th July, 1946 and sale note 160 and these diesel vehicles formed a part of that stock, Mr. Aggarwal could not point to any error in the award on this point. On the finding that

the aforesaid vehicles did not even form a part of the United States surplus stores which alone had been sold to the apellants, indeed nothing further could be said about them. It may be stated that no specific objection was taken in the application for setting aside the award in respect of this claim.

Under claim I(C) compensation was claimed for 200 vehicles called 'specialist' which had not been delivered to the appellants, although they were alleged to be in the Assam area. Before the Umpire, however, it was admitted on behalf of the appellants that 98 such vehicles had been handed over to them and their claim was consequently confined to the price of the remaining 102 vehicles. The Umpire held that no specialist vehicles in Assam outside the Moran depot were included in the sale covered by sale note 160. Even then 98 specialist vehicles were delivered to the appellants in pursuance of a decision taken at a meeting held on 26th October, 1946 between the Director General of Disposals and the representatives of the appellants. This, according to the Umpire, however, would not entitle the appellants to any compensation. It has been noticed by the Court below that no specific objection has been taken against the award in respect of this claim. Only some general objections were raised. It is well settled that only those objections can be entertained by the Court which are of a specific nature. It is significant that the appellants had taken a number of specific objections with regard to the decision on the claims and it is only with regard to some that no specific objections were raised this being one of them.

Under claim I(d) compensation was claimed for 1000 vehicles on the allegation that the delivery of the entire stock, which had been sold, had not been made in its entirety. Before the Umpire, the appellants confined their case to the shortage caused by the removal of vehicles from Moran to Calcutta. The

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

Umpire found on the evidence that the last of these vehicles had been moved from Moran to Calcutta on 5th July, 1946 i.e. before the contract relating to the sale of vehicles in Moran depot was entered into and the execution of sale note 160. The Umpire referred to the special condition in the sale note that any vehicle or trailer moved by any party other than the purchaser out of Moran depot after 10th July, 1946 would be deemed to be the property of the purchaser. It followed from this that vehicles moved out of Moran depot prior to 10th July, 1946 were excluded from sale. On the finding that the sale was confined to vehicles actually located in Moran depot on 10th July, 1946 the Umpire held that there was in fact no short delivery and the appellants were not entitled to any compensation. The Court below examined the relevant conditions of the material contracts and came to the conclusion that the vehicles moved out from Moran depot prior to 10th July, 1946 were excluded from the sale. The award therefore, did not suffer from any error of law on its face. Mr Aggarwal has not been able to show in what manner the Umpire's award with regard to this claim suffers from any apparent error.

Claim II (a) and II (b) arise out of sale note 161.

[His Lordship considered the claim and continued:]

Now, the contract, by means of which the broad heads of agreement were settled and which covered these jeeps, was of 10th July, 1946 and it was stated in the later sale note 161 that these vehicles "are sold to you". Section 4 of the Sale of Goods Act, 1930, provides that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods and in pursuance of which the property in goods is transferred from the seller to the buyer. the contract is called a sale, but where the transfer of

the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. In these circumstances to find out whether the jeeps were sold or unsold goods the only question was whether the jeeps were sold. If sold, further question was whether the property in them had been transferrd or not. For that reference has to be made to Chapter III and in particular to sections 20 and 21 of the Sale of Goods Act which are as follows :—

> "20. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of price or the time of delivery of the goods, or both, is postponed.
>
> 21. Where there is an unconditional contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof."

It cannot be denied that the jeeps fell within the meaning of specific goods and if they were in a deliverable state then the property in them would have passed to the buyer under section 20. If, however they were to be put in a deliverable state after execution of sale note 161, the property could not pass until the seller had done the thing which he was bound to do for the purpose of putting them into deliverable state and the buyer had notice thereof. The Umpire took into consideration these provisions of the Sale of Goods Act as also the evidence and came to the conclusion that the sale had been completed. In other words, in his view

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

according to the evidence led the conditions for passing of property had been satisfied. If the property had passed to the appellants then they were certainly sold goods and were not covered by the later sale note 197.

Mr. Achhru Ram points out that the Umpire proceeded on the admitted basis that the delivery of these jeeps had been made to the appellants, though that was purported to have been done under sale note 197. If the property in these jeeps had passed to the appellants before the execution of sale note 197, it was wholly immaterial whether in the documents the later sale note was mentioned and not sale note 161. Mr. Aggarwal has maintained before me that there was no evidence before the Umpire to show actual delivery of 135 jeeps under sale note 161 but he was not in a position to deny that these jeeps had been delivered under sale note 197. It is significant that the only objection that was raised to this part of the award is contained in paragraph 14 of the objection petition which was in the following terms:—

> "The construction placed on the term 'unsold' as used in sale letter 197 by the learned Umpire is erroneous in law and the error is apparent on the face of the award, Exhibit 13 (C.I.P. 41) does not support the position taken up by the Umpire."

The submissions of Mr. Aggarwal must be confined to the objection as raised. He has not been able to show how there is any error in the award with regard to the meaning of the term unsold as used in sale note 197. Obviously the meaning was what the Umpire has substantially found, namely those goods of which the sale was not complete. Exhibit 13, the meeting note does not in any way militate against that view. There is no objection whatsoever based on the ground

that the delivery of 135 jeeps was never taken by or made to the appellants. In paragraph 4 of the record of the meeting held on 12th September, 1946 to which the Umpire has referred it is stated as follows:—

> As regards 200 good jeeps purchased by Allen Berry in July, 1946, only 68 have been accepted by Allen Berry as being in good condition. The firm states that the balance are not in good condition. Allen Berry asked for special consideration in the matter of supplying them with such spares as will put in good condition the balance outstanding."

The question of their being in a good condition or not could hardly be relevant for the purpose of deciding whether the sale with regard to them stood completed prior to 31st July, 1946 on which date sale note 197 was executed. Thus the objection raised by the appellants could not possibly be sustained.

Claims III (a) to (h) arose out of sale note 197 dated 2nd August, 1946 (Exhibit 15 (1). The relevant part of this sale note may be reproduced—

> "The undernoted quantities of vehicles and trailers available for disposal are sold to you at the prices noted below subject to the General conditions of contract (Form Con. 117 and special condition overleaf.

Location	Particulars of Stores	*Unit* Weight/Nos.	Quantity	Price per unit of quantity Rate
Jodhpur, Sodepur Depots, R. & C. Pools and Cultex Depots (all in Calcutta) Kalaikunda, Texgoan and Khulana Depots	..	All United Stores surplus vehicles and trailers lying on 31st July, 1946 in the preceding column headed location. The vehicles and trailers hereby sold do not include vehicles and trailers in operational use by the Controller USASS Calcutta nor the vehicles mentioned in para 7 below.	..	..

Allen Berry and Co., Pvt., Ltd.
v.
The Union of India
———
Grover, J.

