

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Cornish.

1930,
April 22.

KUNTHI AMMAL AND ANOTHER (DEFENDANTS—
PETITIONERS), APPELLANTS,

v.

SARANGAPANI CHETTI (PLAINTIFF), RESPONDENT.*

*Indian Arbitration Act (IX of 1899), ss. 2, 3, 4, 8, 9 and 19—
Civil Procedure Code (Act V of 1908), sec. 89, cl. (1) and
Sch. II, paras. 17, 19 and 20—Agreement to refer to arbitra-
tion of five arbitrators—Subject-matter of arbitration, suit in
respect of, maintainable in the Presidency Town of Madras
—Suit filed in the City Civil Court, Madras, to appoint an
arbitrator in place of one who refused to act—Jurisdic-
tion, City Civil Court or High Court—Ss. 8 and 9 of
Indian Arbitration Act, if applicable—Act, applicability of,
even though ss. 8 and 9 are inapplicable—Power of High
Court to appoint an arbitrator in a case of reference to more
than two arbitrators.*

Where a submission to arbitration as to division of joint family property was made by the parties to five named arbitrators, one of whom refused to act, and the subject-matter of the submission did not exceed Rs. 2,500 in value and could be sued upon in a Court in the Presidency Town of Madras, and one of the parties instituted a suit in the City Civil Court, Madras, to have the agreement submitting the case for arbitration filed in Court and to provide for the arbitration in accordance with law but the other parties thereto objected that the Indian Arbitration Act applied to the case and that the High Court on its Original Side, and not the City Civil Court, had jurisdiction to entertain the suit, and that no relief could be given to the plaintiff in the case,

Held that the Indian Arbitration Act, 1899, applied to the case, even though the submission was to more than two arbitrators, but the powers conferred by the provisions of sections 8 and 9 of the Act were not available to a party in such a case; *Gopalji*

* Civil Miscellaneous Appeal No. 139 of 1928, and Civil Revision
Petition No. 1048 of 1928.

Kuverji v. Morarji Jeram, (1919) I.L.R. 43 Bom. 809; and *In re Smith & Service and Nelson & Sons*, (1890) 25 Q.B.D. 545, relied on;

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that the High Court on its Original Side had exclusive jurisdiction to deal with the present reference under section 2 read with section 4 of the Indian Arbitration Act; and the provisions of the Civil Procedure Code did not apply by reason of section 3 of the Act and section 89 of the Code;

that, as the specific provisions of sections 8 and 9 of the Act did not apply to the case of a submission to more than two arbitrators, even the High Court, if the suit had been instituted therein, could not give the relief prayed for in the suit under those sections; and that, consequently, the City Civil Court also, assuming it had jurisdiction to entertain the suit, could not give such relief and the suit should have been dismissed.

[Their Lordships did not decide the question whether the City Civil Court had jurisdiction to entertain the suit.]

APPEAL against the order of the City Civil Court, Madras, in Original Suit No. 580 of 1926 and Civil Revision Petition under section 115, Civil Procedure Code, to revise the same order.

K. V. Sessa Ayyangar for appellants.—Under section 89 of the Civil Procedure Code (Act V of 1908) and sections 2 and 3 of the Indian Arbitration Act, 1899, the latter Act applies to the present case. Only the High Court has jurisdiction to entertain the present application arising out of this agreement to refer to arbitration. Section 3 (24) of the General Clauses Act (X of 1897) says that the “High Court” used in reference to civil proceedings means the highest Court of original civil jurisdiction. Even though the City Civil Court may take cognizance of this application, the subject-matter being below Rs. 2,500, still by virtue of section 89, Civil Procedure Code, and section 3 of the Arbitration Act, only the latter Act applies. The City Civil Court does not become the High Court by reason of section 3 of the Madras City Civil Court Act, 1892; the special jurisdiction conferred on the High Court by the Arbitration Act is not conferred on the City Civil Court.

