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Bombay High Court

Case No: O.C.J. Appeal No. 70 of 1966 and Arbitration Petition No. 68 of 1964

Asia Publishing House		APPELLANT
	Vs	
John Wiley and Sons, Inc.		RESPONDENT

Date of Decision: Aug. 29, 1967

Acts Referred:

- Arbitration Act, 1940 - Section 35

Citation: (1969) 71 BOMLR 777

Hon'ble Judges: S.P. Kotval, C.J; Wagle, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

S.P. Kotval, C.J.
This is an appeal against an order passed in Chambers by Mr. Justice K. K. Desai on October 10, 1966, dismissing a petition filed by the appellants to set aside an award made on May 4, 1966, by Mr. P. P. Khambatta, a senior advocate of this Court.

2. The circumstances under which the appeal arises may be briefly stated as follows; The appellants are the Asia Publishing House and P. S. Jayasinghe. Appellant No. 1 is merely the trade name of appellant No. 2 who is the sole proprietor of the business of Asia Publishing House. The respondents John Wiley & Sons, Inc. are a corporation registered in the State of New York in the United States of America. They carry on the business of publishers and they have appeared throughout by a constituted attorney in all these proceedings.

3. On October 1, 1956, the appellants and the respondents entered into an agreement exh. A whereby the appellants were appointed publishers of certain books or titles as they have been referred to in the agreement within the territory of India. Asia have been referred to in the agreement as the "Publishers" and Wileys as the "Proprietors". We shall presently advert to the terms of that agreement. Pursuant to that agreement permission was granted by Wileys to Asia to print and

publish 39 books or titles and as regards the publication of those books or titles there is no dispute before this Court. On March 1, 1963, however, Wileys served a notice upon Asia formally terminating the agreement dated October 1, l956, as from March 31, 1963, in respect of books which had not till then been published under the said agreement. By the notice Asia were informed that they could continue to sell the works already reprinted by them and they could continue to account for the sales as before under the agreement. This was further made clear in a letter dated February 12, 1964, written by the attorneys of the respondents to the attorneys of the appellants.

4. Consequent upon the termination of the agreement Wileys granted similar rights to another publisher Toppan & Co. of Japan which act also the appellants had alleged was illegal and in breach of the agreement between the parties. Clause 15 of the agreement provided that in case of any difference between the publishers and the proprietors relating to the agreement or any other matter arising therefrom or incidental thereto the same "shall be submitted for the arbitration of two persons (one to be named by each of the parties hereto) or their umpire and the publishers and the proprietors shall be bound by the decision of the arbitration award". This clause was implemented by the parties when the termination of the agreement was disputed on behalf of the appellants and a reference was made in the first instance to the arbitration of two persons Mr. S. N. Desai and Mr. N, R. Modi. It appears that these two arbitrators were, though not entirely unversed in law, unable to decide certain questions of law which had been raised before them and they, therefore, had stated a case and formulated certain questions which they referred to the Court. The stated case came up for hearing before Mr. Justice Mody and at the hearing before the learned Judge a further agreement of reference to arbitration was entered into. That agreement at exh. C is dated March 23, 1965 and it is out of that agreement that this appeal has arisen. In the present agreement of reference to arbitration dated March 23, 1965, first reference to arbitration has been mentioned and it has been recited that by an order passed by this Court on March 23, 1965, the said arbitration has been revoked. A fresh arbitrator has been appointed namely Mr. P. P. Khambatta, Advocate, as the sole arbitrator "to determine the dispute between the parties". The terms of reference are stated in para. 2 of this agreement dated March 23, 1965, which we shall presently refer to separately. On May 4, 1966, Mr. Khambatta after several hearings before him delivered his award merely answering the questions referred. By the award the arbitrator held that the appellants were liable to pay to Wileys a sum. of Rs. 1,49,679.48 and each party was ordered to bear its own costs.

5. On August 9, 1966, Asia filed a petition praying inter alia, that the award dated May 4, 1966, should be set aside. The principal contentions raised on behalf of the appellants were two. Firstly that the arbitrator had intentionally misinterpreted the law and that in any case he had acted without jurisdiction in so far as he came to a decision that Wileys were under the agreement dated October 1, 1956, entitled to

give Asia the notice dated March 1, 1963 and in holding that the said notice itself was not illegal. The ground upon which it was contended that the arbitrator exceeded his jurisdiction was that there had been a patent misconstruction of the terms of the agreement which amounted to an error of law and as a result there was a decision in law without jurisdiction. An affidavit in reply to the petition was filed by "Wileys on August 31, 1966 and a rejoinder by Asia on September 3, 1966 and ultimately the order in chamber dated October 10, 1966, was made by Mr. Justice K. K. Desai dismissing the petition. No doubt the order of the learned single Judge merely gives the decision and not the reasons for the decision which is in accord with the practice followed on the Original Side of this Court. That, however, has entailed somewhat lengthy arguments in the appeal before us.

6. We shall presently refer to the principal points raised in the appeal but before we do so it is necessary to advert to the findings of the Arbitrator. The points of reference are to be found in the agreement of reference to arbitration dated March 23, 1965. We set them forth here at this stage, with the answers which were given:

Question-.-(i) Whether Wileys were under the said agreement dated 1st October 1956 and in law entitled to give Asia the notice dated 1st March 1963.

Answer:-Yes.

Question:-(ii) Whether the said Notice was illegal and/or in breach of the Agreement and if so, to what extent.

Answer:-No.

Question:-(iii) Whether Asia is entitled to compensation and/or any other relief in respect thereof and if so, what.

Answer:-No.

Question-.-(iv) Whether the marketing in the Republic of India by Toppan & Co. after 31st March 1963 of reprints of titles originally published by Wileys amounted to a breach of the agreement dated 1st October 1956 and if so, whether Asia is entitled to any relief in respect of the alleged breach by way of compensation and/or otherwise upto 23rd March 1965 and if so, what.

Answer:-No.

Question-.-(v) Whether the refusal to permit the reprinting of books in India of John Wiley & Sons Inc. by Asia Publishing House was justified. If not, what relief is Asia entitled to?

Answer:-Yes.

Question:-(vi) Whether Asia is liable to pay to Wileys the sum of $ 38,440.66 less Income Tax paid or payable thereon or such other amount as the arbitrator may determine and if so, whether an award for the said sum and interest thereon should

be made in favour of Wileys.

Answer:-Asia Publishing House is liable to pay to John Wiley & Sons Inc. a sum of Rs. 1,49,679.48.

Question:-(vii) That an account be taken between Wileys and Asia of the Royalty payable by Asia to Wileys in respect of the sales of reprinted books by Asia from 1st July 1963 upto 31st December 1964 less Income Tax payable thereon and whether an Award should be made in favour of Wileys against Asia for the said amount and interest thereon.

Question:-(viii) What amount as a result of the determination of the above questions should be awarded as being payable by one party to the other.

Answer:-"I award that Asia Publishing House do pay to John Wiley & Sons Inc. the aforesaid sum of Rs. 1,49,679.48 (Rupees one lac forty nine thousand six hundred and seventy nine and forty eight paise only).

7. There was some dispute as to the manner of reading the questions submitted for arbitration and the replies given. Mr. Sen on behalf of the appellants urged that if one reads the award and the bare answers given, it would be impossible to understand the answers or to make any sense out of them and that, therefore, these answers must necessarily be read in conjunction with the points in dispute submitted to the arbitrator. We agree with counsel in that suggestion. We cannot make any sense out of the award if read in isolation. We have therefore set forth above the answer against each question.

8. The award has been challenged before us upon two principal grounds. It has been first of all pointed out that the arbitrator has completely misunderstood and patently misconstrued the terms of the reprint agreement and in so far as he. has so misconstrued the terms: of the agreement, there is a clear error of law which is apparent on the face of the award. Secondly, that there is an error which goes to the root of the jurisdiction of the arbitrator, and the award is liable to be set aside. So far as the provisions of the Indian Arbitration Act are concerned, Mr. Sen stated that he could only bring the case within the ambit of Clause (c) of Section 30, "that an award has been improperly procured or is otherwise invalid". He does not rely upon the words "improperly procured", but according to him the award clearly fell within the words "otherwise invalid".

9. In elaboration of the arguments we have mentioned above, Mr. Sen urged that a mere perusal of the terms of the reprint agreement, would show that what was granted or assigned by Wileys to Asia was one of three things: (a) either an assignment of copy-right itself or (b) a partial assignment of the copy-right or (c) at any rate an interest in the copy-right at least. He urged these grounds in the alternative and argued that in either of the three cases the agreement was not revocable and would render the notice given on March 1, 1963, invalid and illegal.

