1946 *Present :* **Howard C.J. and de Silva J.**

WIJAYARAYANA, Appellant, *and* GENERAL INSURANCE CO., LTD., Respondent.

198—D. C. Colombo, 15,283.

Arbitration—Insurance policy—Clause providing for arbitration in case of difference or dispute—Jurisdiction of Court in case of absence of dispute—Arbitration Ordinance (Cap. 83), s. 7.

One of the clauses of a policy of insurance provided that " all differences arising out of this policy shall be referred to the decision of an arbitrator."

When a claim was made by plaintiff, the insured, the defendant insurance company stated that it proposed to repudiate liability because the plaintiff had violated policy conditions. The particular act of violation was not stated. The defendant company was asked on what grounds it denied liability and the reply sent to the plaintiff was that when the latter made his claim it would be the occasion for informing him on what ground liability was repudiated.

Held, that, in the circumstances, when action was brought, there was no difference or dispute which could be referred to arbitration.

APPEAL from a decision of the District Judge of Colombo. The plaintiff based his action on a policy of insurance effected with the defendant company in respect of his motor car. The plaintiff's motor car collided with a rickshaw puller who recovered damages against the plaintiff. On being called upon to indemnify the plaintiff the defendant company refused to do so. In its defence the defendant company pleaded that it was under no liability to indemnify the plaintiff by reason of the fact that the latter had violated the conditions of the policy by instituting this action without reference to arbitration. The learned District Judge dismissed the plaintiff's action holding that the matters in dispute between the plaintiff and the defendant were not referred to arbitration and in such circumstances the plaintiff could not maintain this action.

H. V. Perera, K.C. (with him *Walter Jayawardene*), for the plaintiff, appellant.—The agreement that the award of the arbitration shall be a condition precedent to any right of action against the company was not a bar to this action as there was not, in fact, any difference or dispute to go before an arbitrator.

Even if there was such a dispute the defendant company has by its conduct waived its rights under the relevant clause of the agreement—*Toronto Railway Co. v. National British and Irish Millers Insurance Co., Ltd.*[1] Assuming that the arbitration clause was binding and assuming also that there was a dispute to be referred to arbitration, the order dismissing the plaintiff's action is wrong ; the learned District Judge should have stayed the action and referred the parties to arbitration. Section 7 of the Arbitration Ordinance is wide enough to catch up a case where parties have agreed that no action shall be brought until the arbitrator has given his award.

[1] *(1914) 111 L. T. 555.*

N. Nadarajah, K.C. (with him *D. W. Fernando*), for the defendant, respondent.—The relevant clause in the agreement expressly makes an award of the arbitrators a condition precedent to the bringing of an action, and the only course open to the learned District Judge was to dismiss the plaintiff's action. See *Scott v. Avery*[1] ; *Trainor v. The Phoenix Fire Assurance Co.*[2]. The conduct of the respondent did not amount to a waiver of its rights under the arbitration clause. Section 7 of the Arbitration Ordinance is similar in terms to section 11 of the Common Law Procedure Act of 1854 which was in force when *Scott v. Avery* was decided.

H. V. Perera, K.C., in reply.—In *Scott v. Avery* (*supra*) no cause of action could arise until the award of the arbitrators was given for the reason that the plaintiff was entitled under the agreement to sue only for such sum as may be awarded by the arbitrators. The plaintiff's action had therefore to be dismissed. The present case is different as the action is based on an unqualified right of indemnity. The Common Law Procedure Act of 1854 had not been enacted at the time the Court of Exchequer gave judgment in *Scott v. Avery* (*supra*).

Cur. adv. vult.

June 26, 1946. HOWARD C.J.—

The plaintiff who appeals from a decision of the District Judge, Colombo, bases his action on a policy of Insurance with respect to his motor car effected with the defendant company. The plaintiff's motor car collided with a rickshaw puller who recovered damages against the plaintiff. On being called upon to indemnify the plaintiff the defendant company refused to do so. In its defence the defendant company pleaded that it was under no liability to indemnify the plaintiff by reason of the fact that the latter had violated the terms and conditions of the Policy by instituting the present action without reference to arbitration. The learned Judge in dismissing the plaintiff's claim has held that the matters in dispute between the plaintiff and the defendant company were not referred to arbitration and in such circumstances the plaintiff cannot maintain this claim.

