

(1942) 12 AHC CK 0010
In the Allahabad High Court

Firm Behari Lal Baij Nath Prasad and Others	APPELLANT
Vs	
Punjab Sugar Mills Co., Ltd.	RESPONDENT

Date of Decision : 22-12-1942

Acts Referred:

Citation : AIR 1943 All 162 : (1943) 13 AWR 62

Hon'ble Judges : Collister, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Collister, J.—These are two connected appeals by a plaintiff. The plaintiff-appellant is a firm named Behari Lal Baij Nath Prasad and the defendant-respondent is the Punjab Sugar Mills, Ltd. The facts are these: On 26th September 1928 there was a contract between the parties under which the defendant agreed to supply 51,000 maunds of molasses to the plaintiff at the rate of rupee 1-2-3 per maund. Delivery was to be made at the rate of 5000 maunds per month from 1st December 1928 to 30th August 1929 and the balance of 6000 maunds was to be delivered in September of 1929. A dispute subsequently arose between the parties, as the plaintiff alleged that by June of 1929 the defendant "had supplied 8671 maunds only, leaving a balance of 26,329 maunds. This led to a second agreement, which was concluded on 19th July 1929 and under which it was stipulated that delivery would be duly made of 16,000 maunds, which had to be delivered under the first agreement, in July, August and September, and that the defendant would supply a further quantity of 10,000 maunds for the season of 1929-30 from December 1929 to the end of April 1930 at the rate of 2000 maunds per month, the stipulated rate per maund being the same as in the agreement of 1928. The defendant duly supplied 16,000 maunds of molasses, but according to the plaintiff, he failed to supply the further quantity of 10,000 maunds and only, supplied 352 maunds 71/2 seers and thereby the plaintiff claims to have suffered a loss of Rs. 14,972-9-6. According to the terms of the first agreement of 1928, the plaintiff had deposited

with the defendant a sum of Rs. 12,750 as earnest money and he says that this was to carry interest at the rate of 8 annas per cent, per month and the plaintiff admits that interest on this sum was paid by the defendant upto 31st October 1929.

2. As a result of a fresh dispute which arose between the parties as regards the question of the defendant's compliance with the agreement of 19th July 1929, the parties on 6th December 1931 executed an agreement to refer this dispute to the arbitration of B. Parmatma Prasad and B. Daulat Ram Asthana and it was further agreed that in the event of a difference of opinion between these two arbitrators, Maulvi Abdul Hakim should act as umpire. All these three gentlemen are vakils of Basti. B. Parmatma Prasad was probably the defendant's nominee and B. Daulat Ram Asthana was probably the plaintiff's nominee. It was provided in the agreement of reference that the award should bind the parties and that each party should act according to it within a period of three months after its pronouncement; and if either party failed to do so, the other should be entitled to seek his remedy in a Court of law. As we have seen, the agreement of reference was dated 6th December 1931, but the proceedings continued upto 2nd December 1937. On 1st June 1937 B. Parmatma Prasad, the arbitrator nominated by the defendant, put in an application in which he said that the plaintiff had apparently lost confidence in him and, therefore, he withdrew from the arbitration proceedings Thereupon; on that same date the defendant preferred an application before the arbitrators in the following terms:

In the above-mentioned suit it is submitted that B. Parmatma Prasad, advocate, one of the arbitrators, has withdrawn himself from the arbitration and has refused to take part in the arbitration proceedings. Under the circumstances there is no arbitration Court now according to law. It is, therefore, hereby prayed that the arbitration proceedings may be concluded or this defendant may be given an opportunity to seek remedy in a competent Court.