The counter-argument has been that a mere perusal of the terms of the reprint agreement would show that no right or interest whatever in the copy-right was ever granted by Wileys to Asia. All that was granted under any of the terms of the agreement was a bare licence to print and publish and that though it was a sole and exclusive licence it was nonetheless a bare licence and could not amount to the grant of any right, whole or partial, or any interest in the copy-right. Secondly, it was urged that the award made by the arbitrator upon the terms of reference which are clear was final and conclusive between the parties and the appellants were not entitled to question the decision of the arbitrator. In so far as it was urged that there has been an error in the construction of the contract giving rise to an error of law which affects the jurisdiction of the arbitrator, the reply was that in the first place there is no error of construction but alternatively assuming that there is, the error was not one which affected the jurisdiction of the arbitrator to decide what he did. It was a mere error in accepting one of the two possible constructions. Therefore, even on the assumption that such an error has taken place, the award was not liable to be set aside. Thirdly, it was urged on behalf of the respondents that if one scrutinises carefully the questions referred for decision by the arbitrator they were all questions of law and since questions of law were specifically referred as such for decision by the arbitrator, any decision given by him on such questions cannot be challenged even though the arbitrator may have committed an error of law. In this respect a distinction was sought to be drawn between questions of fact and questions of law and it was urged that in so far as any question of fact may have been referred to the arbitrator any decision which he may give upon that question would be final and binding upon the parties, but in so far as any question of law is referred, if it is specifically referred as such, then and then only will the decision of the arbitrator be beyond dispute even though the arbitrator may have decided the question of law wrongly. If, on the other hand, a question of law arose only in an ancillary manner in the course of the decision of the points referred, then if the arbitrator went wrong upon such a question, his decision may be open to be challenged. In either case it was urged that he had not committed any error in law and since questions of law had specifically been referred to him as such, whatever decision he has given on those questions would be final and binding and not open to be challenged.

10. These arguments give rise to the following points for determination in this appeal.

(1) Is there an error made by the arbitrator in the construction of any of the terms of the reprint agreement? If so, is the error apparent on the face of the award. If there is an error of law apparent on the face of the award, was that question specifically referred as such for decision by the arbitrator, or was it merely an error of law made by the arbitrator in the course of deciding any question in dispute but not specifically referred?

(2) Is the award liable to be set aside on the ground that there is such an error apparent on the face of the award as would deprive the arbitrator of jurisdiction to so decide?

(3) Can this award be set aside on one or more of the said grounds? Now, it is patent from the points argued that the whole question is one of construction of the reprint agreement dated October 1, 1956 and upon its true construction would arise the other question whether the error, if any, thus committed is such an error of law as affects the jurisdiction of the arbitrator. It is, therefore, necessary first of all to turn to the terms of the reprint agreement.

11. Curiously enough the document bears no title. In the terms of reference and in the agreement dated March 23, 1965, however, it has been throughout referred to as "the Reprint or Publishing Agreement". The reprint agreement dated October 1, 1956, is in the following terms:

Memorandum of Agreement made this first day of October, 1956, Between John Wiley & Sons, Inc., 440 Fourth Avenue, New York 16, New York, U.S.A. (hereinafter called the Proprietors) of the one part and Asia Publishing House, Contractor Building, Nicol Road, Ballard Estate, Bombay 1, India, (hereinafter called the Publishers) of the other part whereby it is mutually agreed as follows representing the Proprietors'' publications (hereinafter called the said works).

1. The Proprietors hereby grant to the Publishers the sole and exclusive license to print and publish the said works in the English language throughout the Republic of India subject to the terms and conditions following.

2. The Publishers shall inform the Proprietors the titles of the books they are interested in publishing in the Publishers'' territory. No printing work shall be carried out by the Publishers until they obtain permission in writing from the Proprietors to do so.

3. The Publishers shall pay the Proprietors a royalty of 15% (fifteen per cent) of the Indian published price on every copy sold, of the said works.

4. No royalty shall be paid by the Publishers to the Proprietors on complimentary copies of the said works. The Publishers shall submit to the Proprietors the names and addresses of the parties to whom complimentary copies have been sent.

5. Accounts of the sales of the said works shall be made up to the 30th day of June and the 31st day of December in each year and delivered and settled within three months thereafter.

6. Three gratis copies of the said works shall be sent to the Proprietors on publication.

7. The Proprietors agree to the revision of the text of the said works by the Publishers in order to suit the syllabus requirements of the Indian educational

institutions. The Publishers shall prior to publication of the said works in India submit such revisions to the Proprietors for their approval,

8. The Publishers shall take all reasonable precautions to protect the copyright of the said works in India, and shall print on the back of the title page of every copy sold in an Indian edition a notice to say that the said work is copyrighted and published under license from John Wiley and Sons Inc.

9. The Publishers undertake that the narne(s) of the Author(s) of the said works shall appear in customary form in due prominence on the title page and on the binding of every copy produced and on all advertisements and publicity matter concerning the said works issued by the Publishers or their agents. It is also understood that the words Special Indian Edition will appear on the front cover of each book published under the agreement.

10. The license herein granted is assigned to the above-named Publishers solely and shall only be transferred by them with the written consent of the Proprietors.

11. Should the Publishers be declared bankrupt or should they violate any of the terms of this Agreement and not rectify such violations within six months of having received written notice from the proprietors to do so then all rights to publish or sell the said works in the English language shall revert to the Proprietors who shall be at liberty to arrange for the sale of the said works to another publisher.

12. The Proprietors shall indemnify the Publishers from and against all proceedings and expenses whatsoever in consequence of the publication in said works of any pirated, libellous, or other unlawful matter, which originally appeared in the Proprietors'' edition of the said works.

13. The Publishers shall be free to make arrangements for the sale of any translations of the said works into Indian languages or of any serial or magazine rights, or of any broadcasting rights in India only. The Publishers shall pay to the Proprietors 75% (seventy-five per cent) of the net sums realized by them as a result of such sales.

14. The Publishers agree to use their best efforts in promoting the sale of the said works in India, Pakistan, Ceylon, and Burma, and shall keep the proprietors informed of such activities in each of these countries,

15. In case any difference shall arise between the Publishers and the Proprietors relating to this Agreement or any other matter arising therefrom or incidental thereto the same shall be ''submitted for the arbitration of two persons (one to be named by each of the parties hereto) or their Umpire and the Publishers and the Proprietors shall be bound by the decision of the Arbitration Award.

John Wiley & Sons Inc.

For and on behalf of the Proprietors, sd. Warren Sullivan

Vice President.
Asia Publishing House

For and on behalf of the Publishers, sd. P.S. Jayasinghe.

12. The principal emphasis on behalf of the appellants is upon clause 1 of this reprint agreement. It has been urged that the publishers have been granted "the sole and exclusive license to print and .publish." By the use of these words it was urged, the copy-right itself was assigned or at any rate an interest in the copyright. Secondly, it is pointed out that the choice by clause 2 is left to the publishers to select the titles of the books which they are interested in publishing in the territory mentioned in the agreement and if the choice is once exercised the proprietors namely Wileys have no option, to refuse. By clause 3 a uniform rate of 15 per cent. ,on the published price of every copy sold is payable by the publishers to the proprietors excepting on complimentary copies as mentioned in clause 4. In clause 5 provision is made for the accounts of the sales which have to be rendered six monthly and settled within three months thereafter. By clause 7 even the revision of the test of the said works is left to the Publishers and the proprietors have given an undertaking to agree to the revision of the text save and except that the publishers prior to the publication have to submit such revisions to the proprietors. Clause 8, it was urged, is of great importance ''because it provides for the protection of the copyright of the said works in India and the responsibility for the protection of the copyright in India is placed upon the publishers. It was urged that such a responsibility must necessarily be that of the proprietors and yet, since the publishers are saddled with that responsibility, it is a clear indication that the proprietory right in the copyright or some interest therein had been transferred or assigned to the publishers. Clauses 10, 11 and 13 were strongly emphasised by Mr. Sen, particularly clause 10 which uses the words '"' The license herein granted is assigned... and shall only be transferred by them (the appellants) with the written consent of the proprietors". Mr. Sen urged that though no doubt the word used is "license", in the conferment of the right the words used are "granted, assigned'"' and that can only indicate the assignment or transfer of either the entire copyright or some similar right or interest in the copyright. "Assignment" he urged is incomprehensible in the context of a license and is properly attributable only to the transference of the copyright wholly or in part. As regards clause 11, it was urged that that is the only clause in the entire ; agreement which deals with the subject of termination of the contract. It provides the only contingency upon which the agreement between the parties could be determined or terminated and therefore the parties, are necessarily limited only to that mode of determination and none other. He relied in this respect upon the decision of the Supreme Court in Associated Hotels of India v. E, N. KapoorA.I.R [1939] . S.C. 1262. If that construction which he placed upon clause 11 be the true construction, then it must necessarily follow that the agreement cannot be terminated in any other mode, least of all by a notice as has been given in the present case. If this contention alone were to succeed, urged

Mr. Sen, then the award of the arbitrator on the face of it would be patently bad for a gross error of law and should be set aside on that short ground.

13. As regards clause 13 it was urged that the proprietors gave to the publishers the other rights in the said works namely of translations of the said works or serialisation or magazine rights and rights of broadcasting and taken together it virtually amounts to this that the proprietors parted with practically every indicia of a copyright in favour of the publishers with the result that there was no title of a copyright left with the proprietors if the total provisions of the reprint agreement are taken into account.

