
(1953) 02 MAD CK 0031

In the Madras High Court

Case No : Civil Miscellaneous Petition No 10470 of 1952

H. Chandanmull and Co., by Proprietor, C. Laxmichand Mehta APPELLANT

Vs

Mohanlal M. Mehta and Others RESPONDENT

Date of Decision : 25-02-1953

Acts Referred:

Constitution of India, 1950 — Article 133(1)

Citation : AIR 1953 Mad 727 : (1954) ILR (Mad) 164 : (1953) 66 LW 344 :
(1953) 1 MLJ 624 : (1953) 1 MLJ 182

Hon'ble Judges : Rajamannar, C.J.; Venkatarama Aiyar, J

Bench : Division Bench

Advocate : K.C. Doraiswami, for the Appellant; A.N. Rangaswami, for the Respondent

Final Decision : Dismissed

Judgement

Rajamannar, C.J.—This is an application for leave to appeal to the Supreme Court of India against the Judgment and order passed by us in -- H. Chandanmull and Co. Vs. Mohambal M. Mehta and Others, dismissing it. This appeal arose out of proceedings under the Arbitration Act. On 2-11-1950 an "ex parte" award was passed for a sum of Rs. 21052-12-8 with interest and costs in favour of the third respondent herein and against the petitioner. The award was filed into this court in O. P. No. 66 of 1951 which prayed for making the award a rule of court. Notice of filing the award was served on the petitioner on 27-3-1951. Under Article 158, Limitation Act, the petitioner had a period of thirty days from the date of service of notice of filing the award to file an application to set aside the award. The petitioner did not file any such application within time but filed an application. No. 2355 of 1951, purporting to be u/s 5, Limitation Act, for excusing the delay in filing the application to set aside the award. That application was dismissed by Krishnaswami Nayudu J. on the ground that Section 5, Limitation Act did not apply. There was an appeal under Clause 15 of the Letters Patent and we dismissed the appeal agreeing with the learned Judge that Section 5, Limitation

Act, has no application to proceedings in Court under the Arbitration Act. It is against this decision of ours that the petitioner seeks leave to appeal to the Supreme Court.

2. At the very outset we may mention that the question of law involved in this appeal, in our opinion, is of such general importance that we have no hesitation in certifying that the case is a fit one for appeal to the Supreme Court under Article 133(1)(c) of the Constitution.

3. The only question on which we have felt considerable difficulty is whether our order can be said to be a judgment, decree or final order in a civil proceeding within the meaning of Article 133(1)(c) of the Constitution. There is no direct decision on the point to help us to decide this question. Our attention has been drawn to several decisions of the Privy Council, the Federal court and of several High Courts in India but we have felt not a little difficulty in applying the test laid down by the Privy Council and by the Federal Court to the facts of the present case.

4. In view of the observations in the decision of the Federal Court in -- "Mohammed Amin Bros v. Dominion of India", AIR 1950 FC 77 (B), it is difficult to maintain the position that the order now under appeal is a judgment or decree. Mukherjea J. pointed out in that decision that in English Courts the word "judgment" is used in the same sense as a "decree" in the CPC and it means the declaration or final determination of the rights of the parties in the matter brought before the court. It is clear that calling our order "a judgment" would not really be of much assistance in deciding the question which falls for decision because it would nevertheless remain to be considered whether the judgment is an "interlocutory judgment" or "a final judgment". It is only a final judgment that will fall within the category of judgment referred to in Article 133(1) of the Constitution.

5. The scope of the expression "final order" was fully discussed by the Federal Court in the ruling reported in -- AIR 1949 1 (Federal Court) . Though that case arose out of criminal proceedings, their Lordships were called upon to construe the expression "final order" in Section 205(1), Government of India Act, 1935. The test laid down in that decision that it is only an order which finally disposes of the rights of the parties and determines the points in dispute and brings the case to an end that can be called a "final order". A preliminary or interlocutory order would not therefore be a "final order". Kania C. J. referred to several English authorities and two rulings of the Judicial Committee in -- "Ramchand Manjimal v. Govardhandas Vishindas Ratanchand", AIR 1920 PC 86 (D) and -- AIR 1933 58 (Privy Council) , and arrived at the test mentioned above. The same test was applied in AIR 1950 FC 77(B)". Mukherjea J. in delivering the judgment of the Court said:

"The expression "final order" has been used in contradistinction to what is known as "interlocutory order" and the essential test to distinguish the one from the

other has been discussed and formulated in several cases decided by the Judicial Committee. All the relevant authorities bearing on the question have been reviewed by this court in their recent pronouncement in AIR 1949 1 (Federal Court) , and the law on point, so far as this court is concerned, seems to be well settled. In full agreement with the decisions of the Judicial Committee and the authorities of the English courts upon which these pronouncements were based, it has been held by this, court that the test for determining the finality of an order is, whether the judgment or order finally disposed of the rights of the parties. To quote the language of Sir George Lowndes in AIR 1933 58 (Privy Council) : "the finality must be a finality in relation to the suit. If after the order the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it." The fact that the order decides an important and even a vital issue is by itself not material. If the decision on an issue puts an end to the suit, the order will undoubtedly be a final one, but if the suit is still left alive and has got to be tried in the ordinary way, no finality could attach to the order."