3. This objection was noted on the order-sheet and the arguments as regards the rate of compensation which had apparently been concluded on behalf of the defendant and had commenced on behalf of the plaintiff were stopped, but it does not appear that anything further was done in the matter until 2nd December 1937. On that date, the umpire and the arbitrator nominated by the plaintiff pronounced what is headed in our paper-book at page 47 as an "arbitration award." This document shows that there was agreement between the arbitrators as to the quantity of molasses to which the plaintiff was entitled, but there was disagreement as regards the rate and amount of compensation. The document goes on to state that the matter in respect to which there was a difference of opinion was referred to the umpire and thereafter he and the two arbitrators met and discussed the matter. They all agreed that the plaintiff was entitled to damages in respect to 9468 maunds of molasses, but they decided that counsel for the parties should be heard as regards the rate of compensation. This was on 1st June 1937, but when counsel for the defendant had concluded

his argument and counsel for the plaintiff had begun his, B. Parmatma Prasad handed in his resignation from the office of arbitrator. Mention is then made of the application which was preferred on behalf of the defendant to the effect that the proceedings be terminated, as the reference had come to an end. It appears that thereafter various rulings were cited before the umpire and the arbitrator nominated by the plaintiff as to the legal effect of the defendant's nominee having withdrawn. After considering these rulings, Moulvi Abdul Hakim and B. Daulat Ram Asthana say in the concluding sentence of this document:

We, therefore, regret that we are unable to decide the case and the parties are at liberty to seek their remedy in Court.

4. Thereafter, on 24th January 1938 the plaintiff instituted suit No. 5 of 1938 in which he set his claim at Rs. 23,405 which consists of the following items:

(1) Rs. 14,972-9-6 being the principal amount of loss alleged to have been suffered. (2) Rs. 6888-6-6, as interest on the foregoing amount. (3) Rs. 1101 as interest on the earnest money. (4) Rs. 443 as interest on the last mentioned sum.

5. It was claimed in the plaint that the period from 6th December 1931 to 2nd December 1937 should be deducted under the provisions of Section 14, Limitation Act, from the statutory period of limitation for the suit. The Court below dismissed the suit on the preliminary issue of limitation. Thereafter, the plaintiff preferred first appeal No. 370 of 1938 in the High Court. On 15th August 1940, for reasons given in our order of that date, we allowed the plaintiff to move the lower Court by an application under para. 17 of Schedule 2, Civil P.C., and the hearing of the appeal was meanwhile stayed. An application was duly made under para. 17 of Schedule 2; but the learned Judge of the Court below has dismissed it on three grounds, namely that para. 17 of Schedule 2 is inapplicable, that the agreement of reference falls under the Arbitration Act and the application is therefore not maintainable and that the application is barred by limitation. We will first take up first appeal No. 370 of 1938 because we have arrived at the conclusion that this appeal must be allowed and upon that finding the connected appeal will admittedly become infructuous. Mr. Malik, on behalf of the appellant firm, pleads that when the arbitration proceeding came to an end on 2nd December 1937 and his clients instituted a suit on 7th February 1938, they were entitled to the benefit of Section 14, Limitation Act, and he contends in this connection that the proceeding before the arbitrators was a civil proceeding in a Court within the meaning of the aforesaid section and that all the other requirements of the section were satisfied. Alternatively he pleads that, if the proceeding before the arbitrators be not deemed to be a proceeding in a Court, then it should be held either that the cause of action remained in suspense or abeyance during the period when the proceeding was going on before the arbitrators and when this proceeding came to an end the right to sue revived or else that a fresh cause of action accrued to the appellants upon the termination of the arbitration proceeding. Section 14 (1), Limitation Act, provides:

In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

6. It is not disputed before us that the appellants had been prosecuting with due diligence and in good faith the proceeding before the arbitrators, and it is also not contested by Mr. P.L. Banerji who appears for the respondent firm--that the proceeding before the arbitrators and the proceeding in the suit were founded on the same cause of action; but he vigorously contends inter alia that the proceeding before the arbitrators was not a proceeding in a Court and that Section 14 has, therefore, no application. The first authority to which Mr. Malik has referred us on behalf of the appellant firm is *Ramdhone Sircar v. Seetanath Sircar* (1864) 1864 W.R. (Supp.) 283 (Supplementary Volume from January to June 1864). In that case a dispute was referred to arbitration and the arbitrators decided in favour of the plaintiff. The Principal Sudder Ameen, not being satisfied as regards the regularity of the arbitration proceeding, refused to enforce the award and referred the plaintiff to a regular suit. The trial Court and the lower appellate Court decided in favour of the plaintiff, and the defendant went in second appeal to the High Court at Calcutta and pleaded inter alia the bar of limitation. At page 284 the learned Judges say:

For respondent it is argued (as did the Munsif) that the agreement to refer to arbitration (which is certainly genuine) saved the limitation. But we find that this document contains no acknowledgment of plaintiff's right of possession. Therefore, it does not give a new term of limitation. The most that can be said is that the time during which the case was before the arbitrators and the plaintiff was trying in another form to enforce the arbitration award, may be deducted from the time which runs for limitation. Whether the case will then come within the term of limitation we have not the means of determining.

