

N.D. BASU'S ARBITRATION ACT. EDITED BY S.K. Bose. Sixth Edition
1969. Eastern Law House (P) Ltd., Calcutta XIIIX+842+cxl.
Rs. 28.

THE BOOK UNDER REVIEW was first published in 1942 and has since seen five editions. The author of the book Shri Nersinhadas Basu was well-known for several books e.g. an Injunction, Evidence, Civil Procedure, Income Tax, Companies Act, Criminal Procedure, Penal Code and subject noted Index of cases etc. That the book has now entered the sixth edition indicates the demand in the market for a book on arbitration, a subject which is of ever growing importance in India. Though we do not have the huge structure of Arbitration Boards as in prevalent in America, yet we have had the basic principles of Arbitration statutorily first recognised in the old code of Civil Procedure of 1882. Before the enactment of the Present Arbitration Act 10 of 1940 the law of Arbitration was contained in the Code of Civil Procedure of 1908 (2nd schedule) and the earlier Arbitration Act of 1899 based on the English Arbitration Act 1899 (52 and 53 Victoria c. 49).

The arrangement of the book is sectionwise commentary with case law upto July 1969. *Russel on Arbitration* has been freely drawn upon by apt quotations throughout the book and the Comparative English case is also given its due place.

When the original first edition was written by the author in 1942, he had naturally taken to the topicwise case noted method. A ready referencer in those days on any topic of law was welcome. But the present edition could well have departed somewhat from that method and heightened the usefulness of the book in an attractive way by resorting to the narrative and analytical method of a treatise. This is more necessary since the law on arbitration has enormously increased its ambit and the load of case law could better be canalised by the analytical method.

What has been stated above would very easily be apparent when we see as many as 1625 paras under various titles, each para citing many decisions, for as footnotes but intermingled and interpolated as full citations with references within the narrative itself. The result is the sentences appear broken and there is lack of continuity of thought in the next sentence. If the footnoted method is adopted, the author could give more coherence, elegance and continuity in the subject matter of the paragraph. Telegraphic sentences and language hardly befit a treatise, e.g. page 11 para 21 "construction just in other statutes, language of which and the circumstances under which they were passed are different, is nor a safe guide." Since there are too many paras under each section

it would have been wise if a synopsis of headings is given after each section is formulated. This appears more necessary as the contents tabulated before the table of cases is rather meagre, not to speak of the meagreness of the subject index at the end of the book. A good index and a synopsis at the beginning of each section will keep the reader in easily locating what he wants in this book of nearly 900 pages.

Apart from typographical mistakes which the learned editor of this edition acknowledges in the editor's note, the book could have been bettered by printing devices. There is no difference in the type used for printing section and other paras. In page 233 of the book paras 478, 479 could be mistaken for a section. Many sections have what are called *Nota Beenas* "N.B." which appear jarring. They could be absorbed in the commentary which should also be classified and subclassified in analyzed continuity. If it is a mere "N.B." why should paras be given to N.B.'s : *vide* pages 123 and 232 of the book. It is even better to give a sub title Legislative History if "N.B." refers only to that. In page 123 para 248-A is proceeded by the title "Chapter II Arbitration without Intervention of Court" and the same is repeated after para 248-A. Spelling mistakes are galore, e.g. : page 265 para 539 "tee Civil Procedure Code", "tee is obviously "the". In para 1094 (page 556) Judgment is given as "Judgment". These are only illustrative and exhaustive.

It is very good that *Russel on Arbitration* is oft-quoted. There are some areas where the author can express his own views where there is conflict of decisions or clarify the position with some critical analysis. In page 284 there is the statement

When arbitration has given no reason for his award, nor there is any legal proposition as basis of award, contention that there are errors of Law on the face of the award must be rejected.¹

The brevity of the statement (telegraphic English) apart, the decision actually further says (and this is important) that arbitrator's award on both fact and law are final and there can be no appeal from his verdict. The Court cannot review his award and correct any mistake in his adjudication *unless objection to the legality of award is apparent in the fact of it*. The italicised portion is sadly missing in the author's references. The above statement of the law 'could further be usefully expanded by reference to the Supreme Court decision (not cited in the book) : *Bingo Steel Furnitute (P) Ltd. v. Union of India*² where Justice Ramaswami states :

An award may be set aside by the Court on the ground of an error of law apparent of the face of an award but an award is not invalid merely because

1. Its citation is given as *Madan Lal v. Hukumchand*, A.I.R. 1967 S.C. 1036. It is really A.I.R. 1967 S.C. 1030.

2. A.I.R. 1967 S.C. 378.

by a process of inference and argument it may be demonstrated that the arbitrator has committed some mistakes in arriving at his conclusions³.....

