

(1955) 08 BOM CK 0026**Bombay High Court****Case No:** Award No. 12 of 1955

Babubhai Vanmalidas Mehta

APPELLANT

Vs

Prabhod Pranshankar Joshi

RESPONDENT

Date of Decision: Aug. 22, 1955**Citation:** AIR 1956 Bom 146 : (1956) 58 BOMLR 917**Hon'ble Judges:** Tendolkar, J**Bench:** Single Bench**Advocate:** K.K. Desai, for the Appellant; Sakhaldande, for the Respondent**Judgement**

1. This is a petition for setting aside an award and although there are numerous grounds on which the validity of the award has been challenged in the view that I take of one of these grounds, viz., that the award has not been made within the time allowed by law, it does not become necessary to set out the various grounds or deal with them. I may also mention -- that in addition to the grounds taken in the petition a submission in law was made at the hearing of this petition that the award is outside the scope of the terms of reference and is therefore void.

That again is a matter which it is unnecessary for me to determine on this petition having regard to the opinion I have formed as to this award having been made beyond time.

2. A few dates that are material are these. On 14-12-1953 the Petitioner and the Respondent signed a submission paper and two persons were appointed as arbitrators, viz., Mr. D. Harkare and Mr. I. P. Joshi. The Petitioner and the Respondent filed their respective statements before the paid arbitrators who also held a meeting on 5-1-1954.

Thereafter the said D. Harkare left Bombay; and on 10-3-1954 the Petitioner received a letter from the Respondent dated 6-3-1954 that as the said Harkare had neglected to work as co-arbitrator and as the Petitioner had failed to appoint another in his place the said Joshi shall act as the sole arbitrator.

On 11th March a notice was given to the Petitioner of a meeting to be held by the sole arbitrator on the 14th March but that was adjourned and the first meeting, before the arbitrator was held on the 28th March. It appears from the minutes of the arbitrator which have been filed that on this date P. P. Joshi, the Respondent, wanted an adjournment for a couple of days to engage his legal adviser as the other side had engaged one and the adjournment was granted and the proceedings were adjourned to the 30th March.

When the meeting of the 30th March was held, a copy of the Respondent's statement was given to the Petitioner and it was directed that the Petitioner should give to the attorneys of the Respondent his own statement in reply by Friday the 9th April and the next meeting was adjourned to the 11th April.

Thereafter the present petitioner file a petition in this Court for setting aside the appointment of the sole arbitrator, and pending the disposal of this petition nothing further was done in the arbitration proceedings. This petition was dismissed on the 19th July 1954 and Mr. Joshi, the sole arbitrator, fixed the next meeting on 24-7-1954, which meeting was adjourned to the 28th July 1954. There are in the minutes of the arbitrator minutes of the proceedings of 28-7-1954 which lasted from 7-30 to 8-5 p. m.

The award is alleged to have been made on 20-11-1954. Although it is engrossed on a stamp paper which was purchased on 9-2-1955 and bears under the signature of the arbitrator the date 20-2-1955, for the purposes of this decision of the only issue that I am determining as to whether the award has been made in time, I will assume that the award was made on the date on which it purports to have been made i. e., on 20-11-1954.

3. Now, under S. 3 of the First Schedule to the Indian Arbitration Act an award must be made within 4 months after entering on the reference, and the question for determination before me is when did the sole arbitrator, Mr. Joshi, enter on the reference. It is urged by the Petitioner that he entered on the reference when he accepted the appointment of sole arbitrator, or in any event that he did so on 28-3-1954 when he held the first meeting, whilst it is the case of the Respondent that the sole arbitrator entered upon the reference only on 28-7-1954 when he started hearing the matter on the merits.

4. In "Iossifoglu v. Coumantaros" (1941) 1 KB 396 (A), the Court of Appeal in England held that arbitrators enter upon a reference as soon as they have accepted their appointment and have communicated with each other about the reference and so far as I am aware, this view of the Court of appeal has not been questioned in any subsequent decisions in English Courts. I may add, with respect, that the view appears to me to be in consonance with the objects sought to be achieved by providing in the Arbitration Act that the award was to be made within four months after entering on the reference. .