7. The case was then remanded. It will be observed that there was no discussion as to the meaning of the word "Court" and there was no actual decision on the point. Mr. Malik then drew our attention to *Abdul Rahim Oosman and Co. Vs. Ojamshee Purshottamdas and Co.*, and he relies on this decision not only in support of his contention as regards the meaning of the word "Court," but also in support of his alternative pleas. In that case the plaintiffs had obtained seven ex parte awards in their favour. Warrants of attachment were issued against the defendants, who under protest deposited in Court the amount claimed. Then the defendants sued to restrain the plaintiffs from withdrawing the money on various grounds, one being that the arbitrator was ineligible. The suit and the arbitration matters were amalgamated and the plaintiffs were allowed to withdraw the money on giving security. The trial Court dismissed the suit of the defendants, but the appellate Court decreed the suit on the ground that the arbitrator was

ineligible and that the arbitration was invalid, but it upheld certain findings of the trial Court, including the finding that there had been a breach of contract by the defendants. The plaintiffs were accordingly directed to repay the money, and thereafter they sued the defendants for breach of contract. The suit was resisted inter alia on the ground of limitation. As regards the plea which we are immediately considering Mr. Malik relies upon the following observation by Lord-Williams J.:

In my opinion the proceedings before the arbitrator were proceedings in a Court within the meaning of the section.

8. It will be observed that the learned Judge has given no reasons for the opinion which he states. The case upon which Mr. Malik mainly relies, however, is a decision of the Privy Council in *Ramdutt Ramkissendass v. E.D. Sassoon & Co.* ("29) 16 AIR 1929 P.C. 103 the facts of which were as follows: Under various contracts between 16th September 1913 and 2nd March 1914 the appellants sold to the respondents certain quantities of jute. In July 1915 the respondents claimed compensation from the appellants for breach of contract; but the latter refused to consider the claim. There was an arbitration clause in the contracts and accordingly on 15th July 1915 the respondents appointed an arbitrator and in December an arbitrator was appointed by the appellants. There was obstruction and delay on the part of the appellants and ultimately on 28th September 1916 the respondents' arbitrator made an award as sole arbitrator. On 8th January 1917 the appellants sued for a declaration that the awards were void and inoperative on the ground that the appointment of a single arbitrator was invalid. The Court of first instance upheld the award, but that judgment was reversed in appeal and thereafter an appeal to the Privy Council was dismissed on 20th July 1922. On 13th December 1922 the respondents again demanded their dues under the contracts and on 28th December they appointed an arbitrator; but the appellants on their part declined to appoint an arbitrator. On 16th March 1923 the Chairman of the Baled Jute Association nominated an arbitrator to act with the arbitrator appointed by the respondents. On 10th April 1923 the appellants applied to the High Court for review of the submission to arbitration, and on 15th August 1923 a consent order was made that the matter in dispute be referred to the two arbitrators, who were directed "to deal with the matter and to make their award in the said reference and at the same time to state a special case for the opinion of this Court (the High Court) on the legal question of whether the defence of limitation can be raised in these matters and, if so, whether the claim is barred."