Claim III(a) was that the authorities in possession of the vehicles placed several obstructions in the way of their delivery and several vehicles were stolen away before delivery to the appellants. In addition to these shortages the Army authorities actually removed 173 vehicles from Jodhpur depot between 31st July, 1946 and 2nd August, 1946. This was denied by the respondent. It was stated, however, that an order for withdrawal of 166 vehicles which were meant for operational use and formed a part of the operational fleet was made on 25th July, 1946 and that the last of these vehicles had been withdrawn by the evening of 31st July and before the receipt of the releasing order. It was also asserted that most, if not all, out of these 166 vehicles had been handed over by way of concession, although the appellants were not entitled to the same under the contract. The Umpire found that a number of vehicles had been withdrawn from Jodhpur depot on 30th and 31st July as also on 2nd August. He further found that the appellants were not entitled to any compensation for those which had been withdrawn up to the midnight of 31st July, 1946 but those which had been withdrawn by the representative of the respondent after that point of time could not have been rightfully withdrawn, with the result that he awarded Rs. 6,49,000 as compensation in respect of them. The court below came to the conclusion that the decision by the Umpire as to what was meant by 'on 31st July, 1946' in sale note 197 was erroneous, the error being apparent. The following part of its judgment in paragraph 244 may be reproduced :—

> "The decision of the learned Umpire that on 31st July, 1946 means the midnight following 31st July, 1946 does not appeal to common sense even. Midnight of 31st July, 1946 and 1st August, 1946 would be the

true interpretation of 'after 31st July, 1946' and not 'on 31st July, 1946.'

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

For this reason the award by the Umpire was not upheld in respect of this and was remitted to him for redecision.

The judgment of the Court below remitting the award under claim III(a) to the Umpire has been assailed by Mr. Aggarwal on the sole ground that the award should have been set aside and not remitted.— If the decision of the Umpire was wrong in law with regard to the construction of sale note 197 there could be no doubt that under section 16(1)(c) of the Act the Court had the power to remit an award for reconsideration 'where an objection to the legality of the award is apparent on the face of it'.—*vide Thawardas. Pherumal* v. *Union of India* (1). Mr. Aggarwal does not dispute the law which is well settled on this point that whether an award should be set aside or remitted is a question of discretion of the Court and unless the Court thinks that the arbitrator can no longer be trusted, it can remit the award to him, though he has miscarried in the conduct of the reference.

The cross objections which have been preferred by the respondent with regard to the decision of the court below relating to this claim may now be considered and decided. Mr. Achhru Ram points out that the Umpire expressed the view on a consideration of the entire evidence that the appellants were entitled to vehicles located in the depots specified in sale note 197 on the midnight between 31st July, and 1st August, 1946 and not those located in those depots on the midnight of 30th/31st July, 1946. It is said, therefore, that there was no question of any error of law and the Umpire had come to the conclusion on a question of fact

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

but what the Umpire proceeded to state further must be noticed and it was this—

> "I may, however, point out that the broad heads of agreement were drawn up and signed on July 31st, 1946 apparently during office hours and it seems to me that the contract could not possibly relate to vehicles located in the said depots on the midnight preceding the signing of the broad heads of agreement, but must have reference to the midnight which followed namely, the midnight between July 31st and August 1st, 1946. In this view of the matter the claimants would not be entitled to any vehicles taken out of Jodhpur depot before the midnight between July 31st and August 1st, 1946 * * * * * * * *".

It is essential to consider the contract or contracts relevant on this point and it is only in the event of any ambiguity that the Umpire could be said to have been justified in looking at other evidence. Sale note 197 was preceded by a formal contract (Exhibit 15) dated 31st July, 1946. This contract ran as follows :—

> "Seth R. Dalmia on behalf of Allen Berry Ltd. and Dalmia Jain Airways Ltd. *has bought* for a sum of Rs. 2,50,00,000 (Two crores fifty lakhs of rupees) all remaining unsold U.S. surplus vehicles in the depots of Jodhpur Sodepur, B and C Pools and Caltex (all in Calcutta) and of Kalaikunda, Texgaon and Khulna other than vehicles in U.A.S.S. operational use. * * *."

The words "has bought" have been underlined (italicised) by me. Sale note 197, the material portion of which has been set out before, clearly mentioned that the things which were being sold were of unsold United States surplus vehicles and trailers lying on 31st July, 1946 in the locations set out in the preceding column headed "Location" but these did not include vehicles and trailers in operational use by the Controller USASS Calcutta for the vehicles mentioned in paragraph 7 which related to 391 Dodge trucks. The contract (Exhibit 15) left no doubt that on 31st July, 1946 all remaining unsold U.S. surplus vehicles other than certain vehicles in operational use had been brought by the appellants. This meant that the relevant point of time for the purpose of seeing what were the vehicles and trailers lying in the various depots was when the contract had been entered into between the parties which was followed by the sale note executed on the same day. This could possibly have no reference to the midnight the 31st July, 1946 and 1st August, 1946. The contract (Exhibit 15) and sale note 197, therefore, do not leave any room for doubt or ambiguity and there was no question of the Umpire taking into consideration extraneous evidence with regard to the same and finding what was really intended was that vehicles and trailers lying on the midnight between 31st July, 1946 and 1st August, 1946 alone were the subject-matter of sale. As has been observed in *Chunchun Jha* v. *Ebadat Ali* (11) "where a document has to be construed, the intention must be gathered in the first place from the document itself. If the words are express and clear, effect must be given to them and any extraneous inquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words

(11) A.I.R. 1954 S.C. 345.

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended." It is not clear from the award of the Umpire that he took into consideration only the surrounding circumstances and it would seem that a good deal of documentary and oral evidence subsequent to the execution of the contract (Exhibit 15) and sale note 197 was taken into consideration by him for finding out what was intended by saying "lying on 31st July, 1946". To my mind, there could be no doubt that as soon as the formal contract dated 31st July, 1946 was signed, the representatives of the respondent could not remove any vehicle or vehicles from the various depots. Reading the two contracts together and keeping in mind that they were executed or signed admittedly during office hours on 31st July, 1946, the reference must be to the position obtaining on the commencement of 31st day of July, 1946 and not subsequent to the point of time when those documents were signed. Mr. Achhru Ram wanted to refer to some authorities on the question whether the words "on 31st July, 1946" should be construed as midnight on 31st July, 1946 and 1st August, 1946 but those authorities proceeded on the language of certain statutory provisions which have no relevancy in the present case. I would, therefore, uphold the decision of the Court below with regard to remission of the award in respect of claim III(a).

Claim III(b) related to alleged removal of 24 vehicles from Jodhpur depot to Jodhpur Annexe, besides the vehicles which are the subject matter of claim III(a).

[His Lordship considered the Claim and Continued :]

Thus I can see no error in the award of the Umpire with respect to this claim.

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

Claim III(c) was in respect of certain vehicles in Khulna depot. [His Lordship considered the Claim and Continued :]. All that Mr. Aggarwal has been able to say in respect of this claim is that all the issues framed by the Umpire had not been decided. In the first place I do not see how they were not decided and secondly, it was altogether unnecessary to decide any other point once it was determined that the appellants had themselves accepted Ondal vehicles in satisfaction of the Khulna vehicles or cranes mounted on water-crafts. Mr. Aggarwal has not been able to point to any infirmity in the award on this aspect which would justify the conclusion that the award was bad.

Claim III(d) was with regard to 400 low bed trailers alleged to have been removed to a place known as Blue Earth Depot. According to the Umpire, if the removal took place of these vehicles before sale note 197 was executed, there was no question of their being delivered to the appellants. [His Lardship considered the Claim and Continued :] Mr. Aggarwal has not been able to satisfy me how there is any error with respect to this claim which would justify setting aside of the award.