14. Before we turn to consider these arguments on the question of construction of the terms of the reprint agreement, it is necessary to remind ourselves that we are not concerned in the present appeal directly with any question of construction at all. The question of construction, if it at all arises in the present appeal, arises in an ancillary manner because of the argument that the award ought to be set aside on the ground of a patent error of law which is apparent on the face of the award and which affects the jurisdiction of the arbitrator to come to such a decision at all. We must therefore make it clear at this stage that whatever we may observe as regards the construction of any of the terms of the agreement is not intended to be a decision as to the proper construction but merely in order to consider whether such an error has been committed in the construction as would vitiate the award.

15. [His Lordship then proceeded to consider the terms of the award.]

16. Looking at it from any point of view and giving the terms of the agreement the most serious consideration it seems to us impossible to hold upon a perusal of its terms that it gave any right or interest to Asia in the copyright itself whether in whole or in part. On the other hand, all that it granted was a license.

17. We may now dispose of some legal contentions which Mr. Sen urged on behalf of the appellants.

18. Relying upon clause 10, he pointed out that that clause prohibits the transfer by the publishers of "the license herein granted" and that having regard to the decision of the Supreme Court in Associated Hotels of India v. R. N. Kapoor, "The right of the respondent to transfer his interest under the document, although with the consent of the appellants, is destructive of any theory of licence". This remark of the Supreme Court is to be found in para. 27 at page 1270, column 1. No doubt, torn from its context and read in isolation, the remark does convey the meaning which Mr. Sen would have it convey, but, if the entire context is read, it cannot be used in the manner in which counsel would like it to be used. A few sentences before the remark was made, the Supreme Court held "Judged by the said tests, it is not possible to hold that the document is one of licence. Certainly it does not confer only a bare personal privilege on the respondent to make use of the rooms. It puts him in exclusive possession of them, untrammelled by the control and free from the

directions of the appellants. The covenants are those that are usually found or expected to be included in a lease deed". Then follows the remark quoted and the Supreme Court further observed "The solitary circumstance that the rooms let out in the present case or situated in a building wherein a hotel is run cannot make any difference in the character of the holding". Therefore, those remarks were made in the context of the total circumstances of that case and in the light of the preceding finding which the Supreme Court gave, and that finding was that the document was one of lease and not of licence. "We do not think that those remarks can apply here,

19. Next it was contended that the clause 11 of the reprint agreement itself provides for the mode in which that agreement can be determined and therefore the parties are limited to determine the agreement in that manner only and not in any other manner, particularly by giving a notice as has been done in the present case. No doubt clause 11 says "Should the publishers be declared bankrupt or should they violate any of the terms of this agreement and not rectify such violations within six months of having received written notice from the proprietors to do so, then all rights to publish or sell the said works in the English language shall revert to the proprietors". The clause lays down that in a particular contingency the agreement between the parties would be determined. The question is whether having regard to the terms of the contract and its nature it was intended that the question of determination of the contract should be limited to only that mode and none other. Now, in this respect Mr. Sen relied on the decision of the English Court of Appeal in Martin-Baker Aircraft Co. Ld. v. Canadian Flight Equipment Ld. Same v. Murison [1955] 2 Q.B. 556. In that case the well-known manufacturers of aircraft, air-craft ejection seats and allied products, Messrs. Martin-Baker Aircraft Co. Ltd. had agreed to permit a Canadian company to manufacture, sell and exploit their products on the American Continent. The agreement contained provisions under which the plaintiffs were to supply the Canadian company with the, "know-how" of the manufacture of their products, for the exchange of information by either side with regard to improvements, for the training of technicians and for the inspection by the plaintiffs of the manufacturing processes of the Canadian company. Royalty was to be paid every six months and a right was given to the plaintiffs to inspect the books, vouchers and records of the Canadian company, but the agreement contained no provision for determination. There was a similar agreement with one of the directors of the Canadian company to grant him the sole selling agency of all the products of the plaintiff company on the North American Continent. In the latter agreement provision was made whereby without prejudice to any other remedy which either party might have against the other for breach or non-observance of the agreement that "either party shall be entitled summarily to determine this agreement" if the other party failed to remedy a breach within 14 days of notice requiring it to do so and if the other party went or was writ into liquidation or made any arrangement with its creditors generally,

20. It will be noticed that the agreement with the director was almost in identical terms with clause 11 of the reprint agreement in this case. The plaintiffs desired to determine both the agreements and the Canadian company and their director contended that they were terminable only by mutual consent. Two propositions were laid down in that case and they were firstly that there is no presumption in favour of permanence of an agreement in the case of a commercial contract. Secondly, that if a contract involved mutual trust and confidence in its fulfilment, normally the Courts would not interpret its terms to imply permanency. The question whether or not such a contract was determinable depended solely upon the true construction of the contract and should be considered from the common law approach which, where the contract left the matter open, proceeded upon the basis of reasonableness.

21. Mr. Sen relied upon a passage from the judgment of Mr. Justice McNair where the learned Judge after referring to In re Berker Sportcraft, Limited''s Agreements (1947) 177 L T 420 observed (p. 578):

...The agreement there, although different in certain terms from the present agreement, has certain features very '' much in common. In that case (as in the present) the licensee was to make use of the designs of the licensor, and in both cases, it appears to me, the reputation of the licensor might be affected by the goods manufactured by the licensee. In the case of that agreement there was an express provision for determination in certain specified events, namely, in the event of the commission or remuneration under the agreement not reaching a certain specified sum; and it was because of that express- provision in the agreement that Jenkins J. took the view that it was not determinable on notice.

Mr. Sen urged that in the present agreement also there is an express provision for determination in certain specified events and therefore in view of that express provision it should be held that the present agreement was not determinable on notice.

22. In the subsequent paragraphs of his judgment Mr. Justice MeNair answered the point. He first of all referred to the fact that the contract in that case was a commercial contract and quoted with approval the remarks of Mr. Justice Russell in referring to the argument based upon Lineally Bailway and Dock Co. v. London and North Western Railway Co. (1875) L.R. 7 H.L. 550 in Credit on Gas Co. v. Credit on Urban Council. [1928] 1 Ch. 174..

...The contract was a commercial contract. The gas company was merely getting a customer for its gas. The remarks of James I.J.(L.R.8 Ch. 942 at 949) and of Lord Selborne at (p. 567) do not point to that class of contract being perpetual. It is true that the character of perpetuity attaches to the legal personality of each of the contracting parties, one being a statutory company and the other a public authority; but it is impossible in these days when limited liability is the general rule to say that

for that reason a contract, indefinite in point of time, by which a gas company secured a customer on particular terms, was intended to be permanent.

Mr. Justice MeNair further observed (p. 579) :

...That reinforces my view that the doctrine has no real application to the case of the ordinary mercantile or commercial contract. I accept also the view which was strongly urged by Mr. Geoffrey Cross that, even if the doctrine laid down by Lord Selborne is to be applied in full, there is a wide class of cases-especially those involving mutual trust and confidence-which falls within the exception.

23. In the present case it is clear that the contract is no more than a commercial contract entered into between two parties one of whom is an individual and the other a well-known American publisher. If it were a mere question of looking at the position of the parties, one should have thought that the fact that one of the parties was an individual would also indicate that the contract was not to be permanent. But there are other and clearer indications in the terms of the contract itself.

24. Clause 1 of the reprint agreement in general terms grants to the publishers the sole and exclusive licence to print and publish the said works in the English language throughout the Republic of India, but "subject to the terms and conditions following". Therefore, unless and until "the terms and conditions following" are put into effect the licence granted by clause 1 is useless, for it cannot be implemented in practice. It can have no utility unless and until the condition laid down by clause 2 comes into operation namely that the publishers shall first inform the proprietors the titles of the books they were interested in publishing in the publishers'' territory and obtain the .permission in writing from the proprietors to do so. Clause 2 expressly says "until permission is granted no printing work shall be carried out". What is the true effect of the first two clauses ? The effect as we see it is that the publishers cannot get any practical benefit out of the contract unless the proprietors gave them permission in writing to publish a book or a title. Until that permission is granted the reprint agreement is worth nothing to the publishers, but on the other hand, so far as the proprietors were concerned, they incurred a serious disability, for after the making of the reprint agreement they had entered into the covenant granting to the publishers the sole and exclusive right to print and publish the said works throughout the Republic of India. Therefore, so far as the proprietors were concerned, they could not have published any of their works within the territory of India.

The contract, thus, imposed an obligation on the proprietors but none on the publishers until clause 2 came into operation and permission was granted to publish one or more books or titles. In Martin-Baker Aircraft Company''s case Mr. Justice McNair emphasised that such a stipulation was an element which pointed strongly in favour of determinability. At page 580 this is how the learned Judge put the point:

...The first thing that one observes is that it is a mere licence, or the operative part of that agreement is a mere licence, to the Canadian company to manufacture, sell and exploit; and accordingly, on the principles which I have adopted, prima facie that licence is terminable. It does not impose any obligation upon the Canadian company to manufacture, sell or exploit any of the Martin-Baker products at all, though it does bar Martin-Baker from entering into any agreement with another party on the American continent to manufacture, sell or exploit if the Canadian company do nothing at all. That alone appears to me to be a consideration which points quite plainly to the view that Martin-Baker cannot have intended that they were to have their hands entirely tied by what may be wholly passive action by the Canadian company. That is one element in this agreement which points strongly in my view to determinability.