If the words "enter on the reference" were to be interpreted as anything different from or in addition to the acceptance by the arbitrator of his appointment, and particularly if they were to be held to mean that the arbitrator must start hearing the matter on the merits, which is a view, as I will presently point out, which had been taken in earlier cases in England, it would entirely depend on the will of the arbitrator after accepting the reference to start hearing it whenever he liked and thereby postpone the time for making the award. Such evidently could not have been the intention of the framers of the Indian Arbitration Act.

5. Turning now to the cases on which the Respondent has relied, these cases are all based on an old English decision -- "Baker v. Stephens" 1867 2 QB 523 (B). In that case the question was whether the award had been made in time, and Cockburn C. J., considered that the words "entering on the reference" were somewhat ambiguous and proceeded to observe:

"The only sound construction appears to me to be that the three months must date from the time the arbitrator actually enters upon the reference: not from the time that he merely takes upon himself the office of arbitrator by accepting the reference, but from the time he takes upon himself and exercises the functions of arbitrator."

Blackburn J., pointed out that the words "entering on the reference" were susceptible of bearing two different meanings, one of which was "accepting the office of an arbitrator" and the second "beginning to hear the parties," and he held that the latter was the proper interpretation to be placed on the words as time should be given for preparation for arbitration proceedings before the hearing actually commenced.

Mellor J., and Shee J., were of the same opinion. Now, ordinarily this decision must be taken to have been impliedly overruled by the decision of (1941) 1 KB 396 (A) although of course this particular case was not cited before the Kings Bench Division when the later decision was given.

But curiously enough, when the question came to be considered by some of the Indian Courts, the case of "Baker v. Stephens" (B) was cited before them and the case of "Iossifoglu v. Coumantaros" (A) was not cited, with the consequent result that some Indian Courts have followed the case of "Baker v. Stephens" (B). Thus, for example, in Nanda Kishore Goswami and Another Vs. Bally Co-operative Credit Society, Ltd. and Others, a Division Bench of that Court held that an arbitrator cannot be said to enter on the reference the moment that he is appointed an arbitrator. E. K. Mukherjea, J. said:

"It is necessary that he must actually begin the work in the presence of the parties or with notice to them before he can be said to have entered on the reference"

and the Allahabad High Court in the case of "Sardar Mal, Hardat Rai v. Bheo Baksh Rai Sri Narain" AIR 1922 All 106 (D) took the same view. They referred with approval to the case of "Baker v. Stephens" (B).

6. Now, in the first Instance, as I have pointed out earlier the case of "Baker v. Stephens" (B) does not appear to me to be good law after the decision of Iossifoglu v. Coumantaros" (A), and it is somewhat unfortunate that the attend their Lordships of the Calcutta and Allahabad High Courts was not drawn to a much later and a recent decision of "Iossifoglu v. Coumantaros" (A). I find it difficult with respect to the two decisions of the sister High Courts, to hold that an arbitrator does not enter upon a reference until he starts hearing a reference.

It is perhaps possible to argue that the decision in "Iossifoglu v. Coumantaros", (A) has gone a bit too far in holding that the moment the arbitrator accepts an appointment he enters upon a reference. Perhaps the arbitrator must do some act which is referable to his position as an arbitrator and to nothing else before it can be said that he entered upon the reference; and indeed in any event, so far as Cockburn, C.J. was concerned in "Baker v. Stephens", (B) he pointed out that the arbitrator must take upon himself and exercise the functions of an arbitrator.

Now, the exercise of a function does not necessarily mean hearing the matter on the merits; and where an arbitrator holds a preliminary meeting and gives directions to the parties as to the progress of arbitration proceedings before him, in my opinion, he assumes the office of an arbitrator and exercises the functions of an arbitrator, because in no other capacity would he be entitled to give any directions with regard to the progress of the arbitration proceedings.

In my opinion, therefore, as it is not necessary in this particular case to determine whether or not the sole arbitrator entered upon a reference, when he accepted the position of sole arbitrator, it is sufficient to hold that when he held the meeting of the 28th of March or at least of the 30th of March & gave directions to the parties as to the future progress of the arbitration, he entered upon the reference, and that such entering upon the reference was not postponed to such time as he started hearing the parties on the merits of the matter before him.

If that is the date from which time begins to run, then obviously the award made on 20-11-1954 is out of time. No petition has been presented to extend the time for making the award, and the award, therefore, is liable to be set aside.

7. I accordingly set aside the award and direct that it may be taken off the files. The Respondent to pay the costs of the petition. Counsel certified.

8. Petition allowed.