Claim III(e) is in respect of certain vehicles like trucks and trailers which may be called the UNRRA vehicles. The term 'UNRRA' meant the United Nations Relief and Rehabilitation Administration. These vehicles were lying in the Alipore Air Strip and had been the subject matter of sale to UNRRA.

[His Lordship considered the pleas and Continued :]

The Umpire held that by sale note 197 the appellants did not acquire any title to unsold vehicles located in Alipore Air Strip. He also decided on what he calls "a very careful consideration of the

Allen Berry and Co., Pvt., Ltd.
v.
The Union of India

Grover, J.

entire evidence" that there was in fact a completed sale in respect of these vehicles in favour of UNRRA. After the UNRRA had taken delivery of a number of these vehicles and trailers the sale with regard to the rest was cancelled after and not before the sale to the appellants. The title in these vehicles reverted to the American Government and they had to be declared surplus afresh before they could be disposed of by the Foreign Liquidation Commission. It was only after the cancellation of the sale in favour of UNRRA in March, 1947 that these vehicles were declared surplus entitling them to be passed on to the Government of India. It followed, therefore, that the decision of the Umpire was that since the title in these vehicles did not vest in the Government of India on 31st July, 1946 they could not form the subject matter of sale under sale note 197. Before the Court below as also before me, a good deal of argument was addressed on the basis of a certificate dated 1st May, 1946, according to which these vehicles were dropped from U.S. Army Property records for the reason that the UNRRA had not called for their delivery. That certificate, however, finds no mention in the award. It is well settled that the Court can find only from any document which may be incorporated in the award whether any error of law has been committed by the arbitrator or the Umpire. In other words, if the document is not specifically mentioned, it is not open to the Court to see how it would have affected the decision of the arbitrator in the matter of a conclusion on a question of fact. The Court below was, however, taken through a good deal of evidence but I am of the view that the appellants must be confined to those documents only which had been mentioned in the award and with respect to which alone it can be shown whether any controversy on a question of law has been settled which is apparently erroneous. Mr. Aggarwal does not dispute that there were certain

documents including the transfer invoice of 6th March, 1947 (Exhibit C(121) which is mentioned in the award which showed that the vehicles in question were passed on to the Government of India as surplus property at that time. What Mr. Aggarwal contends is that other evidence, particularly the certificate, referred to before had not been properly considered by the Umpire and, therefore, the award is bad. It is not possible to accede to the submission of Mr. Aggarwal for the simple reason that the Umpire stated in clear and categorical terms that he had considered the entire evidence on the point which would include those documents on which reliance has been placed by Mr. Aggarwal and if the Umpire had, as indeed he has, given a decision that the transfer of title in the vehicles took place in the year 1947 no scope was left for any interference by the Court. Even with regard to the question whether the vehicles lying on the Alipore Air Strip were included in the sale effected by sale note 197 the finding given by the Umpire is one of the fact and must be accepted as final.

Claim III(f) related to 3,000 vehicles alleged to have been illegally sold by the Government of India through Tata Aircraft Ltd. These vehicles were in Titaghur in Bengal. That was not one of the depots mentioned in sale note 197. The Umpire held that the vehicles sold through Tata Aircraft Ltd. were not covered by sale note 197. The Court below held that the vehicles sold under sale note 197 were those which were located on 31st July, 1946 in the depots mentioned therein. The award of the Umpire consequently did not suffer from any error. Mr. Aggarwal did not address any serious argument before me in respect of this claim and nothing need further be said about it.

The decision of the Umpire on claims III(g) and (h) was not agitated before me at all.

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

Cliam IV arose out of sale note 311, dated 11th September, 1946 (Exhibit 'F') which related to motor vehicles spare parts.

[His Lordship considered the claim and Continued :]

Even if Mr. Aggarwal's argument be assumed to be correct that the decision given by the Director-General of Disposals for various reasons was not binding and final, the appellants could not succeed on the claim in question at all. If the Umpire had no jurisdiction to entertain that claim by virtue of special condition No. 2 in sale note 311 which made the decision of the Director-General of Disposals final and binding with regard to what fell within the definition of M.T. spare parts, then it was not within the competence of the Umpire at all to give any decision in respect of this claim. If, however, he had the jurisdiction, he proceeded to give his own decision on a consideration of the evidence that the exclusion of the spare parts as had been done by the authorities was justified. It is not disputed that a good deal of expert evidence was produced to show what were the nature and type of the spare parts which were covered by sale note 311 and, therefore, when the Umpire came to the conclusion that the items excluded by the Director-General of Disposals had been rightly excluded by him as they could not be regarded as motor vehicles spare parts to which sale note 311 related, that decision on a question of fact was not open for re-examination by the Court. Mr. Aggarwal has not been able to point to any error of law in that behalf.

Under claim V the allegation was that during the course of the negotiations preceding the Assam and the Calcutta sales the Director-General of Disposals

had given several undertakings and assurances with regard to the facilities which were to be provided for the resale of the vehicles and other stores purchased by the appellants. The Umpire has referred to the letter dated 11th July, 1946 (Exhibit 2) written by the Director-General of Disposals, the relevant parts of which have been reproduced in the award. The appellants also relied on other correspondence and notes of discussions in meetings and the acts and the conduct of the parties. The respondent's contention was that no such assurances or undertakings had been given apart from those contained in the letter (Exhibit 2) and that the Government of India was not bound by what the Director-General of Disposals had said in the aforesaid letter. Alternatively, the position taken up was that so far as it was reasonably possible for the Director-General of Disposals every effort was made to give to the appellants the necessary facilities subject to the conditions then prevailing in the country. The Umpire has stated that the evidence which was produced with respect to this claim was voluminous and he had examined it with due care and his view on a consideration of the entire material was that the assurances given in the letter (Exhibit 2) were not legally binding on the Government and it merely contained a record of the assurances that had been given during the course of the negotiations in the matter of such assistance that the Director-General of Disposals would give to the appellants with regard to various matters in order to enable the appellants to expedite the disposal of the vehicles. The Umpire referred to the situation prevailing in the country after the war and particularly after the partition of the country in August, 1947. There was shortage of petrol and with regard to railways there was difficulty in movement. There were also dock strikes and riots in Calcutta. It is unnecessary to mention the other difficulties that prevailed in the country for a fair amount of time.

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

The Umpire expressed his decision in the following words at page 140 of the award :—

> "My view on the evidence is that subject to the difficulties and restrictions such as those indicated above to the claimants by the Directorate-General of Disposals and the Government departments concerned in regard to various matters which form the subject matter of this claim and that the extra contractual obligations undertaken by the Director-General of Disposals were in fact implemented to the extent to which it was possible to implement them under the circumstances existing at that time."