P. V. Venugopala Ayyar for respondent.—The Indian Arbitration Act, 1899, applies only to private arbitrations and not to agreements to refer to arbitration as in this case. There is no provision in the Indian Arbitration Act for filing an

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agreement to refer to arbitration and having the arbitration carried out. Section 89, Civil Procedure Code, says that the Code will apply in the absence of provisions in the Indian Arbitration Act. There are provisions in respect of the present application in Schedule II, paragraphs 17, 18 and 19 of the Civil Procedure Code but there is no provision in the Arbitration Act, and hence the Code applies to this case.

The Indian Arbitration Act does not apply to cases of agreements to refer to arbitration made to more than two arbitrators. Sections 8 and 9 of the Act contemplate only cases of one or two arbitrators: see *Gopalji Kuverji v. Morarji Jeram*(1). The rules made under the Arbitration Act do not cover this class of cases of reference to more than two arbitrators. There is no provision in the Act for filing an agreement to refer to arbitration and making it a rule of Court, as in the Civil Procedure Code. There is no provision in the Act for more than two arbitrators; hence the Act does not apply to such cases but only the provisions of the Code. *In re Smith & Service and Nelson & Sons*(2). The English Act was amended by the Administration of Justice Act, 1920 (10 and 11 Geo. V, c. 11). Even if the Arbitration Act applies, the City Civil Court has jurisdiction.

K. V. Sessa Ayyangar in reply.—The Indian Arbitration Act, 1899, is not confined to cases of one or two arbitrators: see *Abdul Shakur v. Muhammad Yusuf*(3). An “appointed arbitrator” in sections 8 or 9 of the Act means also one of several appointed arbitrators. Even though the special provisions of the Act in its sections 8 and 9 do not apply to a particular case, the Act as a whole will still apply. See *Mackintosh & Co. v. Scindia Steam Navigation Co., Ltd.*(4). The application of an Act cannot be denied, because some of the provisions of the Act cannot apply to a particular contingency or circumstance. The decisions in *Gopalji Kuverji v. Morarji Jeram*(1) and *Mackintosh & Co. v. Scindia Steam Navigation Co., Ltd.*(4) only hold that some special sections do not apply to certain classes of arbitration, and not that the Act does not apply as a whole.

Under section 4 of the Indian Arbitration Act, and section 3, clause 24 of the General Clauses Act, the Court meant is only the High Court, and does not make the City Civil Court,

(1) (1919) I.L.R. 43 Bom. 803.

(2) (1890) 25 Q.B.D. 545.

(3) (1921) I.L.R. 43 All. 456.

(4) (1922) I.L.R. 47 Bom. 250.

which may take cognizance in certain cases, a High Court even in such cases.

Even if the City Civil Court had jurisdiction, it can administer only the provisions of the Arbitration Act, which applies as a whole to all cases of arbitration under section 2 of the Act.

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JUDGMENT.

MADHAVAN NAIR J.—This Civil Miscellaneous Appeal arises out of an order passed by the City Civil Judge in a suit to have an agreement submitting a case for arbitration filed in Court and to provide for the arbitration in accordance with law. The agreement sought to be enforced was entered into between the plaintiff and the defendants referring disputes about their joint family property to five panchayatdars, asking them to divide it among the signatories to the document. One of the panchayatdars refused to act as an arbitrator. For this and other reasons the defendants contended that the agreement could not be enforced. They also contended that the City Civil Court had no jurisdiction to entertain the suit as it fell within the scope of the Indian Arbitration Act (IX of 1899) which vests the High Court with exclusive jurisdiction to try suits of this nature. The learned City Civil Judge overruled these contentions and passed the following order :—

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“I, therefore, direct that Bhagirathi Pillai be appointed arbitrator in place of the person who has resigned and remit this case to the original arbitrators who have not resigned and this additional person newly appointed to dispose of the case according to law and submit a finding within one month.”

