KERALA HIGH COURT

Vanguard Fire and General Insurance Company

Vs.

N.R. Sreenivasa Iyer

A.S. No. 838 of 1958, in O. S. No. 116 of 1956

(K.K. Mathew, J.)

21.12.1962

JUDGMENT

K.K. Mathew, J.

1. The defendant is the appellant. The decree from which this appeal arises is for recovery of Rs. 7,000/- with interest from the defendant for the loss sustained by the plain-tiff in respect of a car insured with the defendant. The plaintiff was owner of a car registered as "T. C. Q. I in the Travencore-Cochin State. It was an Austin 16 H. P. Car. The car was insured with the defendant against loss or damage and a policy was issued by the defendant to the plaintiff covering all accidents from 1-3-1952 to 28-2-1953. The car met with an accident on the night of 21-12-1952 as a result of which it stood in need of repair. The accident was covered by the terms of the Policy and "therefore the defendant was to repair, reinstate or replace the car or the part thereof and its accessories or pay in cash the amount of the loss or damage not exceeding the actual value of the parts damaged or lost plus a reasonable cost of fitting, such costs not exceeding in any case the estimate of the insurer of the value of the car as specified in the schedule attached to the Policy." The defendant company exercised its option under condition No. 3 of the Policy thereby undertaking to get the car repaired. It was to the workshop of the P. S. N. Motors Ltd., Trichur that the car was removed by the plaintiff's son as authorized by the provisions contained in the policy. It was alleged that the defendant thereby assumed possession of the car : but the car was not returned after effecting the repairs as required by the policy as it was burned down in the workshop on 10-7-1953. The plaintiff alleged that the defendant should not have entrusted the car for repairs to a workshop where several inflammable materials like oil and petroleum were stored without ascertaining whether the workshop was insured against fire. The plaintiff alleged that the defendant was negligent in entrusting the car to P. S. N. Motors Ltd., and therefore it was bound to reimburse the plaintiff a sum of Rs. 7,000/-being the reasonable value of the car at the time of the accident. As the defendant did not pay the amount on demand the plaintiff instituted the suit for recovery of the same with interest.

2. The contentions of the defendant were that it was not liable for the loss, that the suit was not maintainable as condition No. 7 in the policy made the award by the arbitrators a condition precedent to a right of suit by the plaintiff, that it did not take charge of the car or entrust it for

repairs to P. S. N. Motors, that the insurance policy was in force only till 28-2-1953, that the responsibility for having entrusted the car to P. S. N. Motors was that of the plaintiff and that P. S. N. Motors was an agent of the plaintiff and not of the defendant, that the removal of the car to P. S. N. Motors Ltd., was not in the discharge of any duty of the plaintiff under the terms of the policy, that it had not assumed possession of the car, and that the plaintiff's cause of action, if at all any, was against the P. S. N. Motors. It also pleaded that the fire that occurred on 10-7-1958 was beyond human control and was an act of God.

3. The lower Court framed 8 issues and recorded findings thereon and decreed the suit. Issue No. 4 runs as follows : "Is this suit maintainable in as much the plaintiff has not conformed to the condition No. 7 of the Policy?" On this issue the finding of the lower Court is that "if the defendant seeks to have that clause enforced under Section 34 of the Arbitration Act the company should have applied for stay of this suit and got the matter referred to arbitration. Defendant has not done any such thing in this matter. I therefore find this issue for the plaintiff that the suit is maintainable."

4. Condition No. 7 reads as follows :

> "All differences arising out of this policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calender month after having been required in writing so to do by either of the parties or in case the arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an Award shall be 4 condition precedent to any right of action against the Company. If the Company shall disclaim liability to the Insured for any claim shall not within twelve calendar months from the date of such disclaimer have been referred to Arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

Condition No. 8 in the policy is also material and is therefore set out hereunder :

> "The due observance and fulfillment of the terms conditions and endorsements of this Policy in so far as they relate to anything to be done or complied with by the Insured and the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy."

Counsel for the appellant contended that condition No. 7 required the making of an award a condition precedent to a right of suit by the insured and that unless there was an award by the arbitrators or the umpire as the case may be, the plaintiff has no cause of action, as the making of the award was a condition precedent to the accrual of a cause of action to the plaintiff and that the view of the lower Court that because the defendant did not apply for stay of the suit under Section 34 of the Arbitration Act 1940 the suit was maintainable, is erroneous.