9. The arbitrators awarded a certain sum to be paid and stated a case. The High Court held that the arbitration proceeding had been instituted on 15th July 1915 and was within the period of three years prescribed by the Limitation Act. In appeal it was held by their Lordships of the Privy Council that it is open to a party to an arbitration proceeding to raise a plea of limitation unless such a plea has been excluded by agreement. Their Lordships held -- in disagreement with

the High Court--that the first arbitration proceeding came to an end with the decision of the single arbitrator whose award was ultimately set aside; but they approved the following observation of Greaves J., who had dealt with the appellants' application to the High Court to revoke the submission to the arbitrators :

It remains for me to decide whether, in computing the period of limitation, the time occupied in prosecuting the proceeding above referred to is to be excluded. It is urged that, having regard to the wording of Section 14, Limitation Act, this section cannot apply. This argument however does not seem to me to be well founded. If limitation, as I think it does, applies in arbitration proceedings, the law of limitation applicable is that laid down in the Limitation Act, 1908, which, is expressed to apply to suits, appeals and certain applications to Courts. If therefore this Act is to be applied to arbitration proceedings, notwithstanding the words above referred to, I see no reason why Section 14 of the Act should not apply. If it is said that the wording of the section is not apposite to arbitration proceedings, it could equally be said that the wording of the Act itself is not apposite. In my view therefore in computing the period of limitation the time occupied in the proceedings which ended in the decision of the Judicial Committee is to be excluded.

10. The report then continues :

In their Lordships' opinion the analogy of the Indian Limitation Act requires that an arbitrator should exclude the time spent in prosecuting in good faith the same claim before an arbitrator who was without jurisdiction. The Limitation Act has no application in terms to arbitration proceedings and, as Greaves J. has pointed out, if the words "suit instituted, appeal preferred, an application made" in Section 3 are to be applied to arbitration proceedings it seems to follow that the same interpretation must be put upon them, in Section 14 and that civil proceedings in a Court must be held to cover civil proceedings before arbitrators whom the parties have substituted for the Courts of law to be the judges of the dispute between them; There is no question here that, the respondents were prosecuting with due diligence their claim against the appellants and that the second arbitration was founded on the same cause of action and was prosecuted in good faith before the previous arbitrator who from defect of jurisdiction was found not competent to exercise jurisdiction in the matter.

11. This decision was considered by AIR 1933 130 (Nagpur) . The facts, so far as it is necessary to state them for the purposes of this appeal, are these: There was a dispute as regards the right to possession of tenancy land and it was referred to arbitration. An award was made, but the plaintiff sued and obtained a decree to the effect that the aforesaid award was void. He then instituted a suit for possession of the tenancy land. The trial Court held that the suit was barred by limitation, and the plaintiff then went in appeal. Before the appellate Court Section 14, Limitation Act, was invoked by the plaintiff and it was pleaded that in computing the period of limitation the plaintiff should have been allowed to

exclude the time during which he had been prosecuting the proceedings before the arbitrators. Staples A.J.C. considered and distinguished the case in *Ramdudd Ramkissendass v. E.D. Sassoon & Co.* ('29) 16 AIR 1929 P.C. 103 He says:

It has not, however, been held by their Lordships that in a suit brought in a civil Court the time taken in previous arbitration proceedings relating to the subject-matter of the suit may be excluded for the purpose of computing limitation, nor do I think that such a view can be taken.

12. He then goes on to say :

It is to be noted that the civil proceeding has to be prosecuted in a Court of first instance or in a Court of appeal and, as argued by the learned Counsel for the respondents, arbitrators are not a Court within the meaning of the section. Further the proceeding must be upon the same cause of action and the Court must be unable to entertain it either from a defect of jurisdiction or from some cause of like nature. Now it is a question whether proceedings before arbitrators can be held to be upon the same cause of action as a civil suit, because primarily the cause of action in proceedings before arbitrators is the agreement of the parties to refer the matter in dispute between them to arbitration, whilst in a civil suit there is no such agreement and the cause of action is upon the right or title which the plaintiff alleges in himself.

13. Finally the learned Judge says :

I am of opinion then that Section 14, Limitation Act, cannot apply in the present case because in the first place although, as held in *Ramdudd Ramkissendass v. E.D. Sassoon & Co.* ('29) 16 AIR 1929 P.C. 103 the Limitation Act should be applied by analogy to proceedings before arbitrators and Section 14 can be invoked with regard to proceedings before arbitrators with reference to previous proceedings before arbitrators, still proceedings before arbitrators will not be proceedings before a Court within the meaning of Section 14 with reference to a subsequent civil suit.