This appeal has been filed by the defendants against this order.

It is urged on behalf of the appellants that the Indian Arbitration Act gives exclusive jurisdiction to the Original Side of the High Court to determine this matter, as, if it were the subject-matter of a suit, the

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suit could be instituted only in a Presidency Town, and that the Code of Civil Procedure, Second Schedule, provides that the Second Schedule of that Code shall not apply to any case falling within the purview of the Indian Arbitration Act. On behalf of the respondents it is contended that the Indian Arbitration Act will not apply to submissions or arbitrations where there are five arbitrators as in the present case, i.e., more arbitrators than one contemplated by sections 8 and 9 of the Act and that, even if the Act applies, the City Civil Court has jurisdiction as it is directed under the Madras City Civil Court Act (VII of 1892), to take cognizance of all suits triable on the Original Side of the High Court, provided the value of the suit does not exceed Rs. 2,500, and provided further that the suit does not relate to Probate, Matrimonial and Insolvency proceedings. It is admitted that the present case falls within these provisions of the Madras City Civil Court Act.

On the above arguments, two questions arise for consideration: (1) Whether the jurisdiction to determine the subject-matter submitted to arbitration in the present case lies exclusively with the High Court, (2) if so, is the City Civil Court vested with that jurisdiction under the Madras City Civil Court Act? As we shall presently show, in the view that we take of this case, it is not necessary to express any definite opinion on the second question.

Under the Indian Law, reference to arbitration is governed by the provisions of the Code of Civil Procedure and the Indian Arbitration Act (Act IX of 1899). Under section 89, clause (1) of the Civil Procedure Code,

“ Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being

in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.”

Section 3 of Act IX of 1899 says that sections 523 to 526 of the Code of Civil Procedure, 1882, (paragraphs 17, 19 and 20 of Schedule II of the Code of Civil Procedure, 1908) shall not apply to any submission or arbitration to which the provisions of this Act for the time being apply. This section excludes those references to arbitration to which the provisions of the Act apply from the operation of paragraphs 17 to 20 of the Second Schedule of the Civil Procedure Code. Section 2 of the Act states—

“ This Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency Town. ”

According to this section, the Act would apply to an agreement forming the subject-matter of a reference to arbitration only if a suit between the parties with respect to that subject-matter could be instituted in a Presidency Town. Section 4 of the Act states that “ the Court ” referred to in the Act in the Presidency towns is the High Court. In the present case it is clear that if a suit is instituted by the parties with reference to the subject of arbitration, i.e., the division of their family property, that suit will have to be instituted at Madras, and therefore, under sections 2 and 4 of the Act, the High Court will be the Court having jurisdiction to determine the reference to arbitration. This is the argument of the appellant. The respondents meet this argument by saying that the plaintiff in order to succeed in his contention should, besides showing that his case falls within section 2 of the Act, also show that the provisions of the Act would apply to the submission or arbitration in question. This argument

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has special reference to section 3 of the Act and is put in this way: Having regard to that section, only those submissions, i.e., written agreements to submit present or future differences to arbitration, whether an arbitrator is named therein or not, [see section 4 (b)], to which the provisions of the Indian Arbitration Act will apply, will be exempt from the operation of the Code of Civil Procedure; in other words, if any of the provisions embodied in any section of the Arbitration Act will not apply to a "submission", then that "submission" will be governed by the rules of the Code of Civil Procedure. In this case, as one of the panchayatdars has refused to act, it is conceded that without resorting to sections 8 or 9,—if these sections will apply—his vacancy cannot be filled up and that relief cannot be given to the plaintiff. The respondent proceeds to show that sections 8 and 9 of the Indian Arbitration Act will not apply to a submission like the present one wherein the dispute is referred to the arbitration of five panchayatdars as those sections will apply only to cases where there is "a single arbitrator or but two arbitrators". In support of his interpretation of sections 8 and 9 of the Act, *Gopalji Kaverji v. Merarji Jeram*(1) is relied on. If this argument is accepted, it will follow that the question of the application of the Act should be considered with reference to both sections 2 and 3, and that if any of the sections of the Act will not apply in the matter of any submission, then despite the fact that a suit in respect of its subject-matter if instituted will undoubtedly lie in the High Court, the provisions of the Code of Civil Procedure will become applicable and the City Civil Court will have exclusive jurisdiction to deal with the matter.