5. The question that arises for consideration is whether the defendant ought to have applied under Section 34 of the Arbitration Act for stay of the suit and not having done so whether it was open to it to put forward the contention that the suit was not maintainable. It is now settled by authorities that if the making of an award is a condition precedent for the accrual of a cause of action to the plaintiff, then that condition has to be satisfied before the plaintiff can acquire a cause of action; and if a suit is instituted before that, it is a good defense to the maintainability of the action itself. A distinction has always been made between cases where the arbitration and the award are made conditions precedent to the right of action itself and where they are merely collateral to the main agreement. In the latter case if a suit is instituted in violation of the collateral agreement, the only consequence is that the suit will be liable to be stayed at the instance of the defendant under Section 34 of the Arbitration Act. But where a suit is instituted when the making of an award is a condition precedent to the accrual of a cause of action in favour of the plaintiff before the making of the award, such a suit is also liable to be dismissed if a defence is taken to that effect the reason being that the plaintiff has no cause of action, until the award is made.

6. *Scott v. Avery*[1], is the leading case on the subject, where it was held that the parties may validly agree that no action shall be brought until the award has been made. Lord Campbell, in the course of his speech, said (at p. 854);

> "Now in this contract of insurance it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any Court whatsoever. That is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatsoever and no cause of action accrues until the arbitrators have determined. Therefore without overturning the case of *Thompson v. V. Charnock,*[2] and the other cases to the same effect, your Lordships may hold that, in this case, where it is expressly, directly, and unequivocally agreed upon between the parties that there shall be no right of action whatever till the arbitrators have decided, it is bar to the section that there has been so such arbitration."

In *Heyman v. Darwins Ltd*[3]*.,* Lord Wright has made the following observation :

> "The contract, either instead of, or along with, a clause submitting differences and disputes to arbitration, may provide that there is to be no right of action save on the award of an arbitrator. The parties in such a case make arbitration followed by an award a condition to any legal right of recovery on the contract. This is a condition of the contract to which the Court must give effect unless the condition has been "waived", that is unless the party seeking to set it up has somehow disentitled himself to do so. The distinction between a mere submission and such a clause is clearly stated by Warrington, L. J., in *Woodall*

1(1856) 5 HLC 811 [3]1942 AC 356 at p. 377

[2]1799-8 Term Rep. 139

> *v. Pearl Assurance Co., Ltd*[4]*.* ".

In *Prataprai v. Sheo Narayan*[5], Mr. Justice Gajendragadkar, (as he then was) held that an agreement of this kind would not oust the jurisdiction of the Court. The Head Note of the report correctly sets out the facts and the gist of the decision in the case :

> "Plaintiff and defendant were members of Bombay Bullion Association. The plaintiff brought a suit for recovery of a sum due to him in respect of forward transactions of bullion that took place between him and the defendant. Bye law 38 of the Association provided as follows : 'In connection with ready or forward transactions between members of the company or between members and non-members, in gold, silver and sovereign, done in accordance with the rules and bye-laws of the Association, or whether a ready or forward transaction in gold, silver and sovereigns has been entered into or not, all the claims or disputes or differences of opinion of any sort arising out of the contracts in respect thereof shall be settled by reference to arbitration."

The bye-law also provided that 'only after obtaining an award from the arbitrators in this manner, any party can go to a Court of law in order to obtain relief in respect of the said transactions.'

> ..... that the bye-law amounted in law to an agreement in writing to refer disputes between persons governed by the bye-law to arbitration within the meaning of Section 2 (a), Arbitration Act. Hence the claim in suit must be resolved by the domestic tribunal contemplated by the bye-law and a suit in respect of it was not maintainable."

In the case of 1919-1 KBD 593 it was held : "The question is within which class does the arbitration clause in the present case come? In my opinion, it comes within the second of those two classes, as in (1856) 5 HLC 811 and the right to bring an action depends upon the result of the arbitration. It is true that the defendants, if they pleased, might not have insisted upon this provision; they might have allowed the action to proceed without raising this defence. I do not think it matters much whether in that case the action proceeds by virtue of a new agreement arrived at between the parties by thus waiving the arbitration clause, or whether the action is founded on the original agreement. Where however one of the parties, as in this case, insists upon the arbitration clause it seems to me clear that arbitration is not a mere matter of procedure, but that proceeding to arbitration is essential to a right of action in the assured."