14. Mr. P. L. Banerji, on behalf of the respondent firm, does not subscribe to the opinion that there was a different cause of action, but he relies otherwise on the reasoning of the learned Judge in so far as he attempts to distinguish the decision in *Ramdudd Ramkissendass v. E.D. Sassoon & Co.* ('29) 16 AIR 1929 P.C. 103 Mr. Banerji argues in this way: It is established law that in the absence of an express agreement to the contrary, it is open to a defendant to plead limitation in an arbitration proceeding. That is to say, the law permits him to draw the attention of the arbitrators to the Limitation Act and to rely on the provisions of Section 3. The Act then being before the arbitrators, the plaintiff must equally be permitted to rely on Section 14, to which Section 3 is subject. Learned Counsel pleads that the only proposition for which the decision of the Privy Council affords authority is that in an arbitration proceeding both parties are entitled to rely on the analogy of the Limitation Act whether the earlier proceeding was before arbitrators or was a suit in Court but where the subsequent proceeding is

a suit, Section 14 must be strictly and literally applied, it will be applicable only when the earlier proceeding was a suit and will have no application when the earlier proceeding was a proceeding before arbitrators.

15. All that Mr. Banerji concedes upon the basis of the above mentioned decision is that the Limitation Act can be pleaded by a defendant before arbitrators, but not before a Court that is to say the scope of Section 14 can be enlarged in a proceeding before arbitrators, but it cannot be enlarged in a suit. And he says that the Judicial Committee have nowhere stated that "Court" in Section 14 means and includes an arbitration proceeding for all purposes. If the view advanced by Mr. Banerji is sound, it will lead to a result which may appear somewhat anomalous. It will mean that Section 14 can be applied when both proceedings were before arbitrators and when the earlier proceeding was a suit and the later proceeding was a proceeding before arbitrators, but it will not apply when the earlier proceeding was before arbitrators and the later proceeding was a suit. It does not, however, necessarily follow that because the result may appear anomalous, the contention is unsound, and therefore assuming though we do not concede that the dictum of the Judicial Committee extends no further than the facts of that particular case, it is necessary for us to consider the question from other aspects. It has not been shown to us that the word "Court" has been defined in any statute except the Evidence Act. Section 3 of that Act says :

Court includes all Judges and Magistrates and all persons, except arbitrators, legally authorised to take evidence.

16. This definition would seem to imply that, except for the purposes of the Evidence Act, an arbitration tribunal is to be regarded as a Court. In Act 14 of 1859, the expression used by the Legislature was "Court of judicature," but in all subsequent Limitation Acts (Act 9 of 1871, Act 15 of 1877 and Act 9 of 1908) the words used are "Court of first instance or Court of appeal." It is contended on behalf of the respondent firm that this expression indicates that what was meant was a statutory Court though the same argument may equally be founded upon the expression "Court of judicature" and there can of course be no doubt that the Limitation Act was primarily intended for statutory Courts. The question is whether a proceeding before arbitrators is necessarily excluded from the operation of Section 14. A Court as ordinarily understood is a tribunal constituted by statute and invested with jurisdiction to adjudicate upon the conflicting claims of litigants entitled to appear before it. A proceeding before arbitrators is a proceeding before a tribunal appointed by the parties or by virtue of an agreement between the parties and invested, by them with jurisdiction to adjudicate upon their conflicting claims. The functions of a statutory Court and the functions of an arbitration tribunal are thus virtually identical--except as regards the law of evidence--the main difference being that in the one case the tribunal is appointed by statute while in the other case it is appointed by, or by agreement between the parties. It is established law that in the absence of an

agreement to the contrary, the Limitation Act is applicable to a proceeding before arbitrators and the Judicial Committee has extended the provisions of Section 14 by analogy to a case where the earlier and the later proceedings were before arbitrators. As we have already shown, their Lordships of the Privy Council have held

that civil proceedings in a Court must be held to cover civil proceedings before arbitrators whom the parties have substituted for the Courts of law to be the judges of the dispute between them,

and, in our opinion, this observation has a wider application than is contended for by learned Counsel for the respondent firm. In Chitale's Limitation Act (Edn. 1) at p. 548 the learned commentator takes this same view. He says :

As regards proceedings before arbitrators, the Privy Council has held that they are tribunals whom the parties have substituted for a Court of law to be the judges of the disputes between them and that proceedings before them are civil proceedings in a Court. The observations to the contrary in the under mentioned case (this is the case from Nagpur already referred to) cannot be considered good law.