(1) (1919) I.L.R. 43 Bom. 809.

We will now proceed to see how far this argument of the respondent can be accepted. Section 8 of the Indian Arbitration Act deals with the power of the Court in certain cases to appoint an arbitrator, umpire or a third arbitrator. Section 9 of the Act deals with the power which the parties have in certain cases to supply the vacancy. I do not think it is necessary for deciding this case to deal at length with the scope of the provisions of these two sections, as I am prepared to accept the reasoning of the learned Judges in *Gopalji Kaverji v. Morarji Jeram*(1), in which the question is discussed elaborately. In that case, strongly relied on by the respondent, it was held by SCOTT C.J. and HAYWARD J. reversing the judgment of MARTEN J. that, in a case of submission to three named arbitrators all of them after acting having declined to proceed any further, the Court had no jurisdiction to appoint fresh arbitrators in their place under the Indian Arbitration Act. Generally stated, following the decisions in *In re Smith & Service and Nelson & Sons*(2), and *Manchester Ship Canal Company v. S. Pearson & Son, Limited*(3), under the English Arbitration Act, the learned Judges adopted the view that sections 8 and 9 would apply only to cases where there is a single arbitrator or but two arbitrators. According to this decision, these sections will not apply to the present case as the agreement in question refers the matter in dispute to five panchayatdars, and therefore, if the respondent's argument is correct, it would follow that the provisions of the Code of Civil Procedure are not excluded under section 3 of the Act and the City Civil Court must be held to have exclusive jurisdiction to deal with the matter. The appellants

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(1) (1919) I.L.R. 43 Bom. 809. (2) (1890) 25 Q.B.D. 545.

(3) [1900] 2 Q.B. 606.

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argue that this decision is wrong and rely on *General Electric Trading Company v. Siemens (India), Ltd.*(1). Sections 8 and 9 of the Indian Act correspond to sections 4 and 5 of the English Arbitration Act which correspond to clauses 12 and 13 of the Common Law Procedure Act of 1854. So far as I can see, though there is some variation in the wording of sections 5 and 6 of the English Arbitration Act from the wording of the corresponding section of the Common Law Procedure Act, the purport of the sections remains exactly the same. In my view there is no support for the view of GHOSH J. that the wording of sections 5 and 6 of the English Arbitration Act would make them applicable to cases of three arbitrators, cases to which admittedly sections 12 and 13 of the Common Law Procedure Act would not apply. In this connection, it may be observed that *In re Smith & Service and Nelson & Sons*(2), relied on by the learned Judges of the Bombay High Court, was decided after the passing of the English Act of 1889, and under it it was held that—

“where an agreement to refer disputes to arbitration provides for a reference to three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed, and one of the parties refuses to appoint an arbitrator, the Court has no power under or apart from the Arbitration Act, 1889, to order him to do”.

In that case, LINDLEY L.J. made the following observations :—

“It certainly looks like a blot in the Act, that by reason of there being no provision as to three arbitrators, as distinguished from two arbitrators and an umpire, sections 4, 5 and 6 do not apply; but we cannot help that.”

This so-called blot in the English Act was cured in England by the enactment of the Administration of

(1) (1928) I.L.R. 56 Calc. 548.

(2) (1890) 25 Q.B.D. 545.