Clause 7 of the Conditions of the Policy which relates to arbitration is worded 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 calendar 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 a condition precedent to any right of action against the

[1] (1855) 10 E. R. 1121. [2] (1892 65 L. T. 825.

Company. If the Company shall disclaim liability to the Insured for any claim hereunder and such 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 herounder."

It was held by the learned Judge and has been contended by Mr. Nadarajah, on behalf of the respondent company, in this Court that clause 7 of the conditions in the Policy provides that a reference to arbitration is made a condition precedent to the defendant's liability in a Court of Law. Mr. H. V. Perera on the other hand maintains that section 7 of the Arbitration Ordinance (Cap. 83) applies and that the plaintiff having, in spite of the arbitration clause in the policy, sought his remedy in Court, the remedy of the defendant company was to move that Court proceedings be stayed and the matter referred to arbitration. Section 7 of the Arbitration Ordinance is worded as follows :—

" Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any existing or future differences between them shall be referred to arbitration, and any one or more of the said parties, or any person claiming through or under them, shall nevertheless commence any action against the other party, or against any person claiming through or under them, in respect of the matters so agreed to be referred, it shall be lawful for the Court in which the action is brought on application by the defendants, or any of them, upon being satisfied that no sufficient reason exists why such matters cannot be referred to arbitration according to such agreement as aforesaid, and that the defendants or any of them were, at the time of the bringing of such action, and still are, ready and willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration, to make an order staying all proceedings in such action, and compelling reference to arbitration on such terms as to costs and otherwise as to such Court may seem fit :

Provided always that any such rule or order may, at any time afterwards, be discharged or varied as justice may require."

In support of his contention Mr. Nadarajah has cited the case of *Scott v. Avery* [1]. This case was decided in 1856, and the law in force when the case was under consideration by the English Courts contained a provision similar to section 7 of the Arbitration Ordinance, namely, section 11 of the Common Law Procedure Act, 1854. This provision was subsequently recreated in section 4 of the Arbitration Act 1889 (52 and 53 Vict c. 49). In *Scott v. Avery* (*supra*) a policy of insurance was effected in a mutual insurance company on a ship, one of the conditions of which was that the sum to be paid to any insurer for loss should in the first instance be ascertained by the Committee ; but if a difference should arise between the insurer and the committee relative to the settling of any loss or to a claim for average, or any other matter relating to the

[1] *(1855) 10 E. R. 1121.*

insurance the difference was to be referred to arbitration in a way pointed out in the conditions : provided always that no insurer who refuses to accept the amount settled by the Committee shall be entitled to maintain any action at law until the matter has been decided by the arbitrators and then only for such sum as the arbitrators shall award and the obtaining of the decision of the arbitrators was declared a condition precedent to the maintaining of the action. The Court of Exchequer gave judgment for the plaintiff in error. On error brought the Court of Exchequer Chamber reversed that judgment, and gave judgment for the defendant in error. A further writ of error was brought and the Judges were summoned : Eleven Judges attended. By a majority of one the Judges were of opinion that judgment should be given for the defendant in error. With that opinion The Lord Chancellor, Lord Campbell and Lord Brougham agreed. In the judgment of the Lord Chancellor at pp. 1136–1137 the following passage occurs :—

" And that, I take it, is what was alluded to by Lord Hardwicke, in the case of *Wellington v. Mackintosh* (*2 Atk. 569*), which was this : The articles of partnership in that case contained a covenant that any dispute should be referred. A bill was filed by one of the partners, and a plea set up that covenant to refer as a bar to the bill. Lord Hardwicke overruled that plea, but said that the parties might have so framed the deed as to oust the jurisdiction of the Court. I take it, that what Lord Hardwicke meant was, that the parties might have so framed the stipulations amongst themselves, that no right of action or right of suit should arise until a reference had been previously made to arbitration. I think it may be illustrated thus : If I covenant with A to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals. But if I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damage sustained by him, then, until J. S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen. The policy of the law does not prevent parties from so contracting. And the question is here, what is the contract ? Does any right of action exist until the amount of damages has been ascertained in the specified mode ? I think clearly not. The stipulation here is, that the sum to be paid to the suffering member shall be settled by the committee. Certain proceedings are provided to obtain the decision of arbitrators, and there is this express stipulation, that ' the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit.'