17. We are also fortified by the opinion expressed by Lord-Williams J., in Ramdutt Ramkissendass v. E.D. Sassoon & Co. ('29) 16 AIR 1929 P.C. 103 which we have already mentioned, and although the learned Judge did not give the reasoning on which his opinion was based, we think with respect that the view which he took is correct. If the contrary view be held, the result will be unfortunate and will operate very harshly on a litigant who, as here, has been guilty of no laches and has been prosecuting his case with due diligence and in good faith. In our judgment, the proceedings before the arbitrators must be excluded for the purpose of computing the period of limitation.

18. Learned Counsel for the respondent firm contends, however, that in other respects also, the requirements of Section 14, Limitation Act, have not been satisfied. He pleads that the word "entertain" in that section is only applicable where the Court had no jurisdiction from the very outset to embark upon the proceeding. In the present case the arbitrators had jurisdiction in the beginning to entertain the proceeding and it was only at a later stage that they lost jurisdiction, and therefore learned Counsel argues that it cannot be said that they had no jurisdiction to entertain the proceeding within the meaning of Section 14. In Mathura Singh v. Bhawani Singh (1900) 22 All. 248 it was held by a Full Bench of this Court that the word "entertain" means "to consider the questions involved in the suit." In that case the inability of the Court to entertain the former suit arose from misjoinder of plaintiffs and causes of action. This was the position also in a Full Bench case of the Calcutta High Court in India Publishers, Ltd. v. Aldridge ('08) 35 Cal. 728 and at p. 733 Maclean C.J. says:

There is a marked difference between the language of the Act of 1859 and that of the existing Limitation Act. In the present Act the words are "unable to

entertain", in the previous Act the words are "unable to decide upon it." A Court may be able to entertain a suit in its inception, but be unable to decide it on the merits owing to some defect, not in jurisdiction, but in procedure. There must have been some reason for this change of language, and a possible reason is that the Legislature intended to limit the benefit of the section to cases where the Court had no power to embark upon the case at all.

19. We may mention here that in Act 14 of 1859 the word used was "decide", in Act 9 of 1871 the word was "try" and in the two subsequent Acts (Act 15 of 1877 and Act 9 of 1908) the Legislature has substituted the word "entertain". At p.735 of the judgment in the case from the High Court of Calcutta which we are considering, the learned Chief Justice says:

In the Allahabad case the Chief Justice reads "unable to entertain" as substantially identical with "unable to decide." But I have pointed out the distinction in language in the two statutes.

20. In our opinion the question presents no serious difficulty. A Court may have no jurisdiction at all to entertain that is to say, to embark upon a particular suit. Or it may have jurisdiction to entertain it at the outset, but a defect of jurisdiction may occur at a later stage. In that case, it will, from the moment when the defect occurs, be unable to entertain the suit. Whether the defect exists at the beginning or whether it occurs at a later stage, the requirements of Section 14 are in our opinion equally satisfied. It is not altogether easy to understand what the Legislature may have intended by substituting the word "entertain" for "try" but we do not think it can ever have been the intention that where a defect of jurisdiction occurs during the proceedings, the plaintiff should be in a worse position, so far as Section 14, Limitation Act, is concerned, than if there was a defect of jurisdiction at the outset which deprived the Court of jurisdiction to embark upon the proceeding. The next plea advanced by Mr. Banerji for the respondent firm is that in point of fact in the present case no defect of jurisdiction occurred when one of the arbitrators withdrew. It is conceded that on the withdrawal of one of the arbitrators the remaining arbitrator and the umpire were not competent to go on with the proceeding, but learned Counsel pleads that the defect was curable, he says that it was open to the plaintiff to apply to the Court under para. 17 of Schedule 2, Civil P.C. Clause (1) of para. 17 reads:

Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement or any of them may apply to any Court having jurisdiction in the matter to which the agreement relates that the agreement be filed in Court.

21. Clause (2) provides that the application shall be numbered and registered as a suit. Clause (3) provides that notice be given to all the other parties to the agreement calling upon them to show cause why the agreement should not be filed. And Clause (4) enacts as follows:

Where no sufficient cause is shown, the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement, or if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator.