7. The question therefore arises whether condition No. 7, stipulating the making of an award, was really a condition precedent to the maintainability of the action. Attempts have been made to enunciate a test for determining whether an arbitration clause amounts to a condition precedent to the institution of the suit or note. It has some times been said that the test is whether the arbitration clause is merely collateral or whether the parties have agreed that the liability of one party or other is to arise only

[4]1919-1 KB 593 at p. 607

[5] AIR 1956 Bom 97

after the making of the award. This proposition put in this manner though unexceptionable does not carry the matter far. The difficulty which arises in answering the question whether an arbitration clause amounts to a condition precedent or not may be illustrated by reference to *Hallen v. Spaeth*[6], That was a case between a lessor and a lessee and the lessor agreed that at the

end of the term he would purchase by valuation buildings erected by the said lessee, by a reference to arbitration if the parties were unable to agree to the valuation. At the end of the term the lessor was given possession and the lessee sued him to recover the value of the building there having been no agreement as to the valuation or any arbitration. In appeal Viscount Haldane said :

> "Their Lordships interpret this as meaning that the amount of the valuation is to be such as may be determined in an arbitration. For, then and not until then does a sum, which has to be ascertained in that fashion, become due and capable of affording a right of action. The determination of this sum is not a matter of independent right for which a claimant can go to the Courts. He is entitled only to what the arbitrators award. If this construction be the true one it brings the case within the principle of (1856) 5 HLC 811 which decided that while by the common law parties could not contract validly to oust the Courts of their jurisdiction, they could contract that no right of action should accrue until a third person had decided the amount to which there was to be a right. This is a principle from which there is no derogation in the Common Law Procedure Act. It is, in their Lordships' view of the construction of the lease, a case to which the principle laid down in (1856) 5 HLC 811 applies, and not that explained in *Dawson v. Fitzgerald*[7], where as a matter of construction it was held on appeal that there was an independently constituted liability enforceable in the Courts to abstain from doing a particular act, with a separable agreement to refer to arbitration the amount of compensation".

8. In *Viney v. Bignold*[8], the policy under consideration contained a clause whereby the parties were required to submit to arbitration the adjustment of the loss payable under the policy with provision that the award should : be conclusive evidence of the amount of loss and that the assured would not be entitled to commence any action until the amount has been ascertained by the arbitrators and that only for the amount awarded. This was held to be an answer to an action by the assured commenced before there had been an award in terms of the agreement. The test is whether there is an absolute covenant to pay with a collateral provision that the amount shall be fixed by arbitration or whether there is only a conditional covenant to pay such amount as will be awarded, a test which it is not easy of application in all cases. An example of the condition for arbitration being held merely collateral and independent of the covenant to pay will be found in (1876) 1 Ex D 257 where a tenant covenanted not to keep such quantities of rabbits and hares as would be injurious to the crops and if he did that, then he would pay reasonable compensation to be settled in the case of difference by arbitration. An action for the lessor's estimated compensation was held to be maintainable although no recourse was had to arbitration proceedings. (See the judgment of Lord Macmillan in *Arthur Andrew Cipriani v.*

[6]1923 AC 684 [8](1887) 20 QBD 172

[7](1876) 1 Ex D 257

Macdonald Burnett[9], as to the circumstances in which the Courts will imply a condition precedent, when there is no express clause to that effect.)

9. The American Law on the point is also the same. Reference may be made in this connection to a passage in American Jurisprudence Vol. 3 page 874 : Article 45 :

"..... Ordinarily, however, the Courts will not construe an arbitration clause as ousting them of their jurisdiction unless such construction is inevitable, and the rule is general that such a clause, which neither by express words nor by necessary implication makes an award a condition precedent as an essential and integral part of the contract, will be construed as merely collateral to the liability clause, and so, no bar to an action in the Courts brought without a prior arbitration and award ..... The distinction between the two classes of cases is frequently recognized. In one, an award is of the essence of the contract by virtue of its terms, thus creating a condition precedent to the right to sue at all. In the other, liability may arise under the contract prior to an award, but recovery in a certain event may be barred until the ascertainment of a particular fact or facts by arbitration. In the first class, the contract remains wholly executory, or, as has been said, there cannot be a contract or a 'cause of action at all until an arbitration is had and the Court Cannot take jurisdiction, for to do so would involve making a contract for the parties. In the second class of cases, the agreement for arbitration is merely a subsidiary part of another contract, for a more extensive purpose, under which substantial rights and liabilities may arise irrespective of the arbitration clause, and though valid so that non-performance will support an action for its breach or may make it available as matter of defence in a suit on the contract, it is not strictly a condition precedent to suit; and should arbitration fail, either through the conduct of the parties or of the arbitrators, the court, in a proper case, may take upon itself the decision of the point involved".