It has been rightly pointed out by the Court below that no specific objections were taken in the application for setting aside the award to the decision of the Umpire in respect of this claim. The general objections as contained in sub-paragraph 45 and 47 of paragraph 9 of the objection petition would not justify the raising of the points which were sought to be raised before the Court below and some of which have been argued before me. The Court below also came to the conclusion that the assurances and undertakings given in the letter (Exhibit 2) were not given by the Director-General of Disposals on behalf of the Government of India and the respondent was not legally bound by the terms of that letter. No arguments appeared to have been addressed there with regard to the finding of the Umpire that to the extent it was possible the assurances and the undertakings in regard to the various facilities had been fulfilled and carried out. Even on the assumption that any assurances and undertakings of the nature alleged by the appellants were given on behalf of the respondent by the Director-General of Disposals, it is not possible to see any error in the award on the point inasmuch as the Umpire has given

a decision which is one of fact that to the extent it was possible they were carried out. Mr. Aggarwal very fairly does not contend that even if it was not possible to provide certain facilities etc., the respondent was obligated to provide them, with the result that a failure to do so would entitle the appellants to compensation.

Claim VI(i) relates to what have been called "the Reverse Lend Lease vehicles." This term was used with regard to those vehicles which were described as reciprocal aid articles in the agreement (Exhibit 'J/61') between the Government of India and the U.S.A. Government. According to the definition contained in paragraph 1(b) of the agreement, any article transferred by the Government of India to the Government of the United States under reciprocal aid was to be regarded as reciprocal aid article. Paragraph 4(c) of the aforesaid agreement provide as follows—

> "(c). The Government of the United States shall be deemed to have acquired, as on September 2, 1945, full title, without qualification as to disposition or use, to all reciprocal aid articles in the possession of the Government of the United States on that date and to all articles furnished to the United States armed forces in India after that date, except that any reciprocal aid articles or other articles furnished to the United States armed forces in India and incorporated into installations in India are herby deemed to be returned to the Government of India as on the date the United States armed forces relinquish possession of such installations."

There were 547 such vehicles in the depots which had been sold to the appellants by means of sale note 197.

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

Indisputably out of these 291 vehicles had been removed by the representatives of the respondent. The appellants case was that these vehicles were covered by sale note 197 and, therefore, compensation was payable by the respondent with regard to 291 vehicles.

According to the Umpire, the question was "whether these vehicles could be said to have been incorporated into installations in India." If they had been so incorporated, they would be deemed to have been returned to the Government of India "as on the date the United States armed forces relinquish possession of such installations." If they could not be treated as having been incorporated into installations in India, the Government of the United States was to be deemed to have acquired the same "as on September 2, 1945, full title, without qualification as to disposition or use." These vehicles were in the possession of the Government of the United States on 2nd September, 1945. The relevant part of the Umpire's award was as follows at page 143—

> "I have carefully considered the evidence and the arguments of learned counsel for the parties and my view is that these vehicles were in fact incorporated into installations in India and that therefore their ownership passed to the Government of India on the date on which the United States armed forces relinquished possession of such installations. They were not part of the United States surplus stores, the title over which passed to the Government of India under paragraph 7 of the agreement EX. J-61"

The Umpire, therefore, came to the conclusion that these vehicles never became the property of the American Government and that as soon as they were

incorporated into installations in India, their ownership vested in the Government of India under paragraph 4(c) of the agreement on the date Jodhpur depot was handed over to the Indian forces by the American forces. These vehicles thereafter did not belong to the American forces and were never declared surplus stores by the American Government and thus they could not form the subject-matter of sale under sale note 197.

Before me, Mr. Aggarwal has argued that the vehicles in question had never been incorporated into installations in the Jodhpur depot and the finding given by the Umpire on the point was based on no evidence. It is pointed out that the entire material to which the Umpire has referred or even to which the Court below has referred was of a negative nature and there was no positive evidence from which it could be inferred that these vehicles were incorporated in the Jodhpur vehicle depot. Even if it be true that there was no positive evidence before the Umpire for arriving at the conclusion at which he did, it cannot be gainsaid that there was abundant material from which an inference could be drawn that the aforesaid vehicles were never declared surplus property by the Amrican Government and it was the surplus property alone which could be transferred to the Government of India under the agreement of May, 1946. The Director-General of Disposals could not convey any title in them by virtue of sale note 197. The findings which were given by the Umpire were certainly based on evidence and it has not been shown how the conclusion at which he arrived was erroneous in law.

It was next contended that if the Reverse Lend Lease vehicles did not form part of the vehicles which were the subject-matter of sale note 197, then the Umpire had no jurisdiction to give any decision in respect of that claim and, therefore, the counter-claim VI

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

which had been allowed by the Umpire could not have been allowed by him. This matter will be decided along with the question of jurisdiction of the Umpire which is to be determined with regard to the points raised in some of the cross-objections.

Claim VI(ii) related to 26 tractors and 26 trailers which had been loaned to Chinese authorities in May, 1946 from Jodhpur depot.

[His Lordship noted the pleas and continued:]

Mr. Aggarwal did not address any particular arguments to me relating to this claim.

Claim VII(i) and counter-claim I arose out of the sale of 70 Dodge trucks to Travancore State. The case of the appellants was that there was no valid sale and that the said trucks had been illegally removed by the respondent from the Sodepur depot, all unsold vehicles which were the subject matter of sale note 197. The respondent maintained that there had been a proper sale and as they were sold vehicles, they were excluded from sale note 197. Before the Umpire, the contention of the appellants was that inasmuch as the vehicles in question had not been segregated and appropriated to the sale, although there was a sale letter with respect to them dated 26/31st July, 1946 (p. 1, file P) they could not be regarded as sold vehicles. The Umpire gave the following findings, after stating that he had very carefully considered the evidence and holding that the vehicles had in fact been segregated and earmarked for delivery to the Travancore State before sale note 197 was executed :—

"My finding, therefore, is that the Dodge trucks located in Sodepur depot included at the time of the sale to the claimants, 70 trucks

> which had already been sold by the respondents to the Director of Transport, Travancore State."

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

It has been pointed out by the Court below that no specific objection was taken in the application for setting aside the award with regard to the finding of the Umpire in respect of this claim and the counter-claim which was in respect of the price of one truck. The appellants would not, therefore, be entitled to raise any objections now to this part of the award. Before that Court as also before me, Mr. Aggarwal wanted to reopen the question whether there was a legal sale in respect of these vehicles to the Travancore State before sale note 197 was executed. The Umpire gave a decision on the evidence before him that these vehicles had been segregated and earmarked for delivery to the Travancore State, the sale letter in respect of which was of 26th/31st July, 1946. According to the Court below the sale letter bore the date 26th July, 1946 but as it was despatched on 31st July, 1946, therefore, that date was also mentioned. The question whether property had passed under sections 20 and 21 of the Sale of Goods Act had to be decided on the evidence, apart from the terms of the contract and these were matters on which the Umpire gave his decision. The same cannot be re-examined by this Court.

With regard to counter-claim I, Mr. Aggarwal has addressed an argument similar to the one relating to claim VI (i). As that relates to the jurisdiction of the Umpire, that will be considered later when cross-objections are decided.

Regarding claim VII (ii) which related to alleged removal of 30 vehicles for delivery to Sindri Works, the Umpire found that they had been sold under sale letter No. 21 dated 20th July, 1946 (document No. 2 in

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

file T-1) and that those vehicles had been earmarked and segregated before 31st July, 1946, with the result that the appellants did not acquire any title over them under sale note 197. As has been observed by the Court below, no specific objection had been taken to this part of the award. Mr. Aggarwal did not address any particular argument in respect of this claim before me, apart from the submission that property in these vehicles had not passed to the buyers, namely, the Sindri Works prior to 31st July, 1946. In view of what has been stated before, the award on the point must be sustained.