22. Paragraph 19 provides:

The foregoing provisions, so far as they are consistent with any agreement filed under para. 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph and to the award and to the decree following thereon.

23. Founding on the provisions of this paragraph, it is contended that if the appellant firm had applied under para. 17, the provisions of para. 5 would have become applicable, and it would then have been open to the appellants to enforce the appointment of an arbitrator. Against this, learned Counsel for the appellant firm pleads that it was incompetent to his clients to prefer an application under para. 17 of the schedule. He has referred us in this connexion to *Ahmad Nur Khan v. Abdur Rahman Khan* ("19) 6 AIR 1919 All. 48 In that case the parties agreed during the pendency of a suit to refer the matters in dispute to arbitration, and the suit was withdrawn. Before the arbitrator had made his award, one of the parties died and the arbitrator, believing himself to have no power to make the representatives of the deceased parties to the proceedings, refused to act any longer as arbitrator. It was held that in these circumstances, inasmuch as the arbitrator could not be compelled to act if he did not wish to do so, the Court could not accept an application under para. 17 to file the agreement of reference. All that this decision really amounts to is that an arbitrator who has refused to act cannot be compelled by the Court to act.

24. The next case from our High Court is more in point and is against the view advanced for the appellants. It is *Bhagwan Dass Vs. Gurdayal*, . A reference to arbitration was made without the intervention of the Court and during the course of the arbitration proceedings one of the arbitrators refused to take any further part in the proceedings. It was held by a bench of this Court -- *Walsh and Wallach JJ.*--that it was open to any of the parties to apply under para. 17 of Schedule 2 for the filing of the agreement to refer, and the fact that the other party had already consented to arbitration, which had been going on for a long time, entitled the applicant absolutely to an order of reference under that paragraph. It was further held that when an Order of Reference is made by a Court under para. 17, the Court can take action under para. 5 and appoint a new arbitrator. At the bottom of page 825 the learned Judges say:

... we think that where a party has gone to arbitration in a case in which, if it had refused to go to arbitration, an order of reference would have been made under para. 17, it is too late for him, when a difficulty arises at a later stage of the proceedings which has not been provided for unless an order of reference has been made, to dispute the right of his opponent to obtain an order of reference

under para 17

25. This decision was followed by Walsh and Ryves JJ. in *Fazal Ilahi Vs. Prag Narain*, . The view taken by this Court has however been dissented from by the High Court of Madras and by other High Courts. In *Muthyala Narayanappa v. Muthyala Ramchandrapa* ("31) 18 AIR 1931 Mad. 28 the parties had privately agreed to refer their dispute to certain named arbitrators and to abide by their unanimous decision, but the agreement did not contain any provision as to what should be done in case any of the arbitrators died in the course of the arbitration proceedings, and one of them died in the course of such proceedings. It was held that the agreement became inoperative and came to an end on the death of the arbitrator and that it could not therefore be filed in Court under para. 17 of Schedule 2, Civil P.C., for the Court could not thereafter make an order of reference "in accordance with" the agreement within the meaning of Clause (4) of para. 17 and "consistently" with it within the meaning of para. 19 of that schedule. The other cases in which the view taken by our High Court was not accepted are *Vishwas Balwant v. Bhalchandra Ganesh* ("31) 18 AIR 1931 Bom. 529, *Rajani Kanta Karati and Another Vs. Panchanan Karati*, and *Firm Salig Ram Bhagat Ram v. Firm Kishen Singh Sant Ram* ("38) 25 AIR 1938 Lah. 859. The view expressed by this Court in *Bhagwan Dass Vs. Gurdayal*, and *Fazal Ilahi Vs. Prag Narain*, was however reaffirmed by this Court in *Datta Mal and Others Vs. Lala Amar Nath and Others*, . the learned Judges--Bennet and Varma JJ.--considered the case reported in *Muthyala Narayanappa v. Muthyala Ramchandrapa* ("31) 18 AIR 1931 Mad. 28 and they say:

The Court took what in our opinion with due respect is a very narrow view of paras. 17 and 19, and by giving an extremely literal interpretation to these paragraphs it held that a reference would not lie. We consider that we should follow the Allahabad rulings and give the more natural interpretation to these provisions for an agreement to arbitrate resulting in a reference to arbitrators.