Therefore ultimately it depends upon the language of the agreement; if it is vague and uncertain, the failure to resort to arbitration will not be a bar to a suit if there is a right of action under the contract, even though by express language an award is made a condition precedent.

10. In Corpus Juris Secundum, Vol. 6, p. 169, Article 29 (b) it is stated :

"If the contract sought to be enforced contains a stipulation not that all questions arising thereunder, whether as to the validity or effect of such contract, or otherwise, shall be submitted to arbitration, but that the decision of arbitrators on a certain question or questions such as the quantity, quality, or price of materials or workmanship, the value of work, the amount or cause of loss or damage, or the like, shall be obtained prior to an action on the contract itself, such stipulation will be enforced, because the parties to a contract have a right to adopt whatever method they see fit for determining such questions and until the method adopted has been pursued, or some sufficient reason given for not pursuing it, no action can be brought on the contract. "Freedom to contract

[9]64 Mad LJ 284 : AIR 1933 PC 91

for arbitration to this extent", it has been said, "imports no invasion of the province of the courts, and there is no ground upon which a right so essential to the convenient transaction of modern business affairs can be denied".

Bearing these principles in mind I think, that condition No. 7 in the Policy requires the making of

an award a condition precedent to any right of action against the company : that clause is expressed in such clear language, that I would be re-writing the clause, were I to say that that was not the intention of the parties. This condition may either mean that the arbitrators have to decide the question whether there is any liability at all under the contract or that they have to decide the quantum of that liability. In either case an award by the arbitrators is a condition precedent to any right of action. There is no difference between a case where the arbitrators have to decide the question of the liability itself and a case where he has to decide the question of the quantum of that liability. In both cases if the contract makes the decision of the arbitrators a condition precedent that has to be fulfilled before a suit can be instituted.
11. In (1856) 5 H. L. C. 811, at p. 851 Lord Campbell said :

It is declared to be a condition precedent to the bringing of any action. There is no doubt that such was the intention of the parties; and, upon a deliberate view of the policy, I am of opinion, that it embraced not only that assessment of damage, the contemplation of quantum, but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers, as well as the amount to be paid. If there had been any question about want of seaworthiness, or deviation, or breach of blockade, I am clearly of opinion that, upon a just construction of this instrument, until those questions had been determined by the arbitrators, no right of action could have accrued to the insured".

12. Section 36 of the Indian Arbitration Act 1940 enables a court, when an appropriate motion is made, to set aside any condition which operates as a condition precedent to the bringing of an action with respect to any matter to which the agreement relates, and the court can order that the agreement shall cease to have effect as regards any particular difference. Section 36 of the Indian Arbitration Act 1940 corresponding to Section 25 (4) of the English Arbitration Act, 1950 reads as follows :

> "Where it is provided (whether in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this Act or any other law) that the agreement shall cease to have effect as regards any particular difference, may further order that the said provision shall also cease to have effect as regards that difference".

So the effect of the *Scott v. Avery* clause can be nullified by applying to the Court for setting aside that clause. As to what are the circumstances under which the clause will be dispensed with, the following observation in Russel on Arbitration, 16th Edn., page 86, is instructive :
Where a Court orders that an arbitration agreement shall cease to have effect in relation to a dispute, it may also order that any *Scott v. Avery* clause in force between the parties (whether contained in the arbitration agreement or not) shall likewise cease to have effect. This section in effect gives the Court a discretion, in suitable cases, to treat the *Scott v. Avery* clause as a mere arbitration clause. There is power to make such an order :-

1. where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the Court. This would seem to cover any case where either the ***Scott v. Avery*** clause is contained in a submission proper, and leave is given to revoke this, or it is contained in an agreement to submit

and leave is given to revoke a submission made pursuant to agreement.