25. Next the point which we have already referred to as to the bringing about a contract of mutual trust and confidence was thus put by the learned Judge (p. 580):

Furthermore, I think it is plain throughout this agreement that there are terms which involve the highest degree of mutual confidence and trust between the two contracting parties, and therefore that it is an agreement which even on the most limited application of Lord Selborne''s doctrine would not be permanent, but would be terminable.

A mere perusal of clauses 5, 8, 9, 12, 13 and 14 would show that the very basis of this agreement was mutual trust and confidence and were that to be destroyed the reprint agreement would become impossible of implementation. That therefore is a strong element in favour of its determinability. The rest of the judgment in the Martin-Baker Aircraft Co.''s case deals with the questions of notice, but that is not a question which arises before us, for it has nowhere been challenged that if notice could be given then the notice in the present case was not reasonable. Thus even having regard to the provisions of clause 11 of the reprint agreement which provides for a specific mode of determination of the agreement, we do not think that in this case or for that reason alone, it must necessarily be held that the reprint agreement was clearly not determinable. On the other hand, we have shown that upon the terms and conditions of the agreement and its nature it could be held that it was determinable. We must at this stage again emphasize-even at the cost of some repetition-that in this appeal we are not called upon, ourselves, to decide whether the agreement was determinable but to see only whether the Arbitrator who has decided that it is determinable by notice and validly determined went wrong so radically that his award must be set aside.

26. The third ground upon which Mr. Sen urged that the arbitrator went wrong was that in giving his answer to question No. 1 in categorical terms as "Yes" he has exceeded his jurisdiction. The effect of this part of the award is to put an end to the entire reprint agreement, for the answer given is to the question "Whether Wileys were under the said Agreement dated 1st October 1956 and in law entitled to give

Asia the notice dated 1st March 1963" and the notice dated 1st March 1963 puts an end to the entire contract. The notice says "We formally terminate the said Memorandum of Agreement of October 1, 1956, as from 31st March 1963". Counsel urged that here there was a patent error made by the arbitrator in that he overlooked the important fact that at least in regard to the 39 titles in regard to which permission to publish under clause 2 had already been granted the contract survived. Therefore, the arbitrator could not hold that the contract as a whole was at an end.

27. We do not think that the construction placed upon the award by counsel is an acceptable one. As a, matter of fact there was not, and there never was, any dispute, before the arbitrator as regards the 39 titles regarding which permission had already been granted by Wileys to Asia to publish, them. Indeed the notice dated March 1, 1963, while terminating the reprint agreement itself excepts the 39 titles by the use of the words "" in respect of books which have not been published by you under the said reprint agreement". The position is further made clear by the last sentence of the notice "Notwithstanding such termination, you shall have the right to continue to sell the works already reprinted by you and shall account for and pay us the royalties accruing thereon as well as the royalties now due and owing by you to us"". If, as counsel himself urged, the award is to be, read in the context of the agreement and the notice, it is clear that the notice raised no issue as regards the 39 books or titles regarding which permission had already been granted to publish them. That question, therefore, was never before the arbitrator and the award does not deal with those 39 titles. There is, therefore, no error made by the arbitrator in this respect much less one which is apparent on the face of the award.

28. Then we turn to the principal contention on this part of the case on behalf of the appellant and the contention was put by Mr. Sen as follows:

29. A copyright he pointed out is defined in Section 1, Sub-section (2) of the Copyright Act of 1911 as meaning

...the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right, -.

(a) to produce, reproduce, perform, or publish any translation of the work;

(b) ...

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise;

(d) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered, and to authorise any such acts

as aforesaid.

Therefore a copyright means the sole right to produce or reproduce any work or any substantial part thereof in any material form and included in that right is the sole right to do one or more of the things described. He pointed out that that is precisely what clause 1 of the reprint agreement in the present case gives to the publishers and clause 1 read in the context of the other clauses which form the terms and conditions thereof, reinforces the conclusion that the sole and absolute copyright in the books was transferred or assigned to the publishers. Therefore there has been a patent misreading of the reprint agreement by the arbitrator.

30. Now we have already dealt with the several clauses of the agreement and we have there pointed out that it is no doubt stated in clause 1 that the sole and exclusive licence to print and publish the said work is granted to the publishers but we have indicated that even so what is granted is termed a licence and not a copyright. "We have also pointed out that the terms of clause 2 of the agreement materially limit such right as has been conferred by clause 1 and clause 2 curtails in a drastic manner the right conferred by clause 1. Indeed clause 2 gives the sole and absolute discretion to the proprietors to grant or not to grant permission to publish any book or title. With that untrammelled and unlimited discretion vested in the proprietors to grant or not to grant permission to publish, the amplitude of the license indicated in clause 1 is almost completely circumscribed and practically rendered ineffective until permission is granted. It amounts to nothing more than a bare licence.

31. But Mr. Sen has relied upon a number of authorities which it is necessary now to consider. The first of this catena of cases is British Actors Film Company v. Glover [1918] 1 K.B. 299. In that case by an agreement dated April 30, 1917, the owners of a copyright in a dramatic and musical work agreed to let to the defendant the right of professionally performing the work in the provinces of the United Kingdom, reserving to themselves full liberty to permit amateur performances. While that agreement was in force the proprietors in consideration of certain payments and royalties granted a licence for five years to the plaintiffs to produce the work in moving picture films and to lease the films for exhibition in the United Kingdom and elsewhere. They also agreed that the plaintiffs should have the right while showing the films to render instrumentally, but not vocally, any portions of the music of the work. The plaintiffs produced a film of the work and when they sought to exhibit it the defendant published in several periodical papers that the entire provincial rights in the work and in the music in connection with any stage performance or moving picture display belonged to him. That affected the plaintiffs and resulted in the suit being filed. It was held in that case that there had been a partial assignment of the copyright to the defendant and that he had become the owner of the particular right mentioned in his agreement and was entitled to take steps to prevent any infringement of that right by the plaintiffs in performing the music of the work.

32. Counsel for the appellants strongly relied upon that decision to urge that in the present case also, by analogy, it must be held that the copyright had been assigned or at least partially assigned. A mere glance however at the terms of the contract in that case shows that it was in material particulars different from the terms of the reprint agreement in the present case. In the first place, in the opening clause of the agreement in that case it was stated "The said Joseph "Williams Ltd. agree to let and the said James M. Government agrees to hire the right of performing the comic operates Cloches de Corneville'' in the provinces of the United Kingdom on the following terms and conditions:" Therefore, at the inception the parties made it clear that it was a letting agreement-an agreement to hire the right to perform. Clearly the proprietary rights were let out. That is something different from saying that the proprietor grants "the sole and exclusive licence to print and publish". Secondly in that case by clause 2 of that agreement upon the signing of the agreement Glover had the option of "booking a provincial tour of the said opera, the provincial rights of the said opera being reserved for him until September 1, 1917, on or before which date he shall give notice in writing should he elect to exercise such option in which case the 25% so paid by him. shall be credited to him in payment of the first fees payable in respect of such tour..," That term showed that the copyright at least partially must have been assigned, otherwise Glover could not on the strength of that agreement book a provincial tour of the said opera. Thirdly, in that case Glover guaranteed a minimum twenty weeks'' performance in each and every year during the continuance of that agreement. (See clause 3). In clause 6 it was provided that the agreement extended to "the provincial professional performances of the said opera". All these terms were clearly indicative of'' a partial assignment of the copyright itself. Further, in that case when the agreement was made between the plaintiffs and the proprietors it was on the other hand provided by clause 1 that "The said licensors hereby grant to the said licensees a licence to produce the said work in moving picture films and to lease the said films for exhibition in the United Kingdom.. .." Clause 4 provided that the said licensees shall be at liberty should they wish to do so to transfer the benefits of that agreement. In deciding which of the two contracts made by the proprietors was to prevail, Mr. Justice Lush referred to the expression used in the plaintiffs'' contract "licence" and observed (p. 306):

...A licence in the strict sense is, as I said during the argument, nothing but a permission which would carry with it immunity from proceedings to those who act upon the permission. It is really a dispensation and nothing more than a dispensation.

In the case of Heap v. Hartley (1880) 42 Ch. D. 461, Cotton L.J. referring to the expression "licence" and what that term carried, said this (p. 468) :

...That is pointedly put in the judgment of Lord Hatherley, then Vice-Chancellor, in this way:-

the Lord Justice is referring to a case of Newly v. Harrison (1861) 1 J. & H. 393-

...With regard to the word ''license,'' there is some little ambiguity. It is, however, well defined in the case of Muskett v Hill (1889) 5 B. N.C. 694 and I prefer stating it in the language there cited by Chief Justice Tindal to giving my own. It is thus stated:-''A dispensation or license properly passes no interest, but only makes an action lawful which without it had been unlawful; as a license to go beyond the seas, to hunt in a man''s park, to come into his house, are only actions which, without license, had been unlawful; but a license to hunt in a man''s park and carry away the deer killed to his own use, to cut down a tree in a man''s ground and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down; but as to carrying away the deer killed and the tree cut down, they are grants.