" That the meaning of the parties therefore was, that the sum to be recovered should be only such a sum as, if not agreed upon in the first

instance between the committee and the suffering member, should be decided by arbitration, and that the sum so ascertained by arbitration and no other, should be the sum to be recovered, appears to me to be clear beyond all possibility of controversy. And if that was their meaning, the circumstances that they have not stated that meaning in the clearest terms, or in the most artistic form, is a matter utterly unimportant. What the Court below had to do was to ascertain what was the meaning of the parties as deduced from the language they have used. It appears to me perfectly clear that the language used indicates this to have been their intention, that, supposing there was a difference between the person who had suffered loss or damage and the committee as to what amount he should recover, that was to be ascertained in a particular mode, and that until that mode had been adopted, and the amount ascertained according to that mode, no right of action should exist. In other words, that the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say."

The basis of the judgment was that until the award was made no right of action accrued. Lord Campbell in his judgment stated that it was clear that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between them. It was declared to be a condition precedent to the bringing of any action. Lord Campbell then proceeded to discuss the legality of a such a contract and held that there was nothing illegal in it. Unless there was some illegality, the Courts were bound to give it effect. His Lordship then proceeded to differentiate the case from that of *Thompson v. Charnock* [1], where it was held that if the contract between the parties simply contain a clause or covenant to refer to arbitration and goes no further, then an action may be brought in spite of that clause, although there has been no arbitration. In this connection Lord Campbell at p. 1139 states as follows :—

" Therefore, without overturning the case of *Thompson v. Charnock* 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 a bar to the action that there has been no such arbitration."

It would appear that in *Scott v. Avery* (*supra*) before the action was brought a difference and dispute arose between the Committee and the plaintiff relating to the insurance, to wit, as to the extent of the said loss and as to the repairs done to the ship and as to the sum to be paid by the Association to the plaintiff in respect of such loss. In *Scott v. Avery* (*supra*) there was a difference or dispute between the parties which was clearly defined and could be referred to arbitration under the terms of the policy. No such defined difference exists in the present case. In

[1] *(1817) 8 T. R. 139.*

their letter of May 8, 1943, the defendants state that they propose to repudiate liability because the plaintiff has violated policy conditions. The particular act of violation is not stated. In a letter of June 5, 1943, the plaintiff's proctor asks on what specific grounds the defendants deny liability. On June 17, 1943, the defendants replied to this letter by stating that when a claim is made, it would be the occasion for informing the plaintiff of the grounds on which liability is repudiated. On July 6, 1943, the plaintiff's proctor informed the defendants that his client proposed to institute an action against them. On July 12, 1943, the defendants repudiated liability. The correspondence between the parties indicates merely a general repudiation of liability by the defendants. In these circumstances does the case come within the principle decided in *Scott v. Avery* (*supra*) ? The latter case was comprehensively reviewed in *Trainor v. The Phoenix Fire Insurance Company* [1]. At p. 827 Lord Coleridge C.J. stated that the case was exactly within the decision of *Scott v. Avery* (*supra*) as interpreted by Lord Cranworth and Lord Campbell and it is a clause agreeing to refer all matters in difference between the assured and the insurer, as a condition precedent to the assured maintaining any action against the insurer. The Lord Chief Justice further stated that if there was a clause stating that " we agree that no cause of action under any circumstances shall arise upon this policy with which the Courts shall deal " or " under no circumstances shall the Courts of Law have anything to do with disputes arising under this clause," such a clause would be invalid as an attempt to take away altogether from the Courts disputes between particular parties and to close the doors under all circumstances and under every conceivable state of the case. The Lord Chief Justice then proceeded to state that this is not what had been done. What had been done was to say that before the Courts can try a case certain conditions precedent shall be fulfilled and the judgment in *Scott v. Avery* (*supra*) had already determined that it matters not whether it is one or more of those steps ; it matters not whether it is liability or the amount of liability if it is limited to being a condition precedent to the maintenance of an action. It will be observed, however, that in the case of *Trainor v. The Phoenix Fire Assurance Company* (*supra*), the action was not dismissed, but the proceedings were stayed. The defendants in that case very rightly stated that they were ready and willing to have the matter settled by arbitration as provided by the policy.

In my opinion, the matter in issue is governed by the House of Lords case of *London and North Western & Great Western Joint Railway Companies v. J. H. Billington* [2]. The headnote of this case is as follows :—

" A Railway Act confirming a Provisional Order, after empowering the railway company to charge a reasonable sum for certain services rendered to a trader, by way of addition to the tonnage rate, enacted that ' any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party.' The company having sued the respondents for

[1] *(1892) 65 Law Times 825.* [2] *(1899) A. C. 79.*

services under this section, the respondents objected to the jurisdiction of the Court on the ground that the matter was one for the arbitrator to determine :—

Held, that as there had been no difference existing between the parties before action brought the arbitrator had not and the Court had jurisdiction.