2. Where the whole arbitral tribunal is removed by the Court : i.e. for misconduct of delay.

3. Where the dispute involves charges of fraud".

13. Section 37(2) of the Indian Arbitration Act 1940 reads as follows :

> "Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement".

Before the introduction of this section it was held that the period of limitation for a suit where there is the *Scott v. Avery* clause will run only from the date of the award. This section would seem to imply that a party can institute a suit even before an award has been made. It would seem further to indicate that the cause of action is not postponed to the making of the award even though it be a condition precedent to a right of suit. I think, it is only when the condition is set aside under Section 36 or waived by the party entitled to insist upon it that the question of proceeding with a suit arises. So the section can only contemplate cases where the Court sets aside the condition under Section 36, or where the condition is waived by the party, and then limitation for a suit will run from the date from which it would have run but for the agreement to have the matter referred to arbitration and an award obtained.

14. It was contended for the respondent that even where a suit is instituted in violation of the clause in the agreement making the award a condition precedent, the only remedy of the defendant is to make an application for a stay under Section 34, and that there is no difference between a case where the arbitration clause is collateral and where it is a condition precedent. Reliance was placed by counsel upon *Dennehy v. Bellamy*[10], where Creer L. J., considered the question with particular reference to Section 3(4) of the English Arbitration Act 1934 corresponding to Section 36 of the Indian Act which gives power to the Judge to eliminate from the contract the promise

[10]1938-2 All ER 262

that had been made with reference to the condition precedent and to treat it as if it were a mere arbitration clause. That was a case of an appeal against an order of the Judge below staying the action in view of the *Scott v. Avery* clause occurring in the policy considered in that case. I do not think that that case is an authority for the proposition that when the defendant does not apply for stay in a case where there is *Scott v. Avery* clause the Court could not dismiss the suit if a plea to that effect is taken. In fact that the suit could be dismissed seems to be implied from what is said by the learned judge. This is what the learned judge says at page 264.

> "I think it was a question of liability under the contract, and it would have been perfectly useless to anybody to allow the action to go on, because the action must necessarily fail, inasmuch as the plaintiff in the action was not in a position to prove that the condition precedent to his liability had in fact been performed.

It is quite true that under the Arbitration Act 1934, Section 3(4), the judge had power, if he thought right to do it, to eliminate from the contract the promise that had been made with reference to the condition precedent, and to treat it as if it were a mere arbitration clause. However, it was for him to judge, and to decide whether or not he would do so".

15. Counsel for the respondent contended that even in a case where there is the *Scott v. Avery* clause the jurisdiction of the Court to entertain the action is not ousted. In this connection he referred to the provisions of Sections 36 and 37 of the Arbitration Act 1940. His argument was that under Section 36 the ancillary jurisdiction of the Court is preserved, which implies that the plaintiff has a right to institute the suit and it was to remove the doubt whether the Court had jurisdiction to grant ancillary reliefs that the section was introduced. That according to him, implies that the Court can entertain the suit even in spite of the *Scott v. Avery* clause. He also argued that Section 37 postulated by implication a right to institute a suit even in a case where there is the *Scott v. Avery* clause, as otherwise it would be difficult to think how time can run from the date of the original cause of action instead of the date of the award.

16. Under Section 36, no doubt, it is open to the Court to set aside the conditions in the agreement as to the operation of the *Scott v. Avery* clause. If the Court were to pass an order dispensing with that clause it is open to the Court to entertain the suit or proceed with it as if the provision for arbitration were only a collateral one. It is doubtful whether the action can be proceeded with without dispensing with the clause making the award a condition precedent to the liability of the company. No doubt, it is open to the Court to stay or not to stay the trial of the suit even in a case where the *Scott v. Avery* clause is present. But the real question which I have to consider is whether when a defendant refuses or neglects to apply for stay in a case where the Court has not exercised its jurisdiction under Section 36 to dispense with the clause relating to the making of the award a condition precedent for right of suit, it is open to the defendant to plead that the suit is not maintainable because no award has been made and get the action dismissed on that ground.