It was not difficult to apply the test so laid down to the two cases which arose before the Federal Court, in both the cases the order sought to be appealed against left the proceeding alive which could continue to a final termination in spite of the order.

6. In the present case the position is this: O. P. No. 66 of 1951 is the petition in which an award is sought to be made a decree of court. It is in this petition that the application was filed by the petitioner u/s 5, Limitation Act. Now that the application has been dismissed, there is nothing to prevent the petition from being proceeded with and resulting in the passing of the decree in terms of the award. In this sense it might be said that the dismissal of the petitioner's application has left the original petition alive.

7. But it must not be overlooked that after the dismissal of the petitioner's application, he cannot take any proceeding to have the award set aside. That right he has undoubtedly lost as a result of the order of Krishnaswami Nayudu J. and our order confirming it. Though the original petition is alive, the petitioner cannot raise any objection to the award itself as such. In this sense the petitioner's right in this behalf has been finally negated. This appears to be a plausible way of looking at the case of the petitioner. In this view the order dismissing his application would be tantamount to the dismissal of a substantive application by him to set aside the award. Unfortunately, however, it turns out that the petitioner never filed into court an application to set aside the award. He thought that he could file such an application after this court had excused the delay. Strictly speaking an application u/s 5, Limitation Act, should have been filed along with the substantive application; but that was not done. We cannot, therefore, say that the result of the dismissal of the application u/s 5, Limitation Act, is virtually a dismissal of the application to set aside the award. It might then have been more easy for us to hold that the particular proceeding has come

to an end by reason of our order, viz, the proceeding to set aside the award, and in that sense our order must be deemed to be a final order.

8. In -- "Promotho v. W. A. Lee", AIR 1921 Cal 415 (F), what happened was this: An appeal was filed out of time. There was an application u/s 5, Limitation Act, to excuse the delay in filing the appeal. That application was dismissed and as a result the appeal itself was dismissed. It was held that the order of the High Court dismissing the appeal after refusing the application u/s 5, Limitation Act, was appealable, under Clause (a) of Section 109 C. P. C. If in the present case an application to set aside the award had been likewise dismissed on the dismissal of an application to excuse the delay in filing it, we would have held following this authority, that the petitioner is entitled to appeal to the Supreme Court. But as we have already pointed out there was no substantive application to set aside the award.

9. In a later case in the Calcutta High Court in -- "Purnendu Nath Tagore v. Kanailal Ghoshal", ILR (1948) Cal 202 (G), the facts were slightly different. A memorandum of appeal presented to an officer of the High court was returned as barred by limitation. Thereupon an application was filed u/s 5, Limitation Act. That application was dismissed. It was held that the order dismissing the application u/s 5, Limitation Act, was neither a decree nor a final order passed on appeal by the High Court within the meaning of Section 109 Clause (a) C. P. C. The earlier decision in -- AIR 1921 Cal 415 (F)", was distinguished on the ground that in that case there was an order made in the appeal itself dismissing it. The learned Judges relied upon a ruling in -- "Karsondas Dharmsey v. Gangabai", 32 Bom 108 (H), in which it was held that an order of the High Court refusing to admit an appeal after the period of limitation had expired was not a decree against which leave to appeal to Privy Council can be granted. But it must be mentioned that these decisions are not of much assistance, because the reasoning in these decisions was based on a consideration of the language of Section 109, Clause (a), C. P. C., which is absent in Article 133(1) of the Constitution, In Section 109, Clause (a), C. P. C., which they were construing, the language was "a decree or final order passed on appeal by a High Court." Part of the reasoning was based on the meaning to be attached to the words "passed on appeal"; words which are not found in Article 133.

10. The question is not free from doubt but on the whole we think that an order like the one in question, viz., an order refusing to excuse the delay in filing an application, cannot be treated except as a procedural order. Though it may have far reaching consequences and adversely affect the rights of parties, by itself it cannot be held to have decided the rights of parties. If as a result of the dismissal of such an application, a substantive application is dismissed, or otherwise put an end to, it may then be held that there had been a final adjudication of rights and therefore there has been a final order.

11. We are, therefore, compelled to dismiss this application though we are otherwise convinced that the case is a fit one for appeal to the Supreme Court of

India. In the circumstances we do not make any order as to costs.