No arguments were addressed either in the Court below or before me with regard to claims Nos. VII(iii) and VII(iv) as also claims VIII and IX which are no longer in dispute.

As regards the counter-claims, Mr. Aggarwal has confined his arguments to challenging the decision of the Umpire and the Court below in respect of counter-claim XI and additional counter-claim II.

Counter claim XI was filed by the respondent on account of rent in respect of various depots which had been taken over by the appellants under sale notes 160, 197 and 311. Additional counter-claim II was with regard to the rent for the site of Caltex Motor Pool. According to the Umpire lands forming part of the sites of various depots handed over to the appellants had been requisitioned by the Government under the Defence of India Rules which were then in force and the Government was under a statutory obligation to pay compensation to the land-owners. The liability of the appellants to compensate the respondent did not arise out of any relationship of landlord and tenant between the parties but out of various contracts

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

executed between them and, therefore, the respondent could claim charges for the occupation of the lands by the appellants. It was further held that the respondent was not responsible for the failure on the part of the appellants to vacate the lands of all, or any of, the depots in their occupation and that the appellants were liable for the rents for such periods during which they remained in their actual occupation Mr. Aggarwal has contended before me that under special condition No. 4 of Sale note 160 the appellants were liable to pay rent and other charges (if any) due payable by the Government of India in respect of occupation of the land at Moran, the liability of the appellants was towards the owners who alone were entitled to the rent and, at any rate such a liability did not exist until it could be shown by the respondent that it had made any payments to the owners of those lands and it existed only to the extent of the amounts paid. On behalf of the respondents it has been pointed out that no such question was raised before the Umpire by the appellants that their liability would arise only if it was established that the Government had actually made certain payments to the land-owners. Had such a matter been raised, the respondent would have shown by producing evidence that it had either paid rent to the owners or paid them compensation under the Defence of India Rules. The Court below considered the phraseology employed in specific condition No. 4 of sale note 160 with particular reference to the words "due payable". It was held that the appellants were liable to pay rent even though the Government might not yet have paid the same to the true owners. It was nowhere provided in any of the specific conditions in the sale note that the appellants would be liable to pay to the true owners only. Mr. Aggarwal has not been able to show how the view expressed by the Court below with regard to the interpretation of special condition No. 4 in sale

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

note 160 and similar conditions in the sale notes is erroneous. If, as has been found by the Umpire which finding is not open to challenge, the land under the depots had been requisitioned under the Defence of India Rules, there was no question of the owners or occupiers from whose possession these lands had been requisitioned. They (the owners) were entitled to claim compensation from the Government and the Government in its turn could ask the appellants to pay rent and other charges to it and that is what seems to have been provided for in special condition No. 4 of sale note 160. At any rate, no specific objections were taken to this part of the award except with regard to the question of jurisdiction of the Umpire to adjudicate on the rent relating to R3A plant structures. The point of jurisdiction has yet to be examined and will be decided along with other matters relating to jurisdiction.

On the question of costs Mr. Aggarwal has vehemently attacked the award of the Umpire. In the award it is stated that parties' counsel have submitted statements of the expenses incurred by them in connection with the arbitration proceedings. They exceeded seven lakhs in the case of the respondent. According to the Umpire they were heavy as might be expected in view of the valuation of the case, its size and nature which were perhaps "unprecedented in the history of litigation in India". Considering everything the Umpire's view was that it would be fair to assess the parties' costs of the proceedings at Rs. 5,70,000 in respect of the claims and Rs. 80,000 in respect of the counter-claims. Having regard to the extent to which the parties had succeeded or failed, it was held that the appellants were liable to pay a sum of Rs. 5,40,544 as costs to the respondents. Before the Court below as also before me, it was urged on behalf of the appellants that the amount of costs

Allen Berry and Co. Pvt., Ltd. *v.* The Union of India

Grover, J.

which had been awarded was almost by way of punishment or penalty and that even a Court of Law could not have awarded such a large sum by way of costs. Mr. Aggarwal says that according to the rules and orders made by this Court, the maximum amount of counsel fee which could be included in the costs could not exceed Rs. 4,500 whereas in the instant case the amount of counsel fees which had been claimed by the respondent exceeded Rs. 5,79,000 and out of the costs which have been awarded by the Umpire the counsel fees constitute the bulk. Mr. Aggarwal relied on *Bhalanshah Agedinoshah* v. *Mir Hussein Bux Khan* (12), and *Sherbanubai Jafferbhoy* v. *Hooseinbhoy Abdoolabhoy* (13), for supporting his contention that they should not have been wholly disproportionate to what a Court of Law could or might have awarded in a suit. In the Sind case, an arbitrator who was asked to decide a suit was authorised to deal with costs. He dismissed the suit but allowed costs to the extent of Rs. 2,000 even though the ordinary costs in the suit would be about Rs. 100. It was held that the part of the award dealing with costs was not separable from the rest and the award was set aside as a whole. In that case a suit had been filed and it was the suit which had been referred to an arbitrator. Actually on the main issue the arbitrator there held that the plaintiff was not entitled to the declaration or injunction sought by him and that his suit be dismissed but he proceeded to award Rs. 2,000 as costs. The Sind Court observed that in the first place, the sum of Rs. 2,000 was not awarded merely as costs but partly as costs and partly in consideration of all circumstances. What those circumstances were could only be surmised. In the second place, the power given to the arbitrator under the mandate issued by the Court was to deal with

(12) A.I.R. 1933 Sind 295.
(13) A.I.R. 1948 Bomb 292.

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

costs as would be dealt with by the Court and as no special costs had been claimed by the plaintiff, the arbitrator could not allow such a large amount of costs. It is apparent that the facts there were entirely different and the arbitrator in that case had proceeded to do something which was apparently illegal. In *Sherbanubai Jafferbhoy* v. *Hooseinbhoy Abdoolabhoy* (13), it was observed that when a Court of Law referred a matter to an arbitrator it substituted a domestic forum in place of itself. But that domestic forum had to act judicially and what a Court of Law could not do judicially an arbitrator also could not do. No court or any judicial tribunal could award any sum to any party *ex gratia* which could only mean giving to a party something to which he was not entitled as a matter of legal right. The principles enunciated by the Bombay Court are unexceptional but it is difficult to see how they could be applied to the question of award of costs in the present case by the Umpire.