The decision of the Court of Appeal (1898), 2 Q. B. 7, reversed and the decision of Wright and Darling JJ. restored upon the above ground."

The facts of this case are as follows :—

" The appellants having brought an action in the county court at Chester against the respondents to recover £38.7*s*. for siding rents for coal wagons, the respondents gave notice to defend and defended the action on the ground that the county court had no jurisdiction to decide the matters in issue in the action, such jurisdiction being ousted by the London and North-Western Railway Company (Rates and Charges) Order Confirmation Act 1891 (54 & 55 Vict. c. ccxxi.) Sched. s. 5. That section empowers the company to charge a reasonable sum, by way of addition to the tonnage rate, for certain services rendered to a trader, and proceeds thus : 'Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party.' The siding rents were for 6*d*. a day for every wagon not released and remaining on the company's premises after four days allowed to the respondents for unloading. The county court judge found as a fact that no difference had arisen before action brought as to the question whether the charge of 6*d*. was a reasonable one, or whether the four days was a reasonable time for unloading. The learned Judge added : 'The defendants knew of the charge being made against them ; they accepted the services with such knowledge, though protesting against the right of the plaintiffs to make any charge ; they make no complaint that the amount of the charge was unreasonable, or the period of four days, so as to enable the plaintiffs to apply to have such question settled by arbitration, nor do they take any step themselves to have the question so settled. When action is brought they say, and apparently for the first time, the question between us is as to the reasonableness of the charge of 6*d*. and therefore for another tribunal.' The Judge therefore gave judgment for the plaintiffs. The defendants having appealed, the Queen's Bench Division (Wright and Darling JJ.) dismissed the appeal with costs. The Court of Appeal (A. L. Smith and Chitty L.JJ.) reversed this decision and entered judgment for the defendants."

In his judgment Lord Halsbury L.C. stated at p. 81 as follows :—

" that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should

have arisen, and I think that must mean a difference of opinion before the action is launched either by formal plaint in the county court or by writ in the superior Courts. Any contention that the parties could, when they are sued for the price of the services, raise then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to me to be absolutely untenable. If, in the ordinary course of things, some question had arisen between the parties which they wanted to arbitrate upon, and a submission to arbitration were agreed upon in this form—which very commonly is the form—" that all matters in difference shall be submitted to A.B.", it would be a condition precedent to the arbitrator entering upon any form of inquiry there that the person who insisted that there was a difference should show that the difference had arisen before the submission to arbitration was made. That is a matter which has been repeatedly decided, and I should think that no lawyer would hesitate to say that that is the true condition of the law."

Lord Ludlow in his judgment at pp. 82–83 also stated :—

" There is, however, one matter about which I do desire to say a word, and that is this—because I entirely concur with my noble and learned friend on the Woolsack—that this difference is a difference which ought to have arisen before action brought, and that it is too late afterwards to raise a difference which can be brought within the meaning of this section. It is sufficient for the purpose of this case to say that it is concluded by the finding of the county court Judge. As I understand that finding (and it is final), it is that there was no difference existing between the parties at the time the action was brought. I think this appeal should be allowed."

In the present case the defendants in their letter of May 8, 1943, stated that they proposed to repudiate liability because the plaintiff had violated policy conditions. The particular act of violation was not stated. They were asked by letter of June 5, 1943, on what specific grounds they denied liability. On June 17, 1943, by letter the defendants informed the plaintiff that, when the latter made his claim, it would be the occasion for informing the plaintiff on what ground liability was repudiated. In these circumstances I am of opinion that, as in *London and North Western & Great Western Joint Railway Companies v. J. H. Billington* (*supra*), when action was brought, there was no difference or dispute which could be referred to arbitration. The order of the learned Judge is, therefore, set aside. Although the conduct of the defendants has been tortuous and evasive in the extreme I think they are entitled to have an order staying the action until the matters in difference between the parties have been referred to arbitration. I so order and direct further that the costs of appeal be paid by the defendants. The costs so far incurred in the lower Court will abide the final result of this action.

DE SILVA J.—I agree.

Order set aside.