26. We do not propose to examine and discuss the above authorities, for, we are of opinion that in the circumstances of this case it is unnecessary for us to express any final opinion as to whether the appellant firm was or was not competent to apply under para. 17 of Schedule 2. Assuming that the view expressed by this Court is correct--that is to say assuming that when one of the arbitrators withdrew, it was open to the appellant firm to enforce the continuance of the arbitration proceeding by means of an application under para. 17--we hold that the provisions of Section 14, Limitation Act, will nevertheless be applicable on the ground that there was a cause "of a like nature" to defect of jurisdiction within the meaning of that section. Before stating our reasons we propose to cite certain observations from the Full Bench case in *Mathura Singh v. Bhawani Singh* (1900) 22 All. 248, already referred to in another connexion. At page 253, in considering the meaning of the words "other cause of a like nature" Strachey C.J. says :

The principle is, broadly speaking, the protection against the bar of limitation of

a man honestly doing his best to get his case tried on the merits, but failing through the Court being unable to give him such a trial. That is the principle, and think it is clearly applicable, not only to cases in which a man brings his suit in the wrong Court, that is a Court having no jurisdiction to entertain it but also where he brings his suit in the right Court but is nevertheless prevented from getting a trial on the merits by something which, though not a defect of jurisdiction, is analogous to that defect.

27. At p. 257 the learned Chief Justice says :

I think that the result of the authorities taken as a whole, and the view which I take of the true principles, may be fairly summarized by saying that if there was an inability in the Court to entertain the former suit produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff, that cause is of like nature to defect of jurisdiction within the meaning of Section 14 of the Act.

28. At page 261 Aikman J. observes :

The question is not free from difficulty, but after careful consideration I am of opinion that the intention of the Legislature was that, given good faith and due diligence on the part of the plaintiff, he was not to suffer from any bona fide mistake in procedure which would have the same effect as if he had gone to the wrong Court, that is which would have had the effect of preventing the Court in limine from approaching the consideration of the case on its merits.

29. Let us now consider the facts of the case which is before us. On 1st June 1937 one of the arbitrators--probably the arbitrator appointed by the respondent firm -- withdrew and on the same day an application was preferred on behalf of the defendants, in which it was said :

Under the circumstances there is no arbitration Court now according to law. It is, therefore, hereby prayed that the arbitration proceedings may be concluded or this defendant may be given an opportunity to seek remedy in a competent Court.

30. The remaining arbitrator and the umpire, after an unexplained interval of six months, held that they were not competent to proceed, and admittedly they were correct in this view. The agreement to refer contained no provision as to what should be done if one of the arbitrators refused to act and when the respondent firm requested the remaining arbitrator and the umpire to close the proceeding in order that they might seek their remedy in a competent Court, the appellant firm may well have thought that an application under para. 17 of Schedule 2 would be in. competent, a view which has the support of several High Courts in India, Therefore, even if we assume that the view expressed by this Court in the cases which we have mentioned be correct and that the appellant firm might have ensured the continuance of the arbitration proceeding by means of an application under para. 17, it was not incumbent upon them to adopt this

procedure. A defect of jurisdiction--even if only temporary--clearly occurred when one of the arbitrators withdrew and we think that the only reasonable view to take in the circumstances is that, even if that defect were curable, there was at least a "cause of a like nature" to defect of jurisdiction which prevented the proceeding from being entertained any longer by the arbitration tribunal. Thus, in our opinion, all the requirements of Section 14, Limitation Act, were satisfied. This being our view, there is no necessity for us to consider the alternative plea of Mr. Malik that the cause of action was in abeyance and the right to sue revived or -- as a further alternative " --that a new cause of action arose when the arbitration proceeding collapsed. The result of our findings is that we allow this appeal and set aside the decree of the Court below and we direct that that Court shall proceed to try the suit on merits according to law. Costs will abide the result. In consequence of this order, first appeal from Order No. 62 of 1941 is dismissed with costs.