Mr. Aggrawal agrees that in the arbitration clause (13) in Exhibit 'B' the assessment of the costs incidental to the reference and the award was left to the discretion of the Arbitrators or the Umpire. Paragraph 8 of the First Schedule to the Act provides that the costs of the reference and the award shall be in the discretion of the arbitrators or the Umpire. According to Russell on Arbitration, 16th Edition, page 250, unless the arbitration agreement expresses a contrary intention, an arbitrator has a full discretion as to the costs of the reference. The "costs of the reference" included all the expenses properly incurred by the parties in the course of the whole inquiry before the Arbitrator. The question before the Umpire, therefore, was as to what was the amount of costs which had been properly incurred in the arbitration proceedings by the respondent. Mr. Achhru

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

Ram points out that the total amount of claims was Rs. 6,73,82,000 and counter-claims, Rs. 67,87,956. The proceedings which started in 1949 and took 16 or 17 hearings before the Arbitrators, took 29 days for documents before the Umpire and 124 days for evidence of the appellants and 129 days for evidence of the respondent. The arguments before the Umpire took 214 days in all. The records and evidence were voluminous and owing to the number of hearings and magnitude of the case it could not be said that the costs which had been incurred by the respondent had been improperly incurred. Even as regards counsel fees, Mr. Achhru Ram says that even in the statement filed by the appellants a sum of about Rs. 6,50,000 had been shown as fees paid to counsel. In these circumstances it is contended that the Umpire exercised his discretion rightly and judicially and that he was not bound to award only such costs as could be awarded by the Court. It appears to me that the Court below arrived at a correct conclusion on the point.

Coming to the cross-objections, they related to claim III(a) which has already been dealt with and counter-claims II, IV, V and VII which involve the question of jurisdiction of the Umpire.

Under counter-claim II it was alleged by the respondent that the appellants were liable to pay Rs. 10,000 as the price of 10 Air Compressors existing in Brooklyn depot which after the decision of the Director General of Disposals as to their not being included in the M.T. spares purchased by the appellants had been sold to the latter for a price to be fixed by the Director General of Disposals, the latter having priced them at Rs. 1,000 each. In their reply, the appellants admitted having taken 10 Air Compressors but they maintained that these Compressors were included in the M.T. spare parts sold to them under sale note 311, dated 11th September, 1946. It was further pleaded that this was one of the items included in paragraph

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

4 of the claim. The counter-claim for Rs. 10,000 was allowed by the Umpire. The Umpire had held that the Director General of Disposals had given a valid decision as to which material was covered by sale note 311, but even if his decision was to be ignored his own view was that Air Compressers could not be included in the term "M.T. spares parts" or in the term "M.T. spares". The 10 Air Compressors had been delivered to the appellants and they had agreed to pay a price of Rs. 1,000 each under protest contending that the Air Compressors were included in sale note 311. Subsequently the transaction was embodied in a sale note 377, dated 17th April, 1948. The Umpire considered that a valid sale subject to the usual conditions had been effected and that the jurisdiction of the Umpire was not ousted. He proceeded further to say—

> "But whether the arbitration clause in Ex. B applies or not, the fact that the parties had, in their pleadings, duly submitted the matter for determination by the Arbitrators, will, in my view, give the Umpire jurisdiction to deal with it."

The Court below was of the opinion that sale note 377 was only a unilateral document which had not been executed or accepted by the appellants and, therefore, the arbitration clause contained in it was not binding on them. The decision of the Umpire that the sale was subject to the usual conditions including the arbitration clause contained in Exhibit B was erroneous, the error being apparent on the record. The other argument that was addressed in the Court below that this counter-claim related to a dispute arising out of sale note 311 which admittedly contained the arbitration clause was repelled for the reason that the dispute could have arisen between the parties

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

even if there was no sale note 311. The view expressed was that the Air Compressors were given to the appellants specifically on the understanding that they were not part of motor vehicles spare parts and it was a separate transaction necessitating the issue of a separate sale note. It was not necessary to look at sale note 311 to find out whether the Air Compressors were given under the sale note or under a separate contract. The Court below observed that the respondent had specifically claimed the amount in question on the ground that the 10 Air Compressors had been sold to the appellants after the Director General of Disposals had given a decision that these were not included in M.T. spares. It was, therefore, found that the dispute out of which the counter-claim arose could not be in consequence of the contract having been made. It was held that the arbitration clause contained in sale note 311 would not govern the case and the Umpire had no jurisdiction.

It is necessary to be quite clear about the principles which govern the determination of the question of jurisdiction of the Arbitrators or the Umpire to decide a particular question or dispute between the parties making a reference. In *A. M. Mair and Co.* v. *Gordhandas Sagarmull* (14), the arbitration clause was in the following words :—

> "All matters, questions, disputes, differences and/or claims arising out of and/or concerning and/or in connection and/or in consequence of or relating to this contract whether or not obligations of either or both parties under this contract be subsisting at the time of such disputes and whether or not this contract has been terminated or purported to be terminated or completed shall be referred

(14) A.I.R. 1951 S.C. 9.

Allen Berry and Co., Pvt., Ltd. v. The Union of India

Grover, J.

to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted."

The respondent, before their Lordships, had delivered certain quantities of jute under the contract but the balance could not be delivered within the stipulated period and by mutual agreement time was extended. Some correspondence followed and the bill of difference which amounted to Rs. 4,000 odd was submitted by the appellants to the respondents who in their turn denied the liability to pay the same. The matter was taken to arbitration and an award was made in favour of the appellants and against the respondents. As observed by their Lordships, the principal dispute raised in the case was whether the extension of time for delivery was granted within the time limited in the contract. That dispute was certainly covered by the arbitration clause. The further dispute that the appellants were not parties to the contract in their own right as principals but entered into the contract only on behalf of the Bengal Jute Mill Company was also held to be one which turned upon the true interpretation of the contract so that the respondents must have recourse to the contract to establish their claim that the appellants were not bound as principals while the latter said that they were. The following observations at page 11 are noteworthy :—

"If that is the position, such a dispute, the determination of which turns on the true construction of the contract, would also seem to be a dispute under the contract. Here, the respondents must have recourse to the contract to establish their case and, therefore, it is a dispute falling within the arbitration clause."

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

In *Ruby General Insurance Co. Ltd.* v. *Pearey Lal Kumar* (15), after referring to the above decision and other cases it was held that the test 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. In the case before their Lordships 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. Thus the difference between the parties was a difference which arose out of the contract and the arbitrator had jurisdiction to decide it. In *Heyman* v. *Darwins Ltd.* (16), it has been laid down very clearly that if the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause but if the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen in respect of or with regard to that contract. In *Macaura* v. *Northern Assurance Co.* (17), and in *Stebbing* v. *Liverpool & London and Golbe* (18), to which reference has been made in *Ruby General Insurance Company's* case (supra), both the parties were relying on the terms of the contract and the question only was, who was right. *In Re An Arbitration between Hohenzollern Action Gesellschaft Fur Locomotivban and the City of London Contract Corporation* (19), Lord Esher, Master of the Rolls while deciding the

(15) A.I.R. 1952 S.C. 119.
(16) (1942) I All. E.R. 337.
(17) 1925 A.C. 619.
(18) 1917-2K.B. 433.
(19) 54 L.T.R. 596.

Allen Berry and Co., Pvt. Ltd. *v.* The Union of India

Grover, J.

question whether the arbitrator had the jurisdiction to try certain matters submitted to him in a clause which provided that all disputes were to be settled by the Engineer etc. observed —

> "Now, of course 'all disputes' cannot mean disputes as to matters that have no relation at all to the contract. But I think that those words are to be read as if they were 'all disputes that may arise between the parties in consequence of this contract having been entered into'."

Actually, the learned Master of the Rolls posed this very question for deciding whether the arbitrator had the jurisdiction in that case to give an award.