The learned Justice distinguishes the decision.

In section 14 the provision in clause (2) of that section enjoins on the court to issue notice to the parties to the filing of the award. In page 419 of the book under review it has been rightly stated that the above provision is mandatory and that if no such notice is given, the court cannot pass any decree on the award. If any decree is passed it can be set aside for that fatal defect of non-issuance of notice. The objective is to give an opportunity to a party to state his objections if any on the award. The commentary from page 408 to page 422 adverts to same aspects of section 14 (2) but does not fully clarify the position as to how limitation affects the party served with notice. The decision in *Engineering Construction Corporation Ltd. v. Madras Port Trust*⁴ (A.I.R. 3 (1968) Mad. 335) could well have been cited and explained in this context. The decision points that the question of limitation has to be decided with reference to the thin column of Article 119 of the Limitation Act read with section 14 (2) of the Arbitration Act.

Where one of the parties objects to the filing of the award, on the ground that there had been no compliance with section 14 (2) and requests the court to pass an order on these objections and the court orders notice of filing of award to be issued to the parties, the limitation would commence only from the date the notice is served on the party. The opinion in the above case further passed out that a proceeding under section 14 (2) is a judicial proceeding. A declaration by the court that the award has been filed in court is not a ministerial act. If there is a dispute as to whether the Acts done by the arbitrator amounted to filing of award, the court should decide the question as a *lis* in a judicial manner.

In the commentary under section 47 extensive references are made to conflicting decisions in pages 813-16. Though the Madras Full Bench decision in *Abdul Rehman v. Muhammed*⁵ is extensively quoted, the contrary decision by the Patna High Court is also referred to, here appears to be no attempt to which the issue as to the power of the court to pass decrees in terms of award as compromise or adjustment or suit under order 23 rule 3 of the Civil Procedure Code. In the Madras Full Bench the trial conclusion was

that under the proviso to section 47 an arbitration award obtained otherwise than in proceedings taken in accordance with the Act cannot without more

3. *Id.* at 380.

4. A.I.R. 1923 P.C. 66 (6a).

5. (1944) 1 K. B. 566.

6. A.I.R. 1968 Mad. 335.

7. A.I.R. 1953 Mad. 781.

be recognised as a compromise or adjustment of the suit ; that no decree can be passed thereon under the provision of Order 23 Rule ; and that the decision in A.I.R. 1945 Mad. 294 should be overruled.⁸

The matter appears to be clarified in *Salima Bibi v. Md. Ibrahim Saheb*⁹ not noticed in the book under review. That decision relies on the Madras Full Bench decision aforesaid and dissents clearly from the opinion of the Patna¹⁰ and Rajasthan¹¹ High Courts (A.I.R. 1952 Pat. 66 ; A.I.R. 1955 Raj. 162) referred to in page 875 of the book under review. The *Salima Bibi* case points that the proviso to section 47 enacts that an award otherwise attained may be taken into consideration as a compromise or adjustment of a suit by any court before which the suit is pending, if all the parties consent to the award. But the proviso does not state when the consent of the parties should be obtained. If before the filing of the award the parties consent to it, the court is entitled to take into consideration as a compromise or adjustment of a suit within the meaning of Order 23 Rule 3 of the Civil Procedure Code. If they agree to abide by the terms of the award even outside the court, the court is entitled under the terms of the proviso to pass a decree under order 23 rule 3 of the Civil Procedure Code. It does not matter whether the consent was signified outside the court or before the court.

In page 689 of the book under review *Gunvantibai v. Official Assignee*¹² gets very cursory treatment. All that is stated is there can be a suit to declare the award as invalid for want of valid reference under section 33. Then follows in pages 689 aforesaid "But see *Gunvantibai v. Official Assignee* (power of court to consider *suo motu*) whether the award is conclusive."