Justice Act of 1925, 10 and 11 Geo. V, c. 81. This would show that the Legislature thought that the interpretation of sections 5 and 6 of the English Act adopted by the learned Judges in *In re Smith & Service and Nelson & Sons*(1) was correct. The blot in the Indian enactment has not been cured by the Indian Legislature as was done by the English Legislature with reference to the English Act. Having regard to these considerations it seems to me that the interpretation of the learned Judges in *Gopalji Kuverji v. Morarji Jeram*(2) of sections 8 and 9 of the Indian Arbitration Act is amply supported by the English authorities. The subsequent decision of the Bombay High Court, *In re Babaldas Khemchand*(3), in no way conflicts with the prior decision in *Gopalji Kuverji v. Morarji Jeram*(2). *Mackintosh & Co. v. Scindia Steam Navigation Co., Ltd.*(4) shows that—

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“where the parties agree to refer their disputes to arbitration without the intervention of the Court, no suit having been brought in respect of those disputes, the Court has no power to order the issue of a commission for the examination of witnesses in the arbitration”.

Though I agree thus far with the respondent's contention that the provisions of sections 8 and 9 of the Indian Arbitration Act do not apply to a case of five panchayatdars like the present one, it does not necessarily follow from this conclusion that the Indian Arbitration Act will not apply to the present case. The very case so strongly relied on by the respondent, *Gopalji Kuverji v. Morarji Jeram*(2), supports this position. As observed by SCOTT C.J. (see page 831) “the Act does not attempt to provide for every case”, and HAYWARD J. points out that, though reference

(1) (1890) 25 Q.B.D. 545.

(2) (1919) I.L.R. 48 Bom. 809.

(3) (1919) I.L.R. 45 Bom. 1.

(4) (1923) I.L.R. 47 Bom. 250.

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to three named arbitrators is not included within the particular provisions of sections 8 and 9, they might fall within the provisions of the other sections including section 19 of the Indian Arbitration Act. In this connection attention may also be drawn to the observations of VAUGHAN WILLIAMS L.J. in *Manchester Ship Canal Company v. S. Pearson & Son, Limited*(1), which show that the English Arbitration Act would govern a submission to arbitration even though the reference is to three arbitrators. The conclusion is, therefore, clear that, though sections 8 and 9 of the Indian Arbitration Act will not apply to the present case, still the case will fall under the purview of the Act, though the parties are left without any remedy under the Act. This blot in the Act will not, in my opinion, make the Act inapplicable to a case though reference is made in it to five Panchayatdars. Two inferences follow from this conclusion; (1) that section 3 cannot be used in the manner suggested by the appellant to limit the scope of section 2, that section 3 simply means that in cases governed by the Indian Arbitration Act, the operation of the provisions of the Code of Civil Procedure mentioned in it is excluded, that the reference to arbitration in the present case is not governed by the provisions of the Code of Civil Procedure and is not therefore within the exclusive jurisdiction of the City Civil Court and (2) that section 2 read with section 4 vests the jurisdiction to deal with the present reference exclusively in the High Court, but that the High Court, in the light of the foregoing observations, must be held to be unable to give the relief asked for by the plaintiff under section 8 or 9 of the Act, as, according to our interpretation, these sections

(1) [1900] 2 Q. B. 606.

cannot be applied to cases wherein the reference is made to five panchayatdars. This disability is certainly "a blot in the Act"; but it must remain so till it is cured by the Legislature.

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It is conceded that, if the High Court cannot interfere in the present case, then, the City Civil Court which, according to the respondent, is directed to deal with the matter, is also helpless, and therefore the second question raised in this appeal as regards the jurisdiction of the City Civil Court under the Code of Civil Procedure need not be decided.

Having regard to my view that the relief asked for cannot be given to the plaintiff under section 8 or 9 of the Act, we must set aside the order of the lower Court. In the result the plaintiff's suit will be dismissed. In the circumstances, we make no order as to costs.

No special order is necessary in the Civil Revision Petition.