Mr. Achhru Ram has relied on the decisions of the Supreme Court, referred to before, and has urged that in order to decide the dispute covered by counter-claim II it is necessary to have recourse to sale note 311 which read with Ex. B admittedly contained an arbitration clause and on which even the appellants had relied throughout for maintaining that the 10 Air Compressors had been rightfully delivered to them, being covered by that transaction. As recourse to that contract is necessary, the dispute must be regarded as one falling within the arbitration clause in that contract. It seems to me that in the light of the principles enunciated in the authorities discussed before the correct way of looking at the matter is to first find out whether the parties are agreed that a binding contract was made and then to decide whether it would be necessary to have recourse to that contract to settle the dispute which has arisen. With regard to counter-claim II, the respondent founded it on sale note 377 and not on sale note 311. The Court below found that sale note 377 was unilateral and was not

Allen Berry and Co., Pvt. Ltd. v. The Union of India

Grover, J.

of binding force on the appellants. The respondent did rely on sale note 311 for showing that the 10 Air Compressors were covered by that transaction but the dispute as raised essentially related to sale note 377 which was set up by the respondent as the binding contract in respect of the Air Compressors. Once it was found that that contract was not binding on the appellants, which decision of the Court has not been challenged before me by Mr. Achhru Ram, the question of having recourse to sale note 311 would not arise, nor can it be said that the dispute with regard to which the counter-claim was made had arisen as a consequence of sale note 311.

Mr. Achhru Ram has next contended that the scope of the reference should be deemed to have been enlarged. It is submitted that to constitute an arbitration agreement in writing it is not necessary that it should be signed by both the parties and in the present case when the above counter-claims were filed before the arbitrators, their jurisdiction was not denied by the appellants to decide the aforesaid counter-claims and the appellants joined issue by filing written statements to those counter-claims. My attention was invited to *National Fire and General Insurance Co. Ltd.* v. *Union of India* (20), *Pratabmull Rameshwar* v. *K. C. Sethia* (1944) *Ltd.* (21), and *Nainsukh Das, Nagar Mal* v. *Gajanand, Shyam Lal* (22), for the purpose of showing that the scope of the reference could be enlarged in this manner. It was held in *National Fire and General Insurance Co. Ltd.* v. *Union of India* (20), that submission to arbitration was not necessarily contained in the policy of insurance itself but might easily be enlarged and had been enlarged in the facts of the case, by inclusion of the question of liability to pay in the statements before

(20) A.I.R. 1956 Cal. 11.
(21) A.I.R. 1960 Cal. 702.
(22) I.L.R. 43 All. 348.

Allen Berry and Co., Pvt Ltd. v. The Union of India

Grover, J.

the arbitrators. The statement in writing of A before the arbitrators and the insurance company's own written answer before the arbitrators to such statement together constituted a further arbitration agreement valid within the meaning of section 2(a) of the Arbitration Act, apart from the arbitration clause in the policy itself. In *Pratabmull Rameshwar* v. *K. C. Sethia (1944)* Ltd. (21), P.B. Mukharji, J., who delivered the judgment sitting singly in *National Fire and General Insurance Co. Ltd., v. Union of India* (20) while dealing with an objection that the awards incorporated decisions regarding matters which had not been referred to the arbitrators, observed at page 707—

> "The appellant's own statement of case before the arbitrators and the respondent's statements in any event constitute a clear submission on this point to the arbitrators and they themselves therefore constitute the arbitration agreement on this point."

In the Allahabad case, the claimants had submitted to the Cawnpore Piece Goods Association a claim which they had signed. The arbitrator appointed by the Association laid down the document before the other party and he wrote thereon in his own hand and over his signature his answer to the claim. He was well aware that the object of the document was to lay before the arbitrators in writing the difference which was to be decided between the parties. It was held that the document constituted a written agreement to submit differences to arbitrators. Mr. Aggarwal points out that in *National Fire and General Insurance Co. Ltd.* v. *Union of India* (20) the disputes had arisen under the same contract whereas in the present case the Air Compressors were alleged by the respondent to have been sold under a different contract and that at

any rate when pleadings are filed before the arbitrators or the Umpire, they cannot constitute an agreement in the absence of any express language employed therein. Reliance has been placed by him on *Ajit Singh* v. *Fateh Singh* (23), where all that the arbitrators were required to do under the arbitration agreement was to find out whether A, a Hindu widow had in fact adopted B. The arbitrators, after finding that A had adopted B, proceeded further to set aside the adoption. It has been held that the act of the arbitrators in setting aside the adoption was wholly without jurisdiction, it being a fundamental rule of law that whatever was without jurisdiction could not acquire any sanctity merely because the parties did not raise the objection of jurisdiction or later on consented to the same. In order to confer jurisdiction on the arbitrators both parties had to agree that the arbitrators would have jurisdiction to set aside the adoption even if in fact or in law it had taken place. Mr. Aggarwal points out that this matter has been set at rest by their Lordships in *Khardah Company Ltd.* v. *Raymen & Co. (India) Private Ltd.* (24). It has been held that a party applying under section 33 of the Act is not estopped by its conduct in appearing before the arbitrators and in taking part in the proceedings before them from questioning the validity of the award. What confers jurisdiction on the arbitrators to hear and decide the dispute is an arbitration agreement as defined in section 2(a) and where there is no such agreement, there is an initial want of jurisdiction which cannot be cured by acquiescence. It woud also appear that the mere fact that pleadings have been filed before the arbitrators would not be sufficient for the purpose of concluding that an agreement has come into being under section 2(a) of the Act as has been suggested by Mr. Achhru

(23) A.I.R. 1962 Punj. 412.
(24) A.I.R. 1962 S.C. 1810.

Ram. The ratio of the decision in *Messrs Alopi Parshad's case* (2), would negative any such view even though it has appealed to some learned Calcutta Judges. It is true that if any such agreement can be spelt out of the pleadings it may have the effect of an additional reference on a particular point but Mr. Achhru Ram has not been able to show anything in the pleadings from which it can be inferred that the scope of the reference was enlarged by mutual consent.

As regards counter-claim IV which related to price of 589 bins, Mr. Achhru Ram very fairly stated that he did not wish to press his cross-objections in regard to the same.

Counter-claim V was to the effect that at the time the appellants came to occupy the Jodhpur depot in August, 1946, the said depot contained some operational equipment, light as well as heavy, which belonged to the second party and which the appellants were under the terms of the contract bound to surrender. Having persistently refused to do so they were liable for their value which was assessed at Rs. 3,00,000. The details of the equipment were given in the statement filed along with the counter-claims. The reply of the appellants was that there was no operational equipment in Jodhpur depot which they were bound to surrender and the Government had taken away whatever they wanted. The Umpire held that the Jodhpur depot did in fact contain at the time it was taken over by the appellants certain operational equipment which the appellants were bound to surrender, as this equipment had not been sold under sale note 197. It was also decided that sale note 197 was subject to general conditions contained in Exhibit 'B' and, therefore, the Umpire had the jurisdiction to decide the matter. He awarded Rs. 2,95,000 as compensation in this behalf. The Court below held that the domestic equipment was not shown to have been