The learned Judge also referred to the remark of Buckley L.J. in Hurst v. Picture Theatres, Limited [1915] 1 K. B. 1:

...If there be a licence with an agreement not to revoke the licence, that if given for value, is an enforceable right.

Then the learned Judge went on to hold (p. 307) :

...In truth Section 5 of the Copyright Act, 1911, does not, in my opinion, refer to a mere licence in the strict sense, that is, to a permission to do an act, and a dispensation if it is done. The law with regard to a licence in that sense is not peculiar to the law of copyright; the consequences of a mere dispensation are the same whatever the right may be which the person entitled to it permits another to exercise. Sect. 5 of the Copyright Act does not refer to that kind of licence; it classifies the rights of a person deriving title from the owner of a copyright into complete assignments, partial assignments, and grants of an interest, which means a proprietary interest in the particular right which is the subject-matter of the agreement, with a licence to exercise it; and the first question that I have to decide, it being of course clear that the defendant did not obtain a complete assignment of all the owner''s right, is which of the two latter rights he acquired under his agreement; was there a partial assignment, or was there a grant of an interest in the right, with a licence to exercise it? If the latter, I think that I shall further have to consider what the nature of the defendant''s right is, whether he would only have a claim on the contract for damages against his licensors, or whether be could protect his interest by injunction or otherwise.
and the learned Judge though with some doubt came to the conclusion that there was a partial assignment of the copyright to the defendant in that case.

33. We have already referred to the terms of the agreement between the owners in that case Messrs. Joseph "Williams, Limited and the defendant Glover and pointed out the peculiar terms of that agreement which indicated a partial assignment of the copyright or an interest in the copyright. None of these terms are to be found in the agreement before us. Certainly there is no suggestion that there was any hiring or letting here of any right whatever. On the other hand, there was no clause in the

contract in that case such as we have here in clause 2 which as we have said leaves it to the absolute and untrammelled discretion of the proprietors to grant or not to grant permission to publish a book or title. That in our opinion is plenary so far as the contract before us is concerned and clinches the issue whether there was a partial assignment of the copyright or interest therein. We will turn to the question whether there arc any other special considerations for holding that an interest in the copyright was assigned, a little later.

34. The other case relied upon was Massager v. British Broadcasting Co. [1929] A. C. 151. In this case the composer of the music of a French opera granted to the proprietors of the theatre called in the contract "the licensee" the sole and exclusive right of representing the play in the United Kingdom, America, and the British Colonies and Dominions, Lord Hailsham notices at page 154 as regards that clause

...I think counsel for the appellant conceded that tile language of that clause taken by itself would be wide enough to confer upon Mr. George Edwardes the absolute performing rights of the play within the area mentioned in the clause, but it was contended that that clause, when read with the recital, to which I have called attention, and with the subsequent clauses in the agreement, must be construed us merely operating either as a licence or, at the most, as the assignment of a right to perform in theatres, or...in towns.

Clause 2 provided that the copyright in the music of the play shall remain the property of the said Andre Massager and he shall be at liberty to use the English lyrics for sale with the music. In consideration of the rights granted, clause 4 provided for payment of certain royalties or fees on a percentage basis and clause 5 stipulated that:

...If tie play be not produced in London by the said George Edwardes within three months from this date all rights of representation as aforesaid shall revert to and become again the absolute property of the licensors.

It was this clause which it was said compares with clause 11 of the agreement in the present case wherein it is provided that should the publishers be declared bankrupt or should they violate any of the terms of the agreement and not rectify such violations within six months of having received written notice from the proprietors to do so, "then all rights to publish or sell the said works in the English language shall revert to the proprietors..." In that case that Clause (clause 5) weighed heavily in favour of it being held that there was an assignment of the copyright. After referring to clause 1 Lord Hailsham held (p. 15&):

.. .That, in my view, plainly operates as an assignment to Mr. George Edwardes of the sole and exclusive right of representation within the area named in the clause, and I think that that view of the clause is strengthened, not only by the expression in clause 2, which stipulates that the copyright in the music shall remain the property of M. Messager, but also by the language of clause 5, which provides that in the

event of non-production within three months ''all rights of representation as aforesaid shall revert to and become again the absolute property of the licensers.'' That seems to me inept language in which to describe the mere cessation of a licence, and is much more apt to describe the reversion to the licensors of rights which had been assigned by clause I.

35. Now, no doubt, even in the present case, it has been pointed out, there is a provision in clause 11 that upon the happening of certain events the rights to publish or sell the said works shall revert to the proprietors, but it seems to us that beyond the common words '"' shall revert'"' there is nothing else which is similar. On the other hand, the expression must necessarily be construed in the context of the other clauses of the agreement and in the totality of the language used in the agreement before us as a whole. There was no clause in the Messager''s case like clause 2 before us. We cannot, therefore, hold merely upon the similarity of some words in clause 5 of the agreement in that case with some words in clause 11 of the present agreement, that what was granted by the present agreement must, therefore, be a partial assignment of a copyright. We may also say that there is a considerable difference between the grant of performing rights in a play or a piece of music or a dramatic composition and a mere copyright. The rights necessary to be conferred in the former cases in order to assign the copyright are not the same as the rights necessary to be conferred in making the assignment of a copyright. ,

36. In Jonathan Cape v. Consolidated Press [1954] 3 All E.L.R. 253 similarly there was the grant of "the exclusive right to print and publish an original work, or any part or abridgment thereof". That was an extreme case where if one considers the provisions of the several clauses of the agreement, one finds that practically every right or interest in the copyright was granted subject only to the safeguarding of the interest of the author in the matter of the fees or royalty due to him. A mere perusal of the terms of clauses 1, 2, 13, 15 and 19 reproduced at page 255 would show that hardly anything was left in the author after the several rights assigned by those clauses are taken into consideration. Danckwerts J. held (see p. 257) on reading the agreement as a whole that it amounted to a partial assignment of the copyright conferred on the author by the Copyright Act of 1911, section 5(1). He expressly declined to decide the point "whether the creation of a grant of any interest in the right by licence is sufficient to confer such a right" i.e. of partial assignment. It is unnecessary to contrast in detail the provisions of that agreement with the agreement we have before us. The terms are materially different.

37. In Loew''s Incorporated v. Littler [1958] 1 Ch. D. 650, similarly the words used were "sell" and "purchase" and it was actually the contention of counsel on behalf of the plaintiff (see page 655) that that was an out-and-out sale and the sale of a sole and exclusive right of production must prima, facie be for the whole life of the copyright, unless modified by other terms in the contract. The point only arose in an ancillary manner in deciding whether the transferee or assignee Mr. George

Edwardes had acquired a right transmissible to his successors.

38. Next reliance was placed on Chaplin v. Leslie Leslie (Publishers) Ltd. [1966] 1 Ch. D. 71. In that case at page 94 where after referring to the cases, which we have referred to above (particularly Messager''s case, British Actors Film Co.''s case, and Loew''s Incorporated''s case) Danckwerts J. observed:

...Mr. Roche sought to distinguish these cases as containing the express word ''grant'', which he contended was the essential or proper word to use in an assignment. The most obvious word is ''assign''. But even if the words ''grant'' or ''assign'' are not used, the intention to assign the copyright may appear from the context. I think that the words in clause 1 of the contract, ''The publishers shall during the legal term of the copyright have the exclusive right of producing, publishing and selling the said work'' ... are ample and effective to constitute an assignment of the copyright to the publishers. The use of the word ''assigns'' in other clauses and the absence of an express provision for reverter in clause 8 does not seem to me to affect the matter. It would, I think, be reasonable to imply a reverter where necessary.

The two last sentences of the quotation throw considerable light upon the other question which we have discussed above viz. that clause 11 in the present case providing for a reverter of rights suggests a grant of some right or interest in the copyright. Mr. Sen relied upon the above passage and urged that clause 1 of the contract in this case is the same as clause 1 of the reprint agreement in the case before us. We do not think so for the simple reason that in the whole of the agreement before us there is no word used like copyright as in clause 1 of the contract in Chaplin''s case, nor is the word "assign" determinative of the issue though it may be an obvious word to use. In the context of the word copyright, the use of the words "exclusive rights" named imply an assignment of the copyright but not necessarily in the case of a license. At any rate, none of these cases decide what would be the effect of clauses such as the second clause we have before us in the context of the general words used in clause 1. "We think that the terms of the agreement before us stand by themselves and have no comparable similarity with the words in any of the contracts dealt with in the cases cited above.

39. The same remarks apply to the decision in Macdonald v. Eyles [1921] 1 Ch. D. 631. The terms in which the authoress in that case Mrs. Margaret Byles agreed to purchase and publish a novel were of the widest amplitude. She had granted to the publishers upon certain terms as to royalty an option to publish her "next three books" and the publishers were during the legal term of the copyright to have the exclusive right of producing and publishing the book within a defined area together with, the entire control of the publication and terms of sale of the book, and also the right of suing in respect of infringement of, copyright. The agreement further provided that Mrs. Margaret was not without the consent of the plaintiffs to publish or allow to be published, any abridgment, translation or dramatized version of the

book and that on the, determination of the agreement in certain events therein specified the right to print and publish the book was to revert to Mrs. Margaret who was. then to be entitled to be registered as the proprietor thereof. Each one of these terms suggests that until a reverter Mrs. Margaret had "during the legal term of the copyright" assigned a right or interest in the copyright. None of these terms are to be found in the contract before us much less was there any term in that contract comparable to clause 2 of the present agreement.