Actually *Gunavanti* case decides that where a hinder minor is represented by Indian mother in the award when the father is alive, the decree that is passed on the award is validable at the instance of the minor, that the court can also *suo motu* consider if the award was collusive and if the dispute was real.

It is not necessary in a text book that all decisions should be cited. At any rate leaving decisions of importance should find a place. As stated already the Supreme Court decision in the *Bingo Steel Furniture (P.) Ltd.* the Madras decision in the *Engineering Construction Corporation* case the *Salima Bai* case could all have been referred to. The Full Bench decision in *O. Md. Yusuf Levai Saheb v. S. Hajee Md. Hussain Rowther*¹³ could well have been noticed. In that decision leaving sections 2,3,14 and 17 of the

8. Quoted in *Basu* at 814.

9. A.I.R. 1962 And. Pra. 123.

10. *Zeaudin v. Abdur Refique*, A.I.R. 1952 Pat. 66.

11. *Phool Narain v. Madan Gopal* A.I.R. 1955 Raj. 162.

12. A.I.R. 1961 Bom. 24.

13. A.I.R. 1964 Mad. (F.B.)

Act together the fundamental basis of arbitration is well discussed as also the validity of award which does not satisfy the statutory provisions.

In pages 76, 530, 721 of the book under review the doctrine of frustration of contract is mentioned with reference to some authorities without discussing the most leading decision in *Satyabrata Ghose v. Mugneeram*.¹⁴ But curiously enough the name of the case is mentioned in table of cases and the pages referred to therein the said decision is not found.

Section 28 of the Contract Act has an explanation which saves contracts to refer to arbitration from the operation of that section. The book under review avers to this section in pages 65-69. The jurisdiction courts to interfere with the awards is also tackled but in doing so some useful decisions on those aspects are omitted and the following significant aspects are not fully brought out :

- (i) If *ab initio* the arbitrators had no jurisdiction, the conduct or acquiescence of parties cannot confer such jurisdiction of *Varadan Shetty v. Naresh Mulji Ltd.*¹⁵
- (ii) The court can determine if the dispute is actually covered by the agreement to refer to arbitration, *Narain Singh v. Dhaneswari*.¹⁶
- (iii) Where the contract itself is forbidden by law as such illegal, the arbitration clause which forms part of the contract is also illegal—section 2 (a).¹⁷
- (iv) Under section 39 an appeal lies under an order on an award stated in the form of a special case under section 13. But no appeal lies from the opinion of the court upon a special case stated by the arbitrator with regard to a question of law arising in the course of reference—*Union of India v. South Indian Corporation*.¹⁸
- (v) The decision in *Heaven and Kesterton v. Sven Widaons A/B*,¹⁹ points : An award of an arbitrator cannot be set aside for error whether of fact or of law except by the machinery which is supplied through the case stated, save that if he chooses to make a speaking award it may be set aside for error on its face. But an award can always be set aside for misconduct. The court has jurisdiction, where it appears on the material before it that an arbitrator has exercised his discretion in a nonjudicial manner as to costs to set aside his award so far as it relates to costs.
- (vi) An arbitration clause in the abrogated contract cannot be involved

14. A.I.R. 1954 S.C. 44.

15. A.I.R. 1960 Bom. 720.

16. A.I.R. 1960 Pat. 201.

17. A.I.R. 1960 Cal. 90.

18. A.I.R. 1960 Andh. Pra. 346.

19. (1958) 1 W.L.R. 248.

for determining questions under the new substituted agreement.
Godu Mal v. Ganga Hasso Mal Idnani.²⁰

- (vii) When the agreement is covered by section 28 of the Contract Act, there is no question of limitation running since the claimant can have no cause of action for the suit so long as the arbitrator is seized of the matter to determine the amount payable, to him.
Uttam Chand Brijlal v. Balmokund.²¹

The book under review as a whole is a useful reference book in the subject of arbitration for lawyers, and students of law. If in the next edition consideration is given to these suggestions given above, the book may well become a high class treatise.

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20. A.I.R. 1958 All. 26.

21. A.I.R. 1929 Sind. 55.

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