sold under sale note 197 and it was not necessary to refer to that contract to decide the dispute. The price of the equipment was being claimed on the ground that it had not been sold to the appellants and, therefore, this claim was independent of sale note 197. It was consequently held that the Umpire had no jurisdiction to adjudicate upon this claim. Mr. Achhru Ram has referred to a letter addressed to the Controller, USASS by Mr. K. T. Pillai, Regional Commissioner (Disposals) which is in file No. A, Exhibit C(48) and in which it was mentioned that the domestic equipment located in the depots, such as portable office accommodation, furniture, Canteen Stores etc. might be allowed to be removed as early as possible. It was also written that the barbed wire fencing and other security stores might be left back for the use of Messrs Allen Berry & Co., it being distinctly understood that they did not belong to them. It is common ground that this dispute related to the equipment of the nature mentioned in the aforesaid letter. As has been rightly pointed out by the Court below, it was not the case of either party that any domestic equipment at Jodhpur depot had been the subject-matter of sale under any of the sale notes. The arbitration clause in sale note 197 read with Ex. B could not cover those questions or disputes which arose under the conditions or special conditions of contract contained therein or in connection with that contract. The aforesaid dispute did not relate either to the general or special conditions in that contract, nor could it be regarded to have any connection with that contract by which only the vehicles and trailers in Jodhpur and other depots were sold. The decision of the Court below must, therefore, be sustained on the point.

Counter-claim VII was in respect of the value of certain articles lying in Brooklyan depot. These articles were alleged to have been taken on loan by the

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

appellants and it was stated that they had never been returned. The reply of the appellants was that they never removed any articles from the Brooklyn depot except the spare parts and bins and a few pieces of furniture which had been purchased by them. The Umpire held that certain articles were in fact handed over to the appellants on 27th November, 1947 which were not returned by then and that the value of these articles would be Rs. 6,044. He awarded that amount to the respondent. The Umpire agreed that the articles in question had not been handed over in connection with any sale note and, therefore, the arbitration clause did not apply but he held that since the parties had filed their statements of claims, the dispute had thus been submitted to his jurisdiction and all objections to jurisdiction should be deemed to have waived. As has been held before merely because pleadings have been field and no objection has been raised to the jurisdiction of the Umpire, that did not amount to an agreement within the meaning of section 2(a) of the Act. The Court below was justified in saying that inherent lack of jurisdiction could not be cured by a plea of waiver. On this point also the decision of the Court below is correct. This disposes of the cross-objections which were preferred by the respondent.

Coming to the question of jurisdiction of the Umpire to make an award in respect of certain other counter-claims, the first one requiring decision is counter-claim VI. This counter-claim related to Reverse Lend Lease vehicles about which it was alleged that 547 of them had not been removed immediately from the depot and that the appellants later on started resisting their removal by setting up a title in themselves. The respondent's representatives were able to remove 291 vehicles only out of 547. The

Umpire awarded to the respondent a sum of Rs. 8,96,000 on account of the non-delivery of these 256 vehicles. Although the question of jurisdiction of the Umpire was not raised before the Court below in respect of this counter-claim, Mr. Aggarwal has contended before me that if these vehicles did not form part of the transaction covered by sale note 197, then the Umpire had no jurisdiction to adjudicate upon the counter-claim relating to them. The dispute which had arisen with regard to these vehicles which has been discussed in claim VI(i) essentially related to sale note 197. The appellants claimed that these vehicles had been sold to them under sale note 197 as they formed a part of the USASS whereas the position taken up by the respondent was that they were outside that deal and were not included in the sale. This dispute, therefore, essentially arose in connection with the aforesaid sale note, with the result that Mr. Aggarwal's contention cannot be accepted.

The respondent claimed a sum of Rs. 10,000 as the price of one truck out of the 70 Dodge trucks alleged to have been sold to the Travancore State which formed the subject-matter of claim No. VII(i) The Umpire awarded this amount to the respondent. Mr. Aggarwal has addressed an argument similar to the one relating to counter-claim VI. For the same reasons his argument must be repelled.

As regards counter-claim XI and additional counter-claim II, Mr. Aggarwal assailed the decision of the Court below on the question of jurisdiction of the Umpire to decide the same only with regard to the lands forming part of the site R3A plant. Even before the Umpire it was contended that the question of the ownership of certain structures forming part of R3-A plant was the subject-matter of a civil action.

Allen Berry and Co., Pvt., Ltd. *v.* The Union of India

Grover, J.

Title suit No. 82/38 of 1954 (The Union of India v. Messrs Allen Berry & Co., Ltd. and Messrs Dalmia Jain Airways)—and, therefore, the Umpire had no jurisdiction to decide the counter-claim of the respondent with regard to the same. The Umpire has stated in the award that one of the questions for decision in the suit was whether the claimants were the owners of the three structures that were subject-matter of that suit. The Umpire considered that having regard to the provisions of sections 34 and 35 of the Act, his jurisdiction to decide the question of rents with respect to the assets forming part of R-3A plant was not barred. It was not denied before him that he had the jurisdiction relating to the claim for rents of land forming part of the said depot. The Court below held that merely because a suit had been filed with regard to three structures of R-3A plant out of 15 structures, the jurisdiction of the Umpire was not ousted. The civil suit was not in respect of the whole of the subject-matter which was before the Umpire and, therefore, section 35 of the Act had no application. Mr. Achhru Ram has pointed out that the subject-matter of reference was the rent of the entire plant whereas in the suit the declaration which had been sought related to three structures only and that the suit had been stayed by an order made on an application filed by the appellants under section 34 of the Act. These facts have not been controverted by Mr. Aggarwal. In *Shiva Jute Balding Limited* v. *Hindley and Company Limited* (25), it has been laid down that section 35 makes proceedings before the arbitrator invalid in the absence of an order under section 34 staying the legal action where the whole of the subject-matter of the reference is covered by any legal proceedings taken with respect to it. In other words, an arbitrator can continue the proceedings and make the

(25) A.I.R. 1959 S.C. 1353.

ʼard on the reference unless the whole of the subject-atter of the reference is covered by the legal proceed-gs which have been instituted. Indeed the language section 35 itself is plain and the view of the Court low is in no way erroneous on the point.

No other matter was urged before me by the arned counsel for the parties. In the result, the peal as well as the cross-objections fail and are dis-issed but in view of the nature of the points invol-d, the parties are left to bear their own costs curred in this Court.

B.R.T.

FULL BENCH

fore Mehar Singh, A. N. Grover and Shamsher Bahadur, JJ.

MEHARAJ KISHAN,—*Appellant*

versus

TARA SINGH AND OTHERS,—*Respondents*

Execution Second Appeal No. 1530 of 1961.

1963

Feb. 26th.

Punjab Pre-emption Act (I of 1913)—Section 11—osit made by pre-emptor under—Whether exempt from chment—Benefit of the section re. immunity of deposit n attachment—Whether can be waived by pre-emptor.

Held, per Full Bench (Grover and Shamsher Bahadur, Mehar Singh, J. Contra)—that section 11 of the Punjab -emption Act, 1913, was enacted for the benefits of a dee and a pre-emptor and no public policy or interest erved or promoted by the immunity from attachment ch extends to a pre-emptor's deposit. The privilege he benefit can certainly be waived by agreement of the ies.

Held, per Mehar Singh, J.—The protection of section 11 he Punjab Pre-emption Act, I of 1913, is available