CORNISH J.—I agree. In my opinion the Arbitration Act governs the submission to arbitration in the case before us. If that be so, section 17 of the Second Schedule of the Civil Procedure Code has no operation; and it follows that the order of the Judge of the City Civil Court purporting to be made under that section was without jurisdiction and should be set aside. Section 2 of the Arbitration Act states that subject to the provisions of section 23 (which are not material here) the Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could be instituted in the Presidency Town. Admittedly, a suit in respect of the subject-matter of the submission in this case could have been instituted in the Presidency Town. Then section 3 of the Arbitration Act provides that sections 523 to 526 of the Code of Civil Procedure, 1882, corresponding to

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paragraphs 17, 19, 20 and 21 of Schedule II of the Code of Civil Procedure, 1908—

“ shall not apply to any submission or arbitration to which the provisions of this Act for the time being apply.”

The meaning of this is, clearly, that when the Arbitration Act governs a submission, the operation of the specified sections of the Civil Procedure Code is excluded. This exclusion is recognized by section 89 of the Code of Civil Procedure, which says —

“ Save in so far as is otherwise provided by the Indian Arbitration Act, 1889, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions in the Second Schedule ” ; and this must mean that the provisions of the Second Schedule shall apply to an arbitration except when the Arbitration Act says that they shall not. But the contention is that the Arbitration Act has no application when, as in the case before us, the submission is to more arbitrators than are contemplated by sections 8 and 9 of the Act. It is established by *In re Smith & Service and Nelson & Sons*(1), *Manchester Ship Canal Company v. S. Pearson & Son, Limited*(2) and *Gopalji Kuverji v. Morarji Jeram*(3) that the power given to the Court by sections 5 and 6 of the English Act, and by the identical sections 8 and 9 of the Indian Act, is confined to cases where there is a single arbitrator or but two arbitrators ; see the judgment of A. L. SMITH L.J. in *Manchester Ship Canal Company v. S. Pearson & Son, Limited*(2). But these authorities do not, nor do the later authorities *In re Babaldas Khemchand*(4) and *Mackintosh & Co. v. Scindia Steam Navigation Co., Ltd.*(5), in my opinion, support the argument that a submission ceases to be governed by the Arbitration Act by reason

(1) (1890) 25 Q.B.D. 545.

(2) [1900] 2 Q.B. 606.

(3) (1919) I.L.R. 43 Bom. 809.

(4) (1919) I.L.R. 45 Bom. 1.

(5) (1922) I.L.R. 47 Bom. 250.

of the submission being to three or more arbitrators. On the contrary that proposition appears to be negatived by the judgment of VAUGHAN WILLIAMS L.J. in *Manchester Ship Canal Company v. S. Pearson & Son, Limited* (1), where he said—

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“In the report of *In re Smith and Service*(2) the judgments, in which it is said that sections 4, 5 and 6 [these sections corresponding to sections 19, 8 and 9 of the Indian Act] did not apply, must be read by the light of the argument for the appellants. It is there said that section 4 had no application to that case, because no legal proceedings had been taken. It is plain from this that when the learned Lords Justices said that section 4 did not apply, it was not meant that this was because it was a case of reference to three arbitrators, but only because no legal proceedings had been commenced.”

In short, it was pointed out that the Arbitration Act was not rendered inapplicable to a submission because in a particular instance the powers given to the Court by the Act were unavailing.

On the question which was raised by Mr. Sessa Ayyangar, whether the definition of “Court” in section 4 of the Arbitration Act is to be taken as indicating another exception to the jurisdiction conferred on the City Civil Court by section 3 of the Madras City Civil Court Act (VII of 1892), I do not think it is necessary to give a decision, for it is obvious that if the High Court has no power under section 8 or 9 of the Arbitration Act to make an appointment of an arbitrator when the reference is to five arbitrators, the City Civil Court has no such power.

For these reasons, I agree that the appeal should succeed and be allowed.

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(1) [1900] 2 Q.B. 606, 608.

(2) (1890) 25 Q.B.D. 545.