17. The question whether the suit is liable to be dismissed in such circumstances was considered in *W. Bruce Ltd. v. J. Strong*[11], and it is observed at p. 1023 as follows :

> "If he does not take out a summons to stay, he cannot rely on the submission to arbitration. If, however, the arbitration clause is in what is often called the *Scott v. Avery* form i. e. making an award a condition precedent, he can rely in his defence on the failure to observe the condition precedent. Section 25(4) provides that the High Court can order that the agreement to submit to arbitration shall cease to have effect at regards any particular dispute, in effect striking the condition precedent out of the contract".

18. In Porter on Insurance at Page 173 it is stated as follows :

> "On hearing the application the 'Court or a Judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were

commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings'.

If the application be not made at the correct time the action may proceed and the defendant may, if the provision for arbitration is a condition precedent, then plead non-performance of it as a defense to the action". In Halsbury's Laws of England, 3rd Edn. Vol. 2 page 19 it is stated :

> "So long as an arbitration agreement only requires certain conditions precedent or subsequent in order to constitute the right of action it does not oust the jurisdiction of the Court, and a provision in an arbitration agreement, known as a ***Scott v. Avery*** clause, whereby the making of the award is to be considered a condition precedent to any right of action in respect of any of the matters agreed to be referred, is valid. It follows that the existence of such a clause, quite apart from any right to stay proceedings, constitutes a defence to any proceedings brought before the publication of the award. Such a clause, however, does not operate to postpone the running of any period of limitation. A stipulation making arbitration a condition precedent to the right to sue may be waived by conduct". In Anson on contract 1959 Edn., page 300 it is observed :
> "However, since this provision can be made to apply not only to the amount of the award, but also to the question of legal liability, it is clear that its effect is to act as a defense to any action brought before the award is made".

(In the footnote reference is made to the English Arbitration Act of 1950, and particularly to Section 25 of that Act which provided for setting aside the ***Scott v. Avery*** clause, and also to Section 27(2) of the Limitation Act 1929 which is to the effect that a clause of this nature does not operate to postpone the running of the period of limitation.)

[11]1951-1 All ER 1021

19. Therefore I come to the conclusion that the defence put forward that the suit was not maintainable is entirely legal and must succeed and that the defendant was entitled not only to have applied for a stay, but also to have demurred to the action as being premature and prayed for a dismissal of the same. Here the condition as to the making of the award has not been dispensed with by the Court under Section 36. No application to stay the trial was also made. The lower Court has held that as no application for stay was filed under Section 34 it was not open to the defendant to contend that the suit was not maintainable. I cannot agree with the conclusion of the Court below. The suit was not maintainable because the plaintiff had no cause of action until after an award has been made. The fact that the limitation will run in such a case as if the *Scott v. Avery* clause were absent is immaterial for the purpose of deciding whether the plaintiff has got a cause of action. It is also immaterial that the defendants could have applied for stay, because that will not preclude the defendant from relying upon the defence which he has to the suit. It follows that the existence of such clause quite apart from any right to stay the proceeding constitutes a defence to any proceedings brought before the publication of the award.

20. Reliance was placed by counsel for the respondent on the ruling reported in *Raghunath Prasad v. L. Gurdyal Prasad*[12] I do not think that in that case the court was considering the effect of *Scott v. Avery* clause, and if it is considered to be a decision on the construction of that clause,

I do not find any discussion of the points relevant to that question. Beyond tracing the history of the evolution of the arbitration law, I do not find the case very helpful for deciding the point now under consideration.

21. This leads me on to the question whether the making of the award as a condition precedent to a right of suit has been waived. There is no evidence in the case that the defendant waived the condition. There was no plea of any waiver of the right to insist upon arbitration as a condition precedent. The fact that the defendant did not apply for stay does not mean that it had waived the condition. As to what constitutes a waiver in a case like this is dealt with in the case reported in *Burridge and Sons v. F. H. Haines and Sons, Ltd*[13]. Avory, J., held :

> "But in answer to this point the insured alleged and set up before the arbitrator that there had been a waiver by the defendant company of that condition..... It appears to me that the evidence is conclusive that there was a waiver within the principles which have been laid down, and which are particularly enunciated in the case to which our attention has been called : of *Toronto Rly. Co. v. National British and Irish Millers Insurance Co. Ltd*[14]. "It may happen that a waiver of a breach of the condition in the policy was not actually intended; but if the conduct and declaration of the insurer are of such a character as to justify the belief that waiver was intended, and, acting upon this belief, the insured is induced to incur trouble and expense and is subjected to delay to his injury and prejudice, the insurer may be prohibited from claiming a forfeiture for such a breach upon the principle of equitable estoppel."