40. While referring to the decision in Messager''s case, we have already noticed the observation that not only may the rights in a copyright wholly or partially be assigned, but that in a given case the owner or proprietor may by a licence create an interest in the copyright and that was the alternative submission of counsel for the appellants before us in the present case also. That such an interest can be created in a copyright is settled by the decision just referred to, Erskine Macdonald Ltd. v. Eyles. At page 639 Peterson J. had stated the rule in the following words:

...In my opinion then by virtue of the provisions of the agreement and Section 1 of the Act, the plaintiffs if they exercise their option in respect of ''Captivity'' will have an interest in the copyright. Until they exercise their option they will not be assignees of the copyright wholly or partially, or grantees of an interest in the copyright by licence u/s 5, Sub-section 2; for it is only the exercise of their option that converts then option to become proprietors or owners of a part of the copyright into equitable ownership of part of the copyright or an interest in the copyright. But they have in the meantime an option to become entitled to an interest in the copyright. Their interest has in the course of the case been called an inchoate interest, it is a right in the plaintiffs to acquire an interest in the copyright by signifying their desire to do so, and is an interest in the copyright in the same way as an option to purchase a piece of land or to acquire certain shares is an interest in tile land or shares.

In his alternative submission Mr. Sen urged that upon the terms of clauses 1 and 2 of the agreement before us "Asia" the publishers, in the present case, had such an option and that to that extent therefore it must be held that they had an interest in the copyright. In order to consider this contention it is necessary to go back a little to the terms of the agreement which Mrs. Eyles the authoress in that case and the proprietor of the copyright had made with her publishers. The facts do not appear to be stated in detail in, the judgment itself but they appear from the noting at the head of the judgment at page 632. The plaintiffs had agreed with Mrs. Eyles the authoress at their own risk and expense to produce and publish a novel written by her called "Margaret Protests," and to use their best endeavours to sell it. The agreement had provided that the plaintiffs should during the legal term of the copyright have the exclusive right of producing and publishing the work in the United Kingdom, the Colonies, India and the United States of America and should have the entire control of the publication and sale and the terms of sale of the book

and that Mrs. Eyles should not during the continuance of the agreement, without the plaintiffs'' consent, publish or allow to be published any abridgement, portion, translation or dramatized version of the work, and that the plaintiffs should pay to Mrs. Eyles certain specified royalties on the sales of the book. Clause 4 provided for payment of royalty and in clause 7 it was provided that if the plaintiffs should at the end of three years from the date of publication or at any time thereafter give notice to Mrs. Eyles that the demand for the work had ceased or should for six months after the work was put of print decline, or after giving notice, neglect, to publish a new edition or impression then in each of such cases the agreement should terminate and on the determination of the agreement the right to print and publish the work should revert to Mrs. Eyles. By clause 10 she further agreed to give to the plaintiffs the offer of her next three books on. terms in respect of royalties specified in that and the following clause. This agreement was made on May 10, 1919, but a few months later in November 1919 Mrs. Eyles entered into an agreement with her co-defendants Messrs. Cassell & Co. Ltd. whereby Messrs. Cassell & Co. Ltd. agreed to publish the next three novels which she might write after the completion of her agreement with the plaintiffs. There were some disputes between Mrs. Eyles and the plaintiffs as regards certain manuscripts of a sociological book which the former had written and submitted to the plaintiffs which the plaintiffs said were not "the next book" within the meaning of the agreement and therefore when in March 1920 Messrs. Cassell & Co. Ltd. were about to publish Mrs. Eyles next novel entitled "Captivity" the plaintiffs commenced their action.

41. Now it is said that the terms entered into between Mrs. Eyles and the plain-tiffs were similar to clauses 1 and 2 in the agreement before us and since this agreement also gives to the publishers an option similar to the one Mrs. Eyles had given to her publishers in that case. In that case what was initially granted to the publishers was undoubtedly an unqualified right or interest in the copyright of her book which Mrs. Eyles was about to write. The terms were firstly that during the legal term of the copyright the publishers were to have the exclusive right of producing and publishing the work in the contracted territory: Secondly that they should have the entire control of the publication and sale and the terms of sale of the book and thirdly Mrs. Eyles was bound by a negative covenant that she should not during the continuance of the agreement without the plaintiffs'' consent publish or allow to be published any abridgment, portion, translation or dramatized version of the work. This was construed to give a right albeit an inchoate right which the learned Judge termed an interest in the copyright. That right was coupled with an option to be exercised within three years by the publishers whereby the publishers could opt to continue the publication or in the event of their neglecting to publish a new edition or impression within a certain time the right to print and publish the work was to revert to Mrs. Eyles. What was thus acquired by the plaintiffs in that case was an "interest" in the copyright namely the exclusive right of producing and publishing the work during the legal term of the copyright. The other terms were that the

entire control of the publication and sale and the terms of sale of the book was with the publishers. All this coupled with the term that Mrs. Eyles could not without the publishers'' consent publish or allow to be published the said work or any part thereof or abridgment etc. of it showed that even assuming that the entire copyright was not parted with, a valuable interest in the copyright was created in favour of the publishers.

42. Is that the case upon the agreement before us? Undoubtedly clause 1 says that "the proprietors hereby grant to the publishers the sole and exclusive license to print and publish the said works", but there the similarity ends. The clause is "subject to the terms and conditions following" and the first term or condition following is of vital import, particularly the second sentence thereof namely '' ''No printing work shall be carried out by the publishers until they obtain permission in writing from the proprietors to do so". This has to be read in the context of the first sentence of clause 2 that "the Publishers shall inform the proprietors the titles of the books they are interested in publishing". The total effect of clause> 2, therefore, is clear. The publishers must first get the permission in writing of the proprietors before they can even start printing a book they are interested in publishing. What then could be the possible meaning of clause 1 in the context of this permission? A license is in essence a permission to do that which without such permission, would be illegal. Therefore, the juxtaposition of the two clauses leads to this that in clause 1 permission is granted, but clause 2 makes it clear that the permission would depend upon the sole discretion of the proprietors whether to grant it or not in a particular case, that is to say, in the case of a particular book or title, The other terms of the agreement also indicate that the proprietors have carefully safeguarded their rights and interests in the copyright. For instance, clause 8 clearly reveals that anxiety. It says that the publishers shall take all reasonable precautions to protect the copyright of the said works in India. This of course is equally compatible with the copyright that the publishers have with the proprietors but the subsequent sentence in clause 8 "and shall print on the back of the title page of every copy sold in an Indian edition a notice to say that the said work is copyrighted and published under license from John Wiley & Sons Inc." in terms suggests that the copyright is that of John Wiley & Sons Inc. There is here a clear reservation of the copyright in favour of the proprietors. There is also a clog on the transfer ability of the rights under the agreement by clause 10, "The license herein granted is assigned to the above named publishers solely and shall only be transferred by them with the written consent of the proprietors". Therefore until written consent is granted it cannot be transferred. That is incompatible with any right or interest in the copyright. Even the right of revision of the text of the said works is subject to the approval of the proprietors as per clause 7. All this clearly shows that no right or interest in the copyright as such was transferred and/or assigned. It is one thing to unequivocally grant the entire right of publication and sale, to say that the proprietor or the author shall not publish or sell it herself; to give the publishers an

option to say at the end of a certain period that the demand for the work has ceased and so terminate the agreement as was the case in ''Mac-donald v. Eyles and quite another thing to say that a general right, e.g. the sole and exclusive licence to print and publish certain works is granted but that sole and exclusive licence is subject to the condition that before publishing any book permission of the proprietors must be obtained in writing and to provide that the proprietors may or may not grant the permission in their sole and absolute discretion. So long as that permission is not given none of the rights mentioned in clauses 1 and 2 of the reprint agreement would spring into being. We have already referred to the provisions of the Copyright Act and the definition of copyright in Section 1(2). Not a single one of those rights or any interest in those rights passed to the publishers under the agreement before us unless and until the proprietors granted permission, in writing to the publishers- to print and publish the said book. Even considering the two decisions relied upon, therefore, it is difficult to hold that any interest in the copyright, much less the whole or part of that copyright, was granted or assigned to the publishers by the reprint agreement.

43. While we have discussed this question at length, it must be stated at this stage that it is not necessary for the purpose of this appeal to decide these questions finally or directly for the purposes of this appeal, but arguments before us having been urged in this elaborate manner on this question, we have referred to those arguments and dealt with them. The real controversy that has been raised in the appeal is whether the award is liable to be set aside for the reason that there is an error which is apparent on the face of that award. For that purpose it is not necessary for this Court to go as far as counsel would have us go and to hold that the construction put upon the agreement by the arbitrator was wrong or that having regard to the agreement and the notice there is a clear error in the construction. As we shall presently show, the cases upon the question, on what conditions an award can be set aside show that it is not in every case of an error whether of fact or law that an award can be set aside by a court. It must be an error which affects the jurisdiction of the arbitrator to make the award itself or, in other words, an error which is apparent on the face of the award. Upon this general rule is engrafted a further exception that if a point or question of law as such is specifically referred for the decision of the arbitrator then even an error made in the decision of that question of law will not vitiate the award.

44. Before, however, we turn to consider those authorities which establish these principles, it is necessary to settle a short point of construction which was raised by Mr. Sen. There was some dispute as to how the award in the first place has to be read and in what context it should be read. Now no doubt the award made by the arbitrator in the present case is cryptic in the extreme, but at least it has the merit of clarity and decisiveness. The award consists of bare answers to the questions posed and we are inclined to accept the contention of Mr. Sen that reading- those answers alone would afford no clear understanding of the award at all and that, therefore, in

order to understand the award we must read the answers in. the context of the questions posed in the agreement of reference itself. Thus Mr. Sen contended, the first question submitted to the arbitrator was "Whether Wileys were under the said agreement dated 1st October 1956 and in law entitled to give Asia the notice dated 1st March 1963 and the answer is "Yes". Mr. Sen urged, therefore, that properly read, the answer should be that Wileys were under the said agreement dated October 1, 1956 and in law entitled to give Asia the notice dated March 1, 1963 and we must deal with the other questions similarly. We think that this is a correct contention and the answers given cannot be read in isolation because otherwise the award would make no sense. We would, therefore, read the answers in the context of the questions referred.

45. But then counsel advanced a second argument which carries the first argument a step further. He urged that in the questions 1 and 2 in the reference to arbitration, there is a reference to the agreement and to notice. These are in terms referred to in questions 1 and 2. Therefore, counsel argues that the agreement and the notice become part and parcel of the answers given by the arbitrator and the answers'' must therefore be read not merely in the context of the questions referred but also in the context of the terms of the agreement and the terms of the notice given. The question is, whether the latter contention should be accepted in the present case,

46. The question as to how an award should be read and interpreted in. the event of a dispute as to its terms came up for consideration in a recent case before the English Court of Appeal in Giacomo Costa etc. v. British Italian etc. [1962] 2 All E.L.R. 58. In that case, a contract was entered in the standard form for the Incorporated Oil Seed Association for the sale of groundnuts, shipment c.i.f. Genoa or Taranto. One of the two ports was to be declared at the sellers'' request but in any case not later than February 1, 1961. The contract contained an arbitration clause providing that all disputes arising out of the contract should be referred to arbitration according to the rules of the association. The buyers did not declare any port before February 1, 1961, as provided in the contract and the sellers claimed to rescind the contract and so the dispute went to arbitration. On a difference of opinion between two arbitrators the Umpire held "that buyers have failed to declare the final port of destination by 1st February 1961 and therefore the contract is void". It was this award the legality of which came up for consideration before the Court of Appeal and the point of attack against the award was that there was an error of law apparent on its face because the award in terms had incorporated the contract which if read would show that the Umpire''s finding was erroneous. That contention was met by the party supporting the award by urging that the contract was not read into the award at all but was merely referred to in coming to a decision and therefore the award could not be read in the light of the terms of the contract. The terms of the contract as such had not become a part of the award. The question which fell for decision was thus stated at page 59 by Mr. Justice Diplock.

The next stage in the argument is that the award, so read, incorporates the contract in the award, so that this Court is entitled-and, indeed, bound, according to counsel for the buyers- to look at the contract in order to see whether the finding of law that the contract is void is a proper finding of law, or whether it is erroneous on its face. This does raise a difficult question of law, in which the authorities are conflicting and, if I may say so, unsatisfactory.

After referring to several authorities the learned Judge concluded (p. 62) :

It seems to me, therefore, that, on the cases, there is none which compels us to hold that a mere references to the contract in the award entitles us to look at the contract. It may be that in particular cases a specific reference to a particular clause of a contract may incorporate the contract, or that clause of it, in the award. I think that we are driven back to first principles in this matter, namely, that an award can only be set aside for error which is on its face. It is true that an award can incorporate another document so as to entitle one to read that document as part of the award and, by reading them together, find an error on the face of the award. But the question whether a contract, or a clause in a contract, is incorporated in the award is a question of construction of the award. It seems to me that the test is put as conveniently as it can be in the words of Denning L.J., which I have already cited from Blabber & Co., Ltd. v. Leopold New born [London], Ltd. (1953) 2 L R.429 '' As I read the cases, if the arbitrator says: "On the wording of this clause I hold'' sj and so, then that clause is impliedly incorporated into the award because he invites the reading of it.

From this, the learned Judge gleaned the following principles (p. 63) :

The principle of reading contracts or other documents into the award is not, in my judgment, one to be encouraged or extended, and, in my view, we are not entitled in this Court, on an award where there is a purely general reference to ''the contract''-and a reference only in that part of the award which deals with the consequences of the finding of fact-to look at the contract and search it in order to see whether there is an error of law. The second ground, in my view, therefore, also fails.

Lord Justice Sellers put the principle in the words of Lord Dunedin in Champsey Bhara & Co. v. Jivraj Halloo Spinning and Weaving Co. [1923] A.C. 480 : A.I.R [1923] P.C. 66 (see page 64) in the following words:

Neither does it open the door to look at a contract because it happens to be mentioned in the recital, or mentioned in what is in effect the conclusion or the order which the award makes. The difficulty is in its application-''not, I think, whether any particular document has been expressly incorporated in an award but whether it has, in the circumstances to be regarded as tile intention of the tribunal which made the award to include the document in question as part of its award and its reasoning. Of course, if any document is intended to form part of an award, it

should be, if things are properly conducted, appended or set out in full. It should be made clear that it is the intention of the award that the document should be actually incorporated into it. It is only infrequently, I hope, that an arbitrator or tribunal making an award fails to include in an award all the relevant matters which it intended so to do. In this case I find no difficulty in agreeing entirely with the learned judge that the contract was not incorporated, or intended to be incorporated, in this award, and I would uphold the learned Judge''s decision on that head without any qualification.

47. These being the principles one thing- is clear that upon the award before us neither the contract nor the notice in terms has been incorporated in the Award. Far from referring to them even generally the arbitrator has not referred to them at all. Secondly, as indicated in the judgment of Diplock L.J. all that we find in the award are the conclusions and nothing more. There is no intention shown by the Arbitrator to include the said documents in the Award, There is no incorporation even by indirect reference. We do not think, therefore, that we are entitled to look at the contract or the notice in reading those conclusions. Even upon the principle which we have accepted that in order to make the answers understandable we must read them in the context of the questions referred to arbitration, we do not think that we are entitled in the present case to look into the terms of the agreement or the notice in order to construe the award, for we are clear the arbitrator himself never intended to refer to the terms of the contract or the notice in giving his award. In the contest of the questions referred, no doubt the contract and the notice are generally referred to but that, as the learned Judge has pointed out, is not sufficient to entitle us to read the terms thereof into the award and construe it accordingly for the arbitrator has not declared or revealed his intention to do so. On the short point, therefore, we think that most of the further contentions of counsel for .the appellant should fail, but in ease we are not right upon this contention, we proceed to consider his further submissions;.

48. Now the principles upon which an award can be set aside by a Court are clear upon the authorities. We would merely refer to some of these authorities most of which re-state the principles in one shape or form. The leading case is the House of Lords decision in Kelantan Government v. Duff Development Co. Limited [1928] A.C. 395. In that case a dispute which had arisen upon an agreement between the Government of Kelantan and the Duff Development Company was submitted to the arbitration of Sir Edwin Arney Speed appointed by the Secretary of State, as the sole arbitrator. Clause 21 of the agreement between the parties provided:

Any and every dispute difference or question which shall at any time arise between the parties hereto touching the construction meaning or effect of these presents or of any clause or thing herein contained or the rights or liabilities of the parties he-rounder or otherwise howsoever relating to the premises shall be referred to the arbitration of a sole arbitrator to be agreed upon between the parties or failing

agreement to be nominated by the Secretary of State for the Colonies for the time being and this shall be deemed a submission....

The question raised upon these facts was whether there was a reference to the arbitrator of any question of law as such or merely a general reference to arbitration. Viscount Cave L.C. held that there was in that case a reference to the arbitrator of the question which had arisen on the construction of the deed of cancellation. The arbitration clause in the deed applied in terms to every dispute, difference or question which might arise between the parties touching the "construction, meaning'', or effect" of the deed and the appointment of the arbitrator showed that differences had arisen as to construction, and the arbitrator was appointed to determine those differences. Therefore Viscount Cave L.C. concluded "The reference, therefore, was a reference as to construction", and when there was such a reference the principle applicable \\vas as follows (p. 409):

If this be so, I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally-for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award; but the mere dissent of the Court from arbitrator''s conclusion on construction is not enough for that purpose.

The House of Lords: followed in this respect the decision in King and Duveen, In re: [1913] 3 K.B. 32. The same principles were adverted to by the other members of the House of Lords: in the Kelantan Government case, though each differed on the question of applicability of those principles to the facts of that case. These differences were later noticed by Lord Russell of Killowen in F.B. Absalom, Ld. v. Great Western (London) Garden Village Society [1933] A.C. 592. In the case last mentioned the alleged error pointed out on the face of the award was that the arbitrator erred in his construction of clause 30 of the contract in that case. There also clause 32 of the agreement between the parties provided that if any dispute should arise between the employer, or the architect on his behalf, and the contractors as to the construction of the contract or as to the withholding by the architect of any certificate to which the contractors might claim to be entitled, the dispute was to be referred to an arbitrator. The contractors suspended the work of construction of a building on the ground that the certificate was not given to them by the architect which would entitle them to payment under the contract and the

question was whether the certificate had been rightly refused tinder the terms of clause 30. The principle upon which an award can be set aside in a case like that was stated at page 610 by Lord Russell as follows:

...In the present case I have on consideration come to the conclusion that no specific question of law was referred. The primary quarrel between the parties was whether, if the value of wont executed and materials on site up to and including March 11,1929, had been truly assessed, the net value available for certification on that date was in excess of (as the contractor alleged) or less than (as the employer contended) the amount which had actually been certified in to and including that date namely, 9484-Z. Those were the disputes which were the foundation of the suspension of work on the one hand and the service of the notice on the other. Those were the disputes ''in regard to the issue of certificates and the validity of the notice'' which were in general terms submitted to the arbitrator. No specific question of construction or of law was submitted. The parties had, however, been ordered to deliver pleadings, and by their statement of claim the contractor had claimed that the arbitrator should under his powers revise the last certificate issued so as to include therein the excess net value which they had alleged and which the arbitrator has found (though for a reduced amount) to have existed on March 11, 1929, It is at this point that the question of the construction of condition 80 arose as a question of law, not specifically submitted, but material in the decision of the matters which had been submitted. This question of law the arbitrator has decided; but if upon the face of the award he has decided it wrongly his decision is in my opinion open to review by the Court.
Therefore the decision in Absalom''s case was that no question of law was as such specifically referred for decision and if such a question had been referred the principle which would have governed the case would have been that the arbitrator''s award would not be open to review by the Court. The same principle was relied upon in the decision of the Court of Appeal in the case to which we have already referred-Giacomo Costa etc. v. British Italian etc., and in Landauer v. Asser. [1905] 2 K. B. 184.

49. Turning to the decisions in India and arising from India the above principles have been accepted. In Durgu, Prosad Chamaria v. Sewakishendas (1949) 52 Bom. L.R. 171 the Privy Council considering the provisions of the Indian Arbitration Act applied the principle laid down in Absalom''s case and in King and Duveen, In re. At page 174 their Lordships observed:

However that may be, their Lordships are satisfied that the two points of law as to which it is said that the arbitrator''s error vitiates the award were specifically referred to him to decide and, if this is so, it would be contrary to well-established principles such as are laid down hi King and Duveen, In re and F.R. Absalom Ld. v. Great Western (London) Oaten Village Society, for a Court of law to interfere with the award even if the Court itself would have taken a different view of either of the

points of law had they been before it.

50. In an appeal from Madhya Pradesh the Supreme Court had occasion recently to consider the entire law on the subject in Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others, After referring to the decision of the Privy Council in Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co. they observed at page 219 para. 18:

An award made by an arbitrator is conclusive as a judgment between the parties and the Court is entitled to set aside are award if the arbitrator has misconducted himself in the proceedings or when the award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid u/s 35 of the Arbitration Act or where an award has been improperly procured or is otherwise invalid (s. 80 of the Arbitration Act). An award may be set aside by the Court on the ground of error on the face of the award, but an award is not invalid merely because by a process of inference and agreement it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion. As observed in Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd.

An error in law on the face of the award means, in their Lordships'' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party, that opens the door to seeing first what that contention is, and then going to the contract on which the parties'' rights depend to see if that contention is sound.

The Court in dealing with an application to set aside an award has not to consider whether the view of the arbitrator on the evidence is justified. The arbitrator''s adjudication is generally considered binding between the parties, for he is a tribunal selected by the parties and the power of the Court to set aside the award is restricted to cases set out in Section 80. It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at, his conclusion. On the assumption that the arbitrator must have arrived at his conclusion by a certain process of reasoning, tile Court cannot proceed to determine whether the conclusion is right or wrong. It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of his award.

51. In the passage we have quoted their Lordships used the expression "error on the face of the award". In Russell on Arbitration, 17th edn., p. 314, it has been pointed out that the jurisdiction is similar to the jurisdiction vested to correct tribunals by certiorari and as to what constitutes "an error apparent on the face of

the award" when issuing a writ of certiorari the Supreme Court in Syed Yakoob Vs. K.S. Radhakrishnan and Others, pointed out:

...The adequacy or sufficiency of evidence led on a point and the Inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised...

It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; but it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious misinterpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record.

52. Upon these authorities, the following principles emerge:

1. An award made pursuant to a proper arbitration agreement is final and binding "between the parties unless the agreement expresses a contrary intention; as for example that it provides for a right of appeal.

2. One exception to this rule is that there should be a clear error of law apparent on the face of the award.

3. The error of law apparent on the face of the award must be obvious or patent or in other words one that goes to the root of the matter and affects the jurisdiction of the arbitrator to decide at all.

4. Even if there is an error of law apparent on the face of the award it is not in every case that the award would be liable to be set aside.

5. Where a question of law is as such specifically referred to arbitration, then even if there is an error of law apparent on the face of the award, the award cannot be set aside, because the question of lay was itself a term of reference and the above Rule 1 will apply.

53. Now to apply these principles to the facts of the present case, we have first of all held that there does not appear to us to be any error made by the arbitrator at all. The decision to which the arbitrator has come does not appear to us to be unreasonable even assuming as was contended for the appellants that we read the award along with the reprint agreement dated October 1, 1956 and the notice dated

March 1, 1963. Even assuming that we are wrong in that view, we think we have said enough to show that at least two views were possible upon construction of the reprint agreement, especially upon the provisions of Clause 1 read in the light of clause 2 of the reprint agreement and the other terms and conditions thereof. Even if we accept counsel''s argument it is clear that several of these terms speak one way and some of them the other way and it cannot possibly be said that there is such a preponderance of terms or conditions in the document as would make the contentions advanced on behalf of the appellants the only possible view to take. We think further that in the present case the sole dispute between the parties was not one of fact at all, but essentially one of the construction of the con-tract between the parties and as would appear from what we say below, that and that alone was the question which was referred for the determination of the arbitrator. This will be clear from paras. 1 and 2 of the statement of the claim on behalf of Asia dated July 31, 1964. They themselves high-lighted the question of interpretation of clause 2 in that paragraph and they pleaded:

By clause 2 of the agreement Asia were to obtain the permission of Wiley before publishing any of the said books, but apart from the question whether such permission can be unreasonably withheld, the sole and exclusive rights to print, publish and sell the said books in India etc. remained in Asia. In other words Wiley are not entitled to withhold permission to Asia and then grant permission to another in the territories of which Asia is the sole and exclusive licensee for the publication of the said books.

The reply to this pleading before the arbitrator is to be found in the reply on behalf of John Wiley & Sons dated October 14, 1964. In para. 2 Wileys said:

With reference to para 2 of Asia''s Statement of Claim, the construction sought to be put by Asia on Clause 2 of the Agreement is incorrect and Unsustainable, Asia acquired no license to print and publish any of the titles of Wileys except those in respect of which Wileys gave their consent in writing. Under the Agreement Wileys have the right to decide in respect of which titles they would give permission to Asia to print and publish them. Wileys are not bound to give any reasons for not giving their consent.

It seems to us that implicit in these pleadings was a clear dispute on a question of law and that question is reflected in the first two issues referred for determination to the arbitrator, namely:

1. "Whether Wileys were under the agreement dated 1st October 1956 and in law entitled to give Asia the notice dated 1st March 1963?"

2. "Whether the said Notice was illegal and/or in breach of the agreement and if so, to what extent?"

We cannot conceive of a clearer submission of questions of law than is implied by these points in dispute. If that be so, then upon the authorities to which we have already referred, even if there is an error of law made by the arbitrator the award cannot be set aside. See Kelantan Government ease and and other cases and King and Duveen, In re, at p. 35.

54. Another circumstance which also suggests that it was really on a point of law that the parties had differed and had submitted that point of law for decision to the arbitrator is that under the first arbitration to Messrs. Mody and Desai u/s 14(b), both of whom were not advocates, found great difficulty in deciding the questions of law which had arisen between the parties. Before the learned Judge, however, the parties agreed to appoint Mr. Khambatta a leading advocate of this Court. The course which the arbitration took between the parties is also indicative of the fact that it was really only because of a difficult question of law that the parties came to appoint Mr. Khambatta.

55. We think that much more than has been established in the present case must be shown before an award made pursuant to a solemn agreement between the parties can be set aside, In our opinion there is nothing wrong with the award that has been given. There is no error much less an error apparent on the face of the award.

56. In the result, we dismiss the appeal with costs.

57. By a consent order passed oil October 21, 1966, it was agreed between the parties that the costs of the notice of motion shall abide the decision in appeal. We, therefore, also order that the costs of the notice of motion shall be paid by the appellants to the respondents.