[12] AIR 1956 All 194 [14](1914) in L. T. 555

[13]1918-87 LJ KB 641

22. Reliance was placed upon a letter Ext. P14 sent by the defendant to the plaintiff to show that the defendant repudiated the contract and thereby waived the condition in it. Is it possible to infer from Ext. P14 that the company denied its obligation to have the matter settled by arbitration? That letter starts off by saying "We are not your insurers on the date of the loss and consequently there is no question of any liability under the policy". I do not think that it is possible to infer from this that the defendant repudiated the contract for arbitration. All that it did was to assert that the claim of the plaintiff arose not out of the contract of insurance but" out of an independent entrustment of the car to it. There was no repudiation of the contract to refer the matter to arbitration. The loss of the car by the fire, it may be recalled, occurred after the currency of the policy. The defendant was obviously referring to that when it stated that it was not an insurer on the date of the loss and therefore there was no liability under the Policy. That statement cannot be considered to be a statement of a pure fact so as to create as estoppel. It was not relied upon by the plaintiff nor was any action taken by the plaintiff on the basis of that statement which operated to his detriment or loss. In these circumstances it cannot be said that there was a waiver of the condition for arbitration, if the claim of the plaintiff was really covered by the policy. I cannot so read the letter as to infer from it a waiver of the right to insist upon arbitration as a condition precedent to the suit if the claim was thought by the defendant to be really covered by the policy. A waiver in order to be effective must be accompanied by an awareness of the right waived. An alternative contention on the basis that the claim was not covered by the policy cannot afford a solid foundation for a plea that the right to have the matter adjudicated by a domestic tribunal was waived if the claim fell within the four corners of the policy. Nor could it

be said that the defendant did in any manner thwart the attempt of the plaintiff to have the matter referred to arbitration.

23. In these circumstances I cannot come to the conclusion that the conduct and the declaration of the defendant were of such a character as to justify the belief in the plaintiff that a waiver was intended or that by acting upon that belief loss or prejudice was caused so that it might be said that the defendant was estopped from insisting upon its right to have the matter referred to arbitration in the first instance. Therefore I find that the defendant did not waive the condition and as such it is entitled to insist upon the dismissal of the suit.

24. As regards the other questions, the contentions urged by the appellant were that there is no averment in the plaint that the car was entrusted to the defendant as a bailee, and that as there is no evidence of negligence, the defendant cannot be made liable. It is true that there is no clear allegation or evidence of negligence on the part of the defendant in keeping the car in the workshop of P. S. N. Motors.

25. Counsel for the respondent submitted that the defendant had exercised its option to repair the car under the contract of insurance, and therefore it was bound to repair the car and reinstate, and that it was immaterial to his client as to what happened to the car in the workshop. Counsel also submitted that under the contract of insurance defendant was bound to reinstate and that that liability was absolute. He relied on a passage from Halsbury's Laws of England Vol. 22, page 321 for the purpose of showing that the defendant, in such circumstances was bound to reinstate the car, and a plea that such performance was impossible cannot be and ought not to be countenanced. That passage is as follows :

> "Unless the insurers elect to reinstate, their obligation to make good the loss by a payment in money continues. If, however, they elect to reinstate, their obligation to make a payment in money ceases, and the contract becomes a contract to reinstate. In the case of a building, this contract is sufficiently performed if the building is put substantially into the same state as before the fire. If the building, when reinstated, differs materially from the original building, or if, through bad workmanship, it proves defective and has to be rebuilt by the assured, the insurers are guilty of a breach of contract for which they are liable in damages. They are also guilty of a breach of contract if they fail to reinstate, and it is no defence that the reinstatement would cost much more to carry out than they had anticipated at the time when they elected, or even that reinstatement had become impossible. If they commit a breach of contract under either head, the damages which may be awarded against them are not necessarily limited to the amount which would have been payable under the policy if they had elected to make a payment in money."

I need not pause to consider the question whether in all circumstances the liability to reinstate is absolute. In view of my conclusion of the first point, I do not think that it is really necessary to decide this question.

26. Therefore I set aside the decree of the lower court and allow the appeal. But considering the circumstances of this case, I order both parties to bear their costs here and in the court below.

